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## SITUATION IN THE DIFFERENT SECTORS

### 1. ECONOMIC AND FINANCIAL AFFAIRS

In 2008, there has not been any formal infringement procedure initiated by the Commission in the field of Economic and Financial Affairs

However, the Commission services received two formal complaints from staff representatives of the Bank of Greece on the occasion of the inclusion of the Central Bank's pension fund in a new State-run pension fund. This measure has been foreseen by the provisions of Law 3655/2008 on 'Administrative and organisational reform of the social security system and other security provisions'.

The plaintiffs claimed, inter alia, that the respective provision would constitute a violation to the prohibition on monetary financing and the Central Bank's independence as laid down in Articles 101 and 108 of the EC Treaty.

In order to prepare a sound assessment of the compliance of the law with the Treaty, it was deemed necessary to receive information on the financial situation of the Greek Pension Fund, including a validation by an independent auditor.

The Commission services officially asked therefore the Greek authorities to provide the information needed for the assessment. After examination of the requested information, the Commission sent out a letter in 2009 confirming the Commission's decision of closing the case since no new elements on the subject of the non observance of Community Law were provided to the Commission. In particular, after an in-depth analysis of the information received, the Commission reached the conclusion that the respective law did not violate the Treaty rules on Central Bank independence and the prohibition on monetary financing.

### 2. ENTERPRISE AND INDUSTRY

#### 2.1. General introduction

Responsibility for ensuring the free movement of goods within the Single Market is entrusted to the Commission services in charge of "Enterprise and Industry" sector. These services manage a large part of the Community acquis consisting of Articles 28 to 30 EC in the non-harmonised area and a large quantity of subordinate Community legislation (regulations, directives and decisions) in the harmonised area. The acquis of the European Union in the "Enterprise and Industry" sector can be found on the web at the following address:

[http://europa.eu.staging.ent.cec.eu.int/enterprise/newapproach/pdf/pink\\_book\\_2007.pdf](http://europa.eu.staging.ent.cec.eu.int/enterprise/newapproach/pdf/pink_book_2007.pdf)

As 'harmonising' rules are adopted in more and more sectors of the Single Market, the non-harmonised area is gradually shrinking. But some 25% of the market is still not subject to harmonised rules and, here, Articles 28-30 EC ensure the easy cross-border exchange of goods.

Generally speaking, the Community acquis governing the free movement of goods is stable and effective, although the highly technical nature of much of the legislation means that there is always considerable activity adapting it to technological progress.

Significant changes are being made to the acquis managed by the Commission in the "Enterprise and Industry" sector; for example in

- the automotive sector (with the forthcoming recasting of the framework legislation for type-approvals and a shift to regulations rather than directives in EC implementing legislation),
- the chemicals sector (with the application from 1 June 2008 of most of the REACH Regulation and the adoption at the end of 2008 of a new Regulation on classification, labelling and packaging of substances and mixtures ),
- pharmaceuticals (with the adoption by the Commission on 10 December 2008 of a package consisting of a Communication on the future single market in pharmaceuticals, and 3 legislative proposals on information to patients, counterfeit medicines and pharmacovigilance).

The Commission's legislative activity in the "Enterprise and Industry" sector is fully in accordance with the "Better Regulation" plan. In this sense, the Commission considers the simplification and codification of existing legislation as important tools in achieving better implementation of EU law. Six proposals, on toy safety, on pharmaceuticals(2), vehicle safety features, construction products and measuring instruments, were delivered in the 2008 simplification programme and the Commission is presenting a further four proposals for adoption in 2009 (on agricultural and forestry tractors, fertilizers, textiles and wheels for motor vehicles). The proposal to recast the late payment directive was adopted on 8 April 2009 and is part of the Small Business Act adopted in June 2008 which for the first time puts into place a comprehensive SME policy framework for the EU and its Member States.

In a move to strengthen the Single Market, in 2008 the Community legislator adopted a "goods package" of measures, including a Regulation on procedural aspects of the mutual recognition principle (laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State). This new instrument addresses some of the issues surrounding mutual recognition of products and thereby improves the smooth functioning of the internal market for goods.

The goods package also contains instruments designed to boost production and trade in goods in the harmonised area by providing a clear and consistent horizontal framework to simplify the application of EU harmonising legislation. At the same time, it strengthens rules on market surveillance to protect consumers from unsafe products and shelter business from unfair competition by operators not complying with the law. The implementation of this package will make it easier for companies, particularly SMEs, to sell their products in the EU whilst increasing consumer protection. The package will also reduce the risk for enterprises that their products do not gain access to the market of the Member State of destination. Special efforts are being made to guarantee their timely and correct application.

The Commission also prepared an internal market directive to simplify the terms and conditions governing the intra-Community transfer of defence-related products. This directive extends the coverage of the current acquis to facilitate the circulation of defence goods within the EU. During 2008, the Council and the Parliament paved the way for first reading

agreement which came on 16 December. The Directive, which has been published in June 2009<sup>1</sup>, has a two-year transposition period.

The Commission also provides guidance and other assistance to help Member States to transpose and implement new directives on time. Assistance is given using a variety of different tools (e.g. interpretative documents, bilateral meetings and Committee meetings).

A very valuable tool for dealing *in advance* with possible technical barriers to the free movement of goods in the non-harmonised area is Directive 98/34/EC, which requires the 27 Member States, the EFTA countries and Turkey to notify all national technical regulations concerning products and Information Society Services *at the draft stage*. The steady high number of notifications (634 in 2008) and reactions from the Commission (199) and the Member States (184) underlines the importance of Directive 98/34/EC as a tool for the prevention of barriers to intra-Community trade - and indeed for better regulation since it provides a forum for making suggestions to improve the quality of national legislation. Its *ex ante* operation means that time-consuming and sometimes controversial infringement procedures can be avoided.

In addition, the Commission monitors the correct application of these rules and opens infringement procedures against Member States if necessary. In 2008, the Commission registered 55 complaints and 3 own-initiative cases in this sector.

But since the Commission services attach great importance to resolving problems coming to its attention as quickly as possible, they also support the use of methods other than infringement proceedings, like the EU Pilot project designed to clarify and solve problems with the application of EU law in cooperation with the Member States involved. The Commission services also organise “package meetings” and bilateral meetings with the Member States to provide advice to national authorities to help ensure the correct application of the EU law.

In the framework of infringement proceedings, non-communication cases and article 228 EC cases are dealt with as quickly as possible, given their automatic priority status under the September Communication<sup>2</sup>. In accordance with the other criteria set out in the September Communication, since 2008 priority status in this sector has been given to the following cases.

#### *Non-harmonised area*

- The failure by a MS to notify national technical rules in draft under Directive 98/34/EC. Such failure renders the rules liable to be declared null and void.
- Breaches of Articles 28-30 EC raising horizontal questions about the functioning of the market.

#### *Harmonised area*

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<sup>1</sup> Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community (OJ L 146 of 10 June 2009)

<sup>2</sup> A Europe of Results – Applying Community Law (COM(2007) 502 of 5.9.2007)

Breaches of key provisions or strategic objectives of directives, in particular new legislation which nowadays is adopted solely in response to a demonstrable need to correct/enhance market performance by regulatory action - its enforcement should be commensurate with the risk of failing to achieve the desired effect.

The considerable share of the Community acquis dealt with by the Commission services responsible for the "Enterprise and Industry" sector covers a wide variety of product domains, in relation to each of which are set out below a description of the current state of the legislation in force, details of any significant changes underway or planned and a general evaluation of the effectiveness of regulatory framework in the domain concerned. Information is also provided about infringement proceedings pursued in each product domain.

## **2.2. Automotive Industry**

### *Current position*

The harmonized legislation in the automotive sector covers three categories of vehicles: (i) motor vehicles and their trailers; (ii) two and three-wheel motor vehicles; and (iii) agricultural or forestry tractors. The legislation, which lays down common requirements designed to protect environmental and safety objectives, is based on a system of whole-vehicle type approval which allows manufacturers to have a vehicle "type" approved in one Member State and then to market the vehicle in all other Member States without further tests. It deals with a multitude of detailed technical specifications for different vehicle systems and components which are frequently modified to adapt them to technical progress while reducing the regulatory burden on industry.

In relation to type-approval of new vehicles, there are three main framework Directives:

- Directive 2007/46/EC establishing a framework for the approval of motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles;
- Directive 2002/24/EC relating to the type-approval of two-or three-wheel motor vehicles; and
- Directive 2003/37/EC relating to the type-approval of agricultural or forestry tractors, their trailers and interchangeable towed machinery, together with their systems, components and separate technical units.

In addition to the framework Directives, separate regulatory acts lay down harmonized technical requirements for the type-approval of individual parts and characteristics of a vehicle. Hitherto, these acts have generally been adopted as Directives. More recently, however, a change in the regulatory approach has been introduced which results in the adoption, through the co-decision process, of a main act in the form of a Regulation laying down fundamental provisions while the technical specifications and administrative provisions for type-approval are contained in implementing measures adopted in accordance with comitology procedures (the "split-level" approach). Due to the global nature of the automotive industry, many of these technical requirements are also harmonized at international level through UNECE Regulations.<sup>3</sup>

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<sup>3</sup> UNECE Regulations are harmonized technical regulations regarding new motor vehicles and motor vehicle equipment that are adopted pursuant to the 1958 Agreement under the auspices of the United

Twenty-nine infringement cases were opened during 2008 in relation to Community legislation in this sector. The vast majority of these cases (25) were due to delays in the communication of national measures transposing EC Directives (which generally contained technical updates of the *acquis*). The Member States most concerned by these cases were the Czech Republic (5 proceedings) and Portugal (4). Twenty-four of these infringement cases were closed after national implementation measures were communicated by the Member States concerned. In most cases, the communication of the national measures occurred before the Commission issued a Reasoned Opinion.

During 2008 the Commission continued to deal with a steady number of questions, complaints and queries in relation to legislation in the automotive sector. Complaints or requests for information were also periodically sent via the petition procedure. Most inquiries were submitted by individuals or SMEs. The areas dealt with included matters such as vehicle exhaust pollutant emissions and noise levels, accessibility requirements applicable to bus interior arrangement and administrative formalities on imports of vehicles from third countries. In many cases, the issues raised could be dealt with by giving guidance on the Commission's interpretation of the relevant EC legislation. Where the complaint turned out to be unsubstantiated, the matter was closed and the reasons for doing so explained.

Only four complaints were registered in 2008. One was closed as no breach of Community law could be identified. A second case was closed after a change in the national legislation at issue. The remaining two complaints, which arise out of the same facts on a question of proper application by the authorities of EC legislation, are still under examination.

During 2008 the Commission also replied to the European Ombudsman in relation to a request for an opinion on the interpretation of Directive 2001/85/EC (type-approval of buses/coaches) insofar as it affected the rights of access by passengers.

#### *Changes underway*

Although a well recognized legal framework exists, the Community *acquis* relating to the automotive sector is in constant evolution. In this regard, the direction of policy-making in the sector has been discussed by a High Level Group that brought together the main stakeholders (Member States, industry, NGOs and MEPs) and the recommendations were set out in the CARS 21 Communication published in February 2007.<sup>4</sup> Through the CARS 21 process, the Commission has developed a medium to long-term, coordinated and predictable policy framework for the automotive industry based on continuous dialogue and consultation with all main stakeholders. In 2008, the Commission launched a mid-term review of CARS 21, seeking views from stakeholders on the automotive regulatory framework. In October 2008, a CARS 21 follow-up Conference was held and the conclusions have been outlined in the CARS 21 mid-term review report.<sup>5</sup>

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Nations Economic Commission for Europe ([www.unece.org](http://www.unece.org)). As a contracting party to the 1958 UNECE Agreement, the European Community can decide to apply a Regulation.

<sup>4</sup> Communication from the Commission to the European Parliament and to the Council, "A Competitive Automotive Regulatory Framework for the 21<sup>st</sup> Century", COM (2007) final, 7 February 2007.

<sup>5</sup> [http://ec.europa.eu/enterprise/automotive/pagesbackground/competitiveness/cars21\\_mtr\\_report.pdf](http://ec.europa.eu/enterprise/automotive/pagesbackground/competitiveness/cars21_mtr_report.pdf)

In May 2008, and as part of the efforts to simplify legislation on safety, the Commission adopted the draft Regulation on type approval requirements for the general safety of motor vehicles.<sup>6</sup>

Significant progress also occurred in relation to updating and completing legislation on vehicle emissions. In July 2008, the Commission adopted the implementing Regulation on emissions from light passenger and commercial vehicles (Euro 5 and 6) and on access to vehicle repair and maintenance information. A political agreement was reached in 2008 with the Council and the European Parliament on a draft Regulation on emissions from heavy-duty vehicles (Euro VI).

Various steps to implement, simplify and update the technical legislation in the sector were taken during 2008. This culminated in the adoption in early 2009 of Regulations on the type-approval of motor vehicles with regard to pedestrian protection<sup>7</sup> and on type-approval of hydrogen-powered vehicles<sup>8</sup>.

A significant proportion of the work in the automotive sector in 2009 and beyond will focus on recasting the legislative framework (and its subsequent completion) and the implementation of new technical legislation. In particular, the regulatory framework for type-approval legislation in relation to two and three-wheeled vehicles and tractors is expected to be revised. In both cases, input from interested parties was sought via a public consultation launched in 2008. The Commission is also working on various proposals, in close co-ordination with Member States, to complete the framework Directive 2007/46/EC for the type-approval of motor vehicles and trailers.

### *Evaluation*

The situation regarding the application of the Community acquis in the automotive sector is acceptable. Nevertheless, the constant evolution of the technical legislation means that it is important to maintain close attention to timely transposition and effective enforcement to ensure that the objectives remain satisfied.

The frequent adaptation of technical legislation in this sector also means that the use of correlation tables is particularly helpful. It should be emphasized that the close cooperation between the Commission and Member States in the preparation of legislative measures means that significant problems regarding conformity or incorrect application are a relatively rare occurrence. Indeed, in many cases, due to the technical nature of the legislation, Member States frequently transpose technical amendments by reference to the relevant Community acts. This was a factor when deciding to prepare new legislation in the form of Regulations instead of Directives.

Other than vehicle re-registration (which falls within the scope of Article 28-30 EC), there are relatively few complaints in this sector. In many instances, it proves unnecessary to open formal proceedings as the facts do not demonstrate non-conformity or incorrect application by the Member States of the harmonized legislation. Instead, infringement proceedings are much

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<sup>6</sup> {SEC (2008) 1908} {SEC (2008) 1909} /\* COM (2008) 316 final – COD 2008/0100\*/ 23.5.2008.

<sup>7</sup> Regulation (EC) No.78/2009 of the European Parliament and of the Council of 14 January 2009 on the type-approval of motor vehicles with regard to the protection of pedestrians and other vulnerable road users (OJ L 35, 4.2.2009, p.1).

<sup>8</sup> Regulation (EC) No.79/2009 of the European Parliament and of the Council of 14 January 2009 on type-approval of hydrogen-powered vehicles (OJ L 35, 4.2.2009, p.32).

more likely to occur as a result of the absence of notification of complete transposition of obligations contained in the Directive.

The absence of full transposition of Directives is likely to become less important in the future when preference is given to Regulations over Directives. This strategy should increase overall efficiency in this area by lowering the overall number of infringement cases based on non- or late communication by Member States of transposition measures. Nevertheless, the complexity of the legislation in this sector and the constant development of new technologies (and the corresponding adaptation of legislation) means that problems of interpretation are an ever-present risk. In addition, Member States might take measures which risk compromising the harmonized approach in Community acts. Consequently, the Commission maintains close cooperation with the national authorities responsible for type-approval, meeting regularly (in general twice a year) to discuss questions regarding the understanding and interpretation of directives in the automotive sector as well as the equivalent UN/ECE Regulations to ensure their common and harmonised application. These meetings are known by the acronym "TAAM" (type approval authorities meeting).

The main priority in the automotive sector continues to be the proper implementation, management and enforcement of legislative proposals. In particular, there has to be long-term regulatory clarity as well as an accurate quantification of the costs and benefits of legislative activity. Given the impact of the current economic crisis, the Commission will weigh up the costs and benefits of any new legislative initiative and seek, as far as possible, to avoid creating new economic burdens.

The Commission is taking steps to assist Member States in the proper interpretation of EC legislation. A draft guidance document on the concept of individual approval of vehicles (which before framework Directive 2007/46/EC was primarily governed by national law) is being discussed with Member States. In addition, in view of the fact that several Member States have announced their intention to provide financial incentives for motor vehicles based on environmental performance, the Commission is currently preparing guidelines with a view to providing practical indications for Member States where these incentives are based on the harmonized pollutant emission limit values.

## **2.3. Chemicals**

### *2.3.1 REACH*

#### *Current position*

In 2008, there were significant developments in the chemicals sector. Many of the substantive provisions of the REACH Regulation (1907/2006) – the cornerstone of the EU's new chemicals legislation – applied from 1 June 2008. In addition, a new Regulation (1272/2008) on classification, labelling and packaging of substances and mixtures ("the CLP Regulation") was adopted at the very end of 2008, designed to ensure that substances and mixtures deemed 'hazardous' are properly identified and clearly indicated before products are placed on the market.

REACH deals with the registration, evaluation, authorisation and restriction of chemical substances. Registration of chemicals with the European Chemicals Agency ("ECHA") is designed to obtain information on manufactured and imported substances to establish whether industry is taking adequate measures to ensure their safe use. Subsequent evaluation by ECHA may include a quality check on registration files and the examination of testing



proposals. Certain substances may undergo ‘substance evaluation’, where national authorities consider all available information on a given substance. Substances giving rise to high concern may be required to obtain Commission authorisation for use under stipulated conditions. Finally, the manufacture, import and use of substances that pose unacceptable risks to human health or the environment may be partly or totally restricted.

The basic implementation package for REACH had to be in place by mid 2008 and the Commission adopted the required implementation measures via the comitology procedure (measures listed below). The Commission also reviewed Annexes I, IV, V, XI and XIII of REACH which led to amendment of Annexes IV, V and XI (again listed below).

It needs to be stressed that the implementation phase of REACH is only the beginning. The first phase – pre-registration with ECHA - started on 1 June 2008 and ended on 1 December 2008. Any contentious issues arising out of REACH implementation were dealt with, in particular, at regular quarterly meetings within the Commission expert group “REACH Competent Authorities” and its subgroups, in particular the Subgroups on the review of Annexes and on nanomaterials.

So far, the Commission has dealt with a rather limited number of enquiries and complaints regarding pre-registration. These problems were resolved in collaboration with ECHA which has developed various tools to help operators to fulfil their REACH obligations (guidance package, Navigator tool, helpdesk, FAQs etc.). National REACH helpdesks are also functioning well.

REACH is directly applicable legislation whose enforcement should be primarily ensured by the Member States through a system of official controls and other appropriate activities. The core parts of REACH began to apply in the second half of 2008 and national provisions on penalties had to be notified by 1 December 2008. Not all Member States have fulfilled this obligation on time and, having addressed this issue several times in its contacts with the competent authorities, the Commission is now initiating infringement proceedings. The CLP Regulation, which entered into force in January 2009, will also start to apply on a staggered timeline, alongside pre-existing legislation which will be progressively repealed.

The REACH system is supplemented by a comprehensive package of technical guidance documents to ensure its uniform and consistent interpretation. Throughout 2008, the Commission was involved in developing new guidance and updating existing guidance, which will be adopted and published by ECHA.

The Commission also actively participated in the first meetings of ECHA’s Forum for the Exchange of Information on Enforcement which is comprised of representatives of national enforcement authorities.

#### *Changes underway*

The Commission is closely monitoring how Member States enforce REACH in order to ensure transparency, impartiality and consistency in enforcement throughout the EU. A study has been commissioned with a view to obtaining detailed comparisons of the types and levels of penalties provided for in different Member States.

The Commission will, in particular, work closely with the ECHA’s Forum for the Exchange of Information on Enforcement which coordinates a network of national authorities

responsible for enforcement. The Commission will also continue to work to enhance good cooperation, coordination and exchange of information with national authorities and ECHA.

The Commission will also review the Annexes to REACH with a view, in particular, to aligning them with the new CLP Regulation.

The Commission has already begun to prepare for one of its main roles under REACH - granting authorisations for the placing on the market and the use of substances giving rise to high concern. This will be a top priority of the Commission in the future.

### *Evaluation*

The correct implementation of the new REACH and CLP Regulations will be critical for the chemical industry sector in the coming years. REACH has the long-term objectives of providing a high level of protection of human health and the environment while ensuring the free circulation of substances on the internal market and enhancing competitiveness and innovation. These objectives should be progressively attained over the next decade and beyond. However, we are at the very beginning of its implementation and clearly it will only be possible to evaluate to what extent these objectives are being fulfilled over the coming years, whereupon corrective action will be taken if necessary.

As REACH legislation is based on a completely new regulatory approach and has shifted much of the burden for ensuring the safe use of chemicals onto industry, the Commission needs to monitor closely whether its implementation is effective and consistent throughout the EU. There is scarcely any information from Member States for the time being. In 2009 much activity will focus on pre-registration and registration obligations and the provision of necessary information in the supply chain under REACH.

The necessary legal framework for regulating chemicals is now in place, as are most guidance documents. Around 2.75 million pre-registrations were made by 65,000 companies for 150,000 different substances. The phased deadlines for registration (based on the quantities of substances to be produced or imported) are 2010, 2013 and 2018.

2009 will be the first year of data sharing and preparation for the submission of joint registrations within “substance information exchange forums” (SIEFs) organised by industry. Neither the Commission nor ECHA can be directly involved in this process, but meetings with industry stakeholders and various workshops are being organised to ensure the correct implementation of REACH.

The Member States should provide their first reports on the operation of REACH by June 2010 and ECHA will report by June 2011. On the basis of these reports, the Commission will prepare the first general report on the operation of REACH and will review the scope of REACH by June 2012.

### *2.3.2. Other chemicals legislation*

#### *Current position*

Monitoring of the implementation by the Member States of Regulation (EC) No 273/2004 on drug precursors, which came into force in 2005, continued. 8 infringement cases were opened and 4 are still ongoing.

Concerning the implementation of Directives 2004/9 and 2004/10 on good laboratory practice, in infringement proceedings before the European Court against Luxembourg on 4 November 2008 the Court held that "*by not putting in place the authorities able to verify the implementation of the principles of good laboratory practice, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 3 of Directive 2004/9/Ec*" (C-95/08).

The Commission launched proceedings against Luxembourg for the non-implementation of Regulation EC No 648/2004 on detergents 648/2004. In its judgment of 24 March 2009 (C-184/08) the European Court of Justice held that Luxembourg had failed to its obligations pursuant to Regulation EC No 648/2004 by not adopting the relevant penalties.

#### *Changes underway*

Provisions of the REACH Regulation will replace Directive 76/769/EEC on 1 June 2009. Until then, new amendments to Directive 76/769/EEC are being enacted as decisions instead of directives which do not require transposition. The volume of enquiries relating to this Directive has always been high, mostly linked to its amendments. This is expected to remain the same when Directive 76/769/EEC is replaced by REACH as new restrictions will continue to be adopted.

In 2008, the Commission continued to use preventive techniques to ensure the correct application and coherent implementation of Directive 2007/23/EC on Pyrotechnic Articles. Commission services and Member States are discussing questions related to the transposition of the directive in the working group set up by the directive. Transposition is due in 2010 and, since it represents an important departure from existing national measures for Member States the transition is being prepared for in advance.

In the explosives sector, Member States must transpose Commission Directive 2008/43/EC on the identification and traceability of explosives.

The number of enquiries received concerning Directive 1999/45/EC on dangerous preparations, Directive 93/15/EEC on explosives and Regulation 2003/2003 on Fertilisers is high. For most of these texts a list of frequently asked questions has been published on the internet which allows operators access to questions put, and replies provided, in the past.

However, the number of actual complaints received remains low. One petition was received concerning ceramic fibres used in car catalyts (ref 2006/90).

#### *Evaluation*

The number of infringements decreased in 2008 largely because the replacement of Directive 76/769/EEC by the REACH Regulation meant that fewer directives needed to be transposed. This trend is naturally expected to continue.

Over the past 3 years the correct implementation of enforcement rules for several regulations (including the adoption of penalties at national level for their infringement) has been a priority. The Court of Justice has supported the Commission by requiring that penalties for infringements to EC regulations be put in place (see C-184/08). This activity should decline as a result.

## 2.4. Pharmaceuticals

### *Current position*

For the main measures monitored by the Commission in the pharmaceutical sector, please refer to Annex I point I.1

With regard to Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use and Regulation (EC) No 726/2004, laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, the Commission brought actions before the Court of Justice against Lithuania for retaining in force after accession a national marketing authorisation which did not comply with the requirements of the Directive and Regulation. (Case C-350/08).

With regard to Directive 2001/83/EC and Regulation (EC) No 726/2004 of the European Parliament and of the Council, laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (EMA), the Commission brought actions before the Court of Justice against Poland for putting on the market and maintaining on the market after accession the national market to medicinal products for which marketing authorisations were not granted in accordance with the above mentioned Directive and Regulation (case C-385/08).

In relation to cases earlier brought before the Court of Justice for non-communication of national measures transposing Directive 2004/27/EC, Directive 2004/28/EC and Directive 2005/28/EC, in which the Court of Justice ruled that the Member States had failed to fulfil its obligations under these directives, in 2008 the Commission closed most of these cases following Member States' communication of national transposition measures.

In 2008, the Commission continued to use preventive techniques to ensure the correct application and coherent implementation of the pharmaceutical acquis.

The following working parties deal with the general interpretation of European pharmaceutical legislation, in preparation for its transposition and implementation by the Member States:

- the Pharmaceutical Committee which met in May 2008,
- the “Notice to applicants” group which met in October 2008 and examined different chapters of the guidelines interpreting requirements for applications for marketing authorisation.

Furthermore, the Commission continued to work intensively with Member States in the course of 2008 to ensure coherent implementation of EC rules on clinical trials set out in Directive 2001/20/EC of the European Parliament and of the Council on clinical trials, complemented by Commission Directives 2003/94/EC and 2005/28/EC. Co-operation was mainly channelled into the ‘Ad hoc group for the development of implementing guidelines for Directive 2001/20/EC relating to good clinical practice in the conduct of clinical trials on medicinal products for human use.’

The Commission also took part in various forums, such as those organised by the European Medicines Agency and the Member States, to present guidelines for the transposition and implementation of legislation. Notably, the Commission participated in the regular meetings of the heads of the national medicines agencies.

In the area of pharmaceutical legislation, the Commission dealt with three petitions.

### *Changes underway*

The so-called “pharmaceutical package” was adopted on 10 December 2008 and transmitted to the European Parliament and the Council for adoption through co-decision, containing:

- two legislative proposals on pharmacovigilance, involving amendments to Regulation (EC) No 726/2004 and Directive 2001/83/EC;
- two legislative proposals on information to patients involving amendments of Directive 2001/83/EC and Regulation (EC) No 726/2004;
- a legislative proposal on counterfeit medicines involving amendments of Directive 2001/83/EC.

The package also includes a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on "Safe, Innovative and Accessible Medicines: a Renewed Vision for the Pharmaceutical Sector" (COM/2008/0666 final), setting out the Commission's strategy for the pharmaceutical sector in the coming years.

During 2008, the Commission prepared measures to implement Regulation (EC) No 1394/2007, for adoption in 2009.

In addition, the Commission has adopted Commission Regulation (EC) No 1234/2008 of 24 November 2008 concerning the examination of variations to the terms of marketing authorisations for medicinal products for human use and veterinary medicinal products, modernizing the system on variations and repealing Regulations (EC) No 1084/2003 and (EC) No 1085/2003.

### *Evaluation*

The pharmaceutical sector is highly dynamic and subject to frequent change. A major legislative package was transmitted to the European Parliament and the Council at the end of 2008, which will continue to require close collaboration with Member States to ensure the correct application of Community law. The working groups, expert meetings and committees described above will continue to provide a useful tool to ensure coherent implementation of the Community rules.

### The Transparency Directive

Pricing and reimbursement policies fall within the competence of Member States. However, Directive 89/105/EEC (commonly referred to as the "Transparency Directive") defines a series of procedural requirements to ensure the transparency of national pricing and

reimbursement measures. Its provisions do not affect the capacity of Member States to determine the organisation and financing of their healthcare systems. In particular, Member States are free to set the prices of medicines and to determine their reimbursement status under national or regional health insurance schemes. Directive 89/105/EEC is a peculiar instrument under Community law because it lies at the interface between EU responsibilities (internal market) and national competences in the public health area (freedom of Member States to organise their social security systems).

After enlargement in 2004, national systems in many of the new Member States were still insufficiently aligned with the obligations of the Transparency Directive. It was also reported that some of the older Member States did not always respect the principles of the Directive. The Commission has therefore significantly stepped-up its efforts to ensure the enforcement of the Directive in the last five years.

In 2008, further substantial progress was made in strengthening the implementation of the Directive in the Member States. Problems identified on the basis of complaints were systematically addressed through bilateral discussions and in cooperation with the competent national authorities. This approach allowed the transposition of the procedural requirements of the directive in several Member States to be improved, thus bringing greater transparency to national pricing and reimbursement systems. One case ruled on by the European Court of Justice, found that Austrian legislation had failed to comply with the time-limits for pricing and reimbursement decisions laid down in Directive 89/105/EEC (footnote: Judgment of 17 July 2008, Case C-311/07, Commission v. Austria). Discussions with Member States on the application and interpretation of the directive were also pursued in the framework of the Transparency Committee convened in November 2008.

Given the complexity and constant evolution of national health insurance systems, it is expected that further monitoring will be necessary in the coming years. The Commission will give priority to infringement proceedings in cases where the Directive has not been adequately transposed and where this could entail significant barriers to trade in medicinal products.

## **2.5. Medical devices**

### *Current position*

The medical devices sector is regulated by three main directives: Directive 90/385/EEC relating to active implantable medical devices, Directive 93/42/EEC concerning medical devices, and Directive 98/79/EC on *in vitro* diagnostic medical devices. The first two directives have been modified several times, most recently by Directive 2007/47/EC which was due to be transposed by the Member States by 21 December 2008. However, the transposition rate of this directive was low and, at the beginning of 2009, the Commission initiated 18 infringement proceedings for non-communication of transposition measures.

Except for one case, all the infringement cases opened in 2007 for non-communication of national measures transposing Commission Directive 2005/50/EC, on the reclassification of hip, knee and shoulder joint replacements in the framework of Council Directive 93/42/EEC, were closed in 2008. The remaining open case is due to be closed in 2009. Eight infringement proceedings against Bulgaria were also closed after communication of the transposition measures for the whole *acquis* on medical devices.

Six infringement cases for non-conformity with, or incorrect application of, medical devices directives were still open at the end of 2008 although one will probably be closed in 2009. Two new complaints were received in 2008 and are being analysed; five other complaints

received in 2008 concerned an issue (i.e. registration requirements for medical devices in Italy) in relation to which the Commission had already started proceedings based on three complaints received in 2007.

### *Changes underway*

In 2009, communication and conformity of national measures transposing Directive 2007/47/EC will be checked. Correlation tables are extremely helpful in the performance of this task, in particular if the relevant provisions of the Directive(s) are transposed by amending several different legal acts of the Member States.

Looking to the future, the Commission launched a public consultation in 2008 concerning the recast of the medical devices directives; 200 responses were received and analysed. The Commission intends to make the regulatory environment simpler and more easily-understandable (e.g. by merging Directives 90/385/EEC and 93/42/EEC, together with their amending directives). This will better ensure the efficient functioning of the internal market whilst guaranteeing a high level of safety for patients and users. A more transparent system regarding the control and placing on the market of medical devices would enable European citizens to be confident of the safety of these products. In addition, Directive 98/79/EC concerning in vitro diagnostic medical devices, which has not been amended since its adoption, might be revised. In the context of the revision of these three directives, necessary alignments with the New Legislative Framework for the Marketing of Products will be considered.

### *Evaluation*

The present regime in the medical devices sector is continually being adapted for a broad range of products and issues in order to ensure a high level of safety for patients, users and third parties. The initiative to modernize the *acquis* derives from a desire to simplify it in accordance with better regulation principles and to further improve safety standards and market surveillance, in the light of technical and scientific progress.

## **2.6. Cosmetics**

### *Current position*

The cosmetics “*acquis*” consists of Council Directive 76/768/EEC, which has been amended seven times and modified for the purpose of adapting to technical progress 50 times<sup>9</sup>. It will be replaced by a Regulation to be adopted in 2009.

In 2008, there were three meetings of the Standing Committee on Cosmetics Products (a regulatory comitology committee), and three meetings of the Working Group on Cosmetics, which includes Member States, representatives of industry and consumers. The agenda of the Standing Committee always includes a point on the transposition of directives.

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<sup>9</sup> The consolidated text of Council Directive 76/768/EC and the adaptations to technical progress are available on: [http://ec.europa.eu/enterprise/cosmetics/html/consolidated\\_dir.htm](http://ec.europa.eu/enterprise/cosmetics/html/consolidated_dir.htm).

National transposition measures are systematically checked to ensure that the text submitted relates to cosmetic products, that the reference of the directive transposed is mentioned and that all of the substances concerned by the adaptation are mentioned.

The Commission launched 27 infringement proceedings for non communication of national transposition measures relating to Commission Directives 2007/22, 2007/53, 2007/54, 2007/67, 2008/14 and 2008/42 on the adaptation to technical progress of Council Directive 76/768/CEE on cosmetic products, whose transposition deadlines were all in 2008. 15 of these proceedings were closed within the same year.

One complaint was received for alleged non-conformity to Directive 76/768/EEC, which is currently being investigated.

### *Changes underway*

In 2008, four directives adapting the Cosmetics Directive to technical progress were adopted by the Commission, two with transposition deadlines in 2008 and two with deadlines in 2009. After the adoption of each directive, the Commission sent a letter to the Member States to remind them of the deadlines and offer support with transposition. It was not necessary to include an obligation to provide correlation tables for the above-mentioned directives because the content is very technical and Member States use the original text of the directive in their transposition measures.

A proposal for a (recasting) regulation of the European Parliament and the Council on cosmetic products was adopted by the Commission on 5 February 2008. This aims to guarantee the safety of cosmetic products, in the light of innovation, and to simplify the legislative environment. Negotiations with Council and European Parliament carried on during 2008 and early 2009, and will lead to the adoption of the Regulation in First Reading in the course of 2009.

### *Evaluation*

By its very nature, the cosmetics sector is subject to continuous innovation and technical progress, and so legislation must continue to be dynamic. In this context, the Commission acknowledges the very fruitful cooperation enjoyed not only with the Member States but also with all stakeholders.

The recast of the principal legislation in the form of a regulation will improve the efficiency of the internal market for cosmetics. The Regulation will enter into force in the course of 2013, and, as a result, all future technical adaptations will also be adopted by regulation. This change will create a single legislative framework as the sole reference for operators in the internal market. In addition, it will save resources by removing the need for Member States to adopt (and for the Commission to monitor) transposition measures. During the transition period between the adoption of the Regulation and its application, the Commission will continue to adopt technical adaptation directives.

## **2.7. Mechanical, electrical and telecommunications equipment**

### *Current position*



With respect to Directive 2004/108/EC on the approximation of the laws of the Member States relating to electromagnetic compatibility and repealing Directive 89/336/EC, 5 non-communication cases were still open at the beginning of 2008. During the year, 4 cases were closed, following communication of national transposition measures. One case against Luxembourg was referred to the ECJ, since the national transposition measures were not communicated.

Directive 2006/42/EC on machinery, amending Directive 95/16/EC (recast), came into force on 29/6/2008. 12 non-communication cases were opened. By the end of 2008, 3 Member States (Greece, Italy and Luxembourg) had still not notified their transposition measures.

One case against Poland under Directive 94/25/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft, was closed following modification of the legislation concerning the registration of recreational craft.

#### *Changes underway*

Following the adoption of Decision 768/2008/EC on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, some directives will have to be revised. A proposal to amend the Machinery Directive (Directive 2006/42/EC) is expected to be adopted in the 2nd quarter of 2009 with the aim of introducing environmental protection requirements for new machinery for pesticide application placed on the market in the EU.

An amendment for the purposes of adaptation to technical progress is expected in the 3<sup>rd</sup> quarter of 2009 in relation to Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery.

Like in 2007, priorities are the non-communication cases. In 2007, the non-communication cases concerned Directive 2004/26/EC and Directive 2002/88/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery.

In 2008, the above mentioned directives are no longer of concern (since following communication of the national transposing measures, the Commission withdrew its proceedings against several Member States). The priority non-communication cases in 2008 concern Directive 2004/108/EC on the approximation of the laws of the Member States relating to electromagnetic compatibility and Directive 2006/42/EC on machinery.

#### *Evaluation*

The mechanical, electrical and telecommunications equipment sectors function smoothly. The existing acquis is relatively long-standing and well established. It has not required much development in the past, nor is much expected to be needed in the foreseeable future. The volume of problems arising is reasonably limited and stable. The overall situation is stable, manageable and acceptable.

## 2.8. Gas appliances, pressure equipment and legal metrology

### 2.8.1. Gas appliances

#### *Current position*

The **gas appliances sector** is covered by Directive 90/396/EEC on appliances burning gaseous fuels, one of the early New Approach Directives. It has the dual purpose of ensuring the free movement of gas appliances through technical harmonisation with regard to hazards due to gas, and of guaranteeing a high level of protection of public interest objectives referred to in Article 95(3) of the EC Treaty. It includes the definition of mandatory essential requirements and the setting up of mandatory conformity assessment procedures.

Work on safeguard clause notifications has continued, with particular emphasis on issues relating to the safety of patio heaters. A letter of formal notice was sent to Germany, for incorrect implementation of Directive 90/396/EEC on gas appliances.

#### *Changes underway*

The Directive has been operational and has functioned satisfactorily for more than fifteen years but technical progress and innovation, together with experience of its implementation has led to an examination of the need for revision by the Working Group on Gas Appliances. Within this Working Group a subgroup has been created charged with presenting specific proposals for amendment. The Directive will also be aligned with Decision 768/2008/EC on a common framework for the marketing of products.

In addition, a study on “Competitiveness in the EU gas appliances sector” has been underway since August 2008 and the final report is expected in the second half of 2009. This study is intended to provide information to the Commission, the Member States and stakeholders on the current situation in the gas appliances sector and to highlight future prospects for development in the sector. This analysis will also feed into the overall assessment of the sector in the context of the possible revision of the Directive.

In 2009, along with work to identify where the Directive might be modified, the emphasis in managing the Directive will be on infringement procedures, safeguard clauses and better implementation of the Directive generally.

#### *Evaluation*

The regulatory framework has served well for 15 years but the time has come for a re-assessment to ensure that it continues to fulfil its objectives by the most effective means possible.

### 2.8.2. Pressure equipment

#### *Current position*

Managing the pressure sector means protecting health and safety in relation to pressure risks, and involves products ranging from simple pressure cookers to large chemical installations.

EC law in this area mainly comprises the harmonisation Directives 87/404/EEC on simple pressure vessels and 97/23/EC on pressure equipment, covering the design, manufacture and conformity assessment of such equipment.

In addition, Directive 75/324/EEC on aerosol dispensers specifies the safety and labelling requirements that aerosol dispensers must satisfy in order to be placed on the market.

Two cases against Italy were closed, as no incorrect implementation of Directive 97/23/EC was demonstrated. Also in connection with Directive 97/23, a reasoned opinion alleging incorrect implementation in relation to solar panels was sent to Spain.

#### *Changes underway*

Directives 87/404/EEC and 97/23/EC are scheduled to be aligned with the new legal framework for the marketing of products and in particular Decision 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products and repealing Council Decision 93/465/EEC.

Directive 2008/47/EC of 8 April 2008<sup>10</sup>, modified Directive 75/324/EEC, adapting it to technical progress. Member States must transpose this Directive by 29 October 2009 and the new regime it introduces will apply from 29 April 2010. Timely transposition will be a priority in 2009.

The four old Directives on pressure vessels (framework directive 76/767/EEC and three specific ones on gas cylinders, namely Directives 84/525/EEC, 84/526/EEC and 84/527/EEC), originally scheduled to be repealed in 2008, will be repealed by a forthcoming Directive of the Council and the European Parliament on transportable pressure equipment. A proposal for this Directive is currently under preparation (by another Commission service), and is expected to be adopted by the end of 2009.

#### *Evaluation*

The sector functions smoothly and there are no major problems. Nevertheless, infringement procedures and issues relating to the correct implementation of all directives in the pressure sector will be actively pursued by the Commission services in 2009.

#### *2.8.3. Legal metrology*

##### *Current position*

The acquis in this area has a wide scope covering units of measurement and metrological requirements for the placing on the market and putting into service of pre-packed products and measuring instruments.

The main Directives dealing with the design and manufacture of measuring instruments are Directives 71/316/EEC on common provisions for both measuring instruments and methods of metrological control, 90/384/EEC on non-automatic weighing instruments and 2004/22/EC on measuring instruments.

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<sup>10</sup> Directive 2008/47/EC amending, for the purposes of adapting to technical progress, Directive 75/324/EEC on the approximation of the laws of the Member States relating to aerosol dispensers (OJ L 96, 9.4.2008, p.15).

Commission Directive 2007/13/EC of 7 March 2007<sup>11</sup> modified Annex II of Directive 71/316/EEC to include images of distinguishing letters used by some Member States for the EC initial verification mark affixed on a measuring instrument to indicate conformity with EC requirements. Member States had to comply with this Directive by 10 March 2008. The Commission began infringement procedures against 6 Member States for non communication of transposition measures but has since closed two cases following communication.

With regard to pre-packed products, the main pieces of Community legislation are Directives 75/106/EEC on pre-packaged liquids, 75/107/EEC on bottles used as measuring containers, 76/211/EEC relating to the making-up by weight or by volume of certain pre-packaged products and 80/232/EEC on ranges of nominal quantities and nominal capacities for certain pre-packaged products. (From 11 April 2009, requirements for pre-packaged liquids will appear in Directive 76/211/EEC as Directive 75/106/EEC will be repealed by Directive 2007/45/EC).

Directive 2007/45/EC of the Council and the European Parliament of 5 September 2007, laying down rules on nominal quantities for pre-packed products, repealing Council Directives 75/106/EEC and 80/232/EEC and amending Council Directive 76/211/EEC<sup>12</sup>, aims to liberalise nominal quantities of pre-packaged products within the EU in line with ECJ jurisprudence, with the exception of wine and spirits for which nominal quantities will continue to be defined at Community level. The substance of the Directive became applicable on 11 April 2009 but Member States should have transposed it by 11 October 2008. The Commission began infringement procedures against 10 Member States for non communication of national transposition measures.

Units of measurement are harmonised at Community level by Directive 80/181/EEC<sup>13</sup> which creates a harmonized regulatory framework throughout the EU to eliminate trade barriers between Member States.

On 10 September 2007, the Commission presented a proposal for a Directive of the European Parliament and the Council to amend Directive 80/181/EEC so as to allow the use on a permanent basis of certain indications supplementary to the legal units of measurement and to adapt the Directive to technical progress. In accordance with the subsidiarity principle, the amendment also expressly permits the United Kingdom and Ireland to continue to use the 'mile' for road signs/speed indications, the 'pint' for milk in returnable bottles and for beer and cider on draught and the 'troy ounce' for transactions in precious metals. The maintenance of these terms in limited, local circumstances will not lead to barriers to the free movement of products. A common position (28/2008)<sup>14</sup> was adopted by the Council on 18 November 2008 and the Parliament approved the text without amendment on its second reading on 16 December 2008.

### *Changes underway*

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<sup>11</sup> Commission Directive 2007/13/EC amending Annex II to Council Directive 71/316/EEC on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control (OJ L 73, 13.3.07, p.10).

<sup>12</sup> OJ L 247, 21.9.2007, p.17.

<sup>13</sup> Proposal for a Directive of the European Parliament and of the Council amending Council Directive 80/181/EEC on the approximation of the laws of the Member States relating to units of measurement (COM (2007)510 final).

<sup>14</sup> OJ C 330 E, 30.12.2008, p.1.

Directive 2004/22/EC was adapted by Regulation (EC) No 1137/2008<sup>15</sup> to the new regulatory procedure with scrutiny established by Council Decision 1999/468/EC laying down procedures for the exercise of implementing powers conferred on the Commission, as amended by Decision 2006/512/EC.

On 24 November 2008 the Measuring Instruments Committee established under Directive 2004/22/EC met and delivered a favourable opinion in relation to three texts submitted by the Commission on the publication of references of normative documents drawn up by OIML (advisory procedure). Applying the new regulatory procedure with scrutiny, the Committee also gave the green light to a draft Commission Directive amending Directive 2004/22/EC (on the exploitation of maximum permissible errors) as regards instrument-specific annexes MI-001 to MI-005. On the expiry of the three month period permitting scrutiny by the European Parliament and the Council, and in the absence of opposition, the draft Directive should be adopted in the first half of 2009.

On 3 December 2008 the Commission presented a legislative proposal for a Directive of the European Parliament and the Council, repealing 8 old metrology Directives (COM (2008)801)<sup>16</sup>. These Directives were adopted under framework Directive 71/316/EEC. They co-existed with national provisions. However, in practice adaptation to technical progress and innovation in relation to products covered by these Directives was effected either by the voluntary application of new international and European standards or through national provisions implementing these standards. It was also felt that the free movement of these products could be adequately ensured by Articles 28 to 30 EC and the mutual recognition principle.

A standardisation mandate for smart metering was issued in March 2009 with a view to ensuring the free movement of meters with additional functions concerning energy end-use efficiency.

### *Evaluation*

The measuring instruments sector functions smoothly and no major problems have been encountered. In 2009 attention priority will primarily be given to infringement procedures and the correct implementation of directives in the sector.

## **2.9. Construction products**

### *Current position*

Directive 89/106/EC on construction products (“the CPD”) has not been amended recently, which has allowed for steady development of its implementation within national systems. Harmonisation through European standards, published in the OJEU, has continued and conditions for enterprises operating in this sector, either as manufacturers or users of construction products, have thus made solid progress during 2008. However, certain

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<sup>15</sup> Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 adapting a number of instruments subject to the procedure laid down in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny (OJ L 311, 31.11.2008, p.1).

<sup>16</sup> The Directives that are proposed to be repealed are Directives 71/317/EEC, 71/347/EEC, 71/349/EEC, 74/148/EEC, 75/33/EEC, 76/765/EEC, 76/766/EEC and 86/217/EEC.

fundamental problems with the implementation of the CPD remain unsolved, resulting in different transposition by the Member States and consequent inefficiencies in the market.

During 2008, a joint reasoned opinion was issued in relation to two cases against Germany (2004/5116 and 2005/4743). In addition, four infringement cases were closed and several others are approaching closure. The two German cases mentioned above and a case against the UK (2005/4074) are considered as priority cases due to their great importance to the sector as a whole.

#### *Changes underway*

The revision of the CPD proceeded during 2008 with the adoption on 23 May of a Commission proposal for a Regulation (“the CPR”). Originally it was thought that adoption by the legislature would be possible in 2009, in which case the new CPR replacing the CPD would have come into force in mid-2011. However, recent developments in the co-decision procedure have made it likely that this timing will be substantially delayed.

Even if the CPR is unlikely to come into force in the next two years, the initiation of new infringement proceedings (and the conduct of ongoing proceedings) is still influenced by the legislative process leading to the adoption of the CPR. One of the main reasons for revision of the CPD is confusion over its provisions resulting in different national implementation in the Member States, in particular as regards the use of CE marking. Forthcoming clarification of some aspects of the CPD in the CPR inevitable has a bearing on the conduct of present and future infringement proceedings and, conversely, judgments in ongoing infringement cases could help in finalising the CPR.

In dealing with complaints generally, the aim is to reach a conclusion as swiftly as possible. Some may be dealt with using the new procedure arising out of the partnership approach to enforcement (where the Member State concerned is participating in the ongoing pilot project). Contacts with all Member States are in any event being intensified in the context of the continuing legislative process and this would seem to allow for more informal attempts to convince Member States of the need to adjust some of their current practices.

In choosing and designating priority infringement cases in the future, links with the continuing legislative process on the CPR will be an important factor.

#### *Evaluation*

The acquis in this sector is in a state of transition. Since the new CPR will not be in place for at least another two years, we expect to continue to be confronted with legal uncertainties emanating from unclear provisions of the CPD and the consequent divergent interpretation by the Member States. However, efforts will continue to be made to deal with new cases more swiftly than before. Closer contacts with MS will undoubtedly prove to be of assistance for reaching these objectives.

### **2.10. Textiles/clothing, footwear and wood**

#### *Current position*

**Textiles and clothing** are regulated by Directive 96/74/EC on textile labelling which has been adapted to technical progress four times by Commission Directives 97/37/EC, 2004/34/EC, 2006/3/EC and 2007/3/EC. The recast of Directive 96/74/EC was adopted on 14 January 2009

in the form of Directive 2008/121/EC of the European Parliament and of the Council of 14 January 2009 on textile names [Official Journal L 19 of 23.1.2009 p.39.] Directives 96/73/EC (adapted to technical progress by two Commission Directives 2006/2/EC and 2007/4/EC) and 73/44/EEC specify testing methods for sampling and analysis of fibre mixtures in order to determine the conformity of the information supplied on a label according to Directive 96/74/EC. Due to the technical nature of this legislation, the Committee and Working Group for Directives relating to textile names and labelling, composed of experts from Member States and other interested parties, assist the Commission in the adaptation of the textiles Directives to technical progress.

The acquis in textiles/clothing sector is not considered problematic, although occasionally national mandatory labelling requirements going beyond the scope of the labelling Directive (on size, care instructions etc.) create trade barriers prohibited under Article 28 EC and necessitate infringement proceedings. Nor does the transposition of technical amendments of Directives 96/74 and 96/73/EC pose any major problems. In some minor instances of incomplete compliance, Member States were contacted informally to bring about realignment of national implementing rules. The informal cooperation with the Member States has proved effective in the resolution of most problems. In 2008 one complaint was lodged in relation to the legislation governing the placing of textiles/clothing and footwear on the European market. It concerned textile labelling requirements in Slovakia. After amendments requested by the Commission were effected by the Slovak authorities, the procedure was closed.

In relation to amendments of Directives 2007/3/EC and 2007/4/EC, for which the transposition deadline was 2 February 2008, 6 infringement proceedings for non-communication were launched in March 2008. Following notification of transposition measures by the relevant national authorities, all the cases were closed by the end of the year. Letters of formal notice were also sent to Cyprus and Poland in March 2008, requesting the complete notification of national implementing measures for Directive 96/74/EC. Following the positive reactions of these Member States, the procedures were closed.

In the *footwear* sector, Directive 94/11/EC on the labelling of materials used in consumer footwear generally does not give rise to significant implementation problems. Infringement proceedings launched against Cyprus in March 2008 for non-communication of national transposition measures were closed in November on compliance by the Cypriot authorities. Omissions and discrepancies found in Slovak and Hungarian transposition measures were resolved by informal communication with the relevant authorities.

#### *Changes underway*

During 2008, intensive consultation with Member States and other stakeholders in the framework of the Working Group on Textile Names and Labelling led to the adoption by the Commission in January 2009 of a proposal for a Regulation of the European Parliament and of the Council on Textile Names and Related Labelling of Textile Products. The legislative procedure leading to adoption by the legislature will continue during 2009. This new Regulation will replace all current directives in the field of textile names and labelling, namely Directives 2008/121/EC, 96/73/EC, 73/44/EEC and their amending directives.

#### *Evaluation*

Regulation in the textiles, clothing and footwear sectors is considered effective. Assessment of national transposition measures will continue. In relation to the few remaining

discrepancies on textile names and labelling, direct informal communication with the Member States is being used and if this proves unsuccessful formal infringement proceedings will be launched.

The adoption of the new Regulation, scheduled for the first quarter of 2010, and its subsequent implementation are expected to facilitate the work of national administrations, particularly as transposition will not be necessary.

### **2.11. Toys**

The European Commission has tabled a new Directive to improve toy safety in Europe. The proposal aims to enhance the safety of toys replacing and modernizing the 20 year old Toys Directive, 88/378/EEC of 3rd May 1988. The revision has three objectives: first and foremost to introduce new and higher safety requirements to cope with recently identified hazards, secondly to strengthen manufacturers' and importers' responsibility for the marketing of toys and finally to enhance the market surveillance obligations of Member States

### **2.12. Cultural goods**

In 2008, the *acquis* in this area remained stable. The codification process was followed by the European Parliament and the Council but no act was adopted in this year.

Under Article 16 of the Directive 93/7/EEC, every three years the Commission shall send the European Parliament, the Council and the European Economic and Social Committee a report reviewing the application of the Directive by the Member States. In 2008, the Commission began preparing the third such report, covering the period 2004-2007. To that end, the Commission asked the Member States to send national reports for that period.

The third report will allow the Commission and other interested parties to determine whether the Directive continues to fulfil its purpose and whether any modification is necessary.

### **2.13. Late payment**

Directive 2000/35/EC<sup>17</sup> aims to combat late payment in commercial transactions between businesses and between businesses and public authorities. Experience since it entered into force and reports following external studies have shown that, although attitudes to late payment have changed, the Directive actually has little impact.

Several high level political messages have underlined the need for an amended instrument to combat late payment in commercial transactions. The Small Business Act [COM(2008)394] highlighted the key importance of SMEs to the competitiveness of the EU economy and stressed that effective access to finance was one of the major challenges SMEs have to face, together with the need to make better use of the opportunities provided by the Single Market. The European Economic Recovery Plan [COM(2008)800] stressed that sufficient and affordable access to finance was a pre-condition for investment, growth and job creation in the context of the economic slowdown and asked the EU and the Member States to ensure that public authorities pay invoices for supplies and services within one month.

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<sup>17</sup> Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, p. 35–38.



Against this background, during 2008 the Directive has undergone a revision exercise; an external study was conducted during 2007-8 to assess the cost/benefit relationship of proposals presented in a report on the Directive made in 2006. The Commission also launched a public consultation of stakeholders in all official EU languages which closed on 31 August 2008 and yielded 510 responses. In addition, the European Business Test Panel was consulted between 13 May 2008 and 20 June 2008 and 408 responses were received. An Impact Assessment was presented to the Impact Assessment Board on December 2008. A proposal for a recast Directive was adopted by the European Commission on 8 April 2009.

During 2008 the Court of Justice delivered three judgments on late payment. In one action (based mainly on Art. 3(2) of the Directive) the national provisions at issue were held to be in line with the Directive. In the two other cases<sup>18</sup> where preliminary references had been made, the Court of Justice confirmed that the Directive “governs only certain specific rules intended to combat [such] delays, namely, rules on interest for late payments (Article 3), retention of title (Article 4) and procedures for recovery of unchallenged claims (Article 5)”. This provided further reason to amend the Directive.

The European Commission has received several “complaints” denouncing late payments, especially by public administrations. The replies to these enquiries informed the correspondents about the scope of the Directive and the competence of national authorities for the resolution of problems.

#### **2.14. Weapons**

Council Directive 91/477/EEC on control of the acquisition and possession of weapons has been amended by the Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008, which is to be transposed by Member States by 28 July 2010. The rationale of the amending directive is twofold: to comply with the requirements of a United Nations Protocol against the illicit manufacturing of and trafficking in firearms, signed by the Community in 2001, and to enhance security in firearms-related issues. In 2008, the Commission offered the Member States assistance in facilitating appropriate and timely transposition. The Commission will intensify its contacts with the Member States in the course of 2009, in particular through the creation of a Contact Group, which will provide the opportunity to tackle possible problems related to transposition measures.

#### **2.15. Product liability**

Directive 85/374 on product liability is a consolidated tool that strikes a fair balance in spreading risk among citizens and producers, while ensuring the safety of citizens in relation to products put into circulation in the internal market.

In 2008 two requests for preliminary rulings, still pending at the end of March 2009, were referred to the Court of Justice<sup>19</sup>. In the first, the Appellate Committee of the House of Lords in the UK asks for clarification of the meaning of the words “instituted proceedings against the producer” in article 11 of the Directive 85/374. The second relates to the scope of Articles 9 (concept of “damage”) and 13 (“rights of an injured person under the rules of the law of

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<sup>18</sup> Case C-306/06, Deutsche Telekom, judgment of 3 April 2008 and case C-265/07, Caffaro, judgment of 11 September 2008.

<sup>19</sup> Case C-358/08, Aventis Pasteur SA c M. Declan O’Byrne and case C-285/08, Moteurs Leroy Somer.

contractual or non-contractual liability or a special liability system”). Both judgments are expected later in 2009.

## **2.16. Defence goods**

According to established ECJ case-law, EC law applies to defence goods unless Member States makes use of article 296 EC, on a justifiable case-by-case basis. However, no internal market measure had ever addressed the circulation of defence goods within the EU.

As a result, EU defence industries were denied the usual benefits of the internal market, which has hindered industrial specialisation and cost-efficient consolidation. Pan-European defence companies are emerging and EU armed forces rely more and more on one another in the framework of ESDP, yet there is no regulatory framework supporting this industrial and strategic pan-Europeanization.

In December 2007, the Commission tabled the article 95-based directive simplifying the terms and conditions of intra-Community transfers of defence-related products with a view to securing and simplifying the free circulation of defence goods within the EU. The directive is an internal market instrument tailor-made for the particular nature and sensitivity of defence goods.

In 2008, swift negotiations in the Council and the Parliament paved the way for first reading agreement on 16 December 2008. The directive will be published around June 2009 with a two-year transposition period. In the meantime, the Commission will pay peculiar attention to the certification of the main European defence companies as certification testifies to their ability to reap the maximum advantage from the EU simplified transfers regime.

## **2.17. Non-harmonised area**

### *Current position*

Articles 28-30 EC ensure the easy cross-border exchange of goods within the Internal Market in areas that are not subject to harmonisation by Community legislation. The Commission monitors the correct application of these rules and opens infringement procedures against Member States when necessary.

In 2008 the Commission dealt with fewer complaints and infringement cases in the various non-harmonised fields covered by Article 28-30 EC - 73 in 2008 compared with 85 in 2007. The main areas are: registration of vehicles, construction products, food supplements and parallel imports of medicines and plant protection products. Today's restrictions on the free movement of goods often relate to requirements for products imposed in one Member State that are additional to, or more stringent than, those imposed in another. Market access for imported products can also be hampered by complicated and time-consuming administrative procedures.

The majority of complaints (around 2/3) are brought by small and medium-sized enterprises. This confirms findings that in contrast to large operators who have been very successful in benefiting from the opportunities of the single market, SMEs often find it fragmented and difficult to penetrate.

In 2008 several infringement cases were closed following agreement between the Commission and the Member States on solutions to the problems. Italy, for instance, lifted

regional provisions prohibiting the import of green-listed waste from other Member States. Italy responded to the Commission's intervention by issuing, within just 1 month, a new measure which revoked the prohibition.

However, in other cases it was not possible to reach agreement and the Commission decided to bring proceedings before the Court of Justice:

- Against the Czech Republic for obstacles to the registration of second-hand cars originating from other Member States, in particular by requesting an additional road worthiness test.<sup>20</sup>;
- Against Belgium for unduly restricting the trade in birds born and bred in captivity<sup>21</sup>;
- Against Austria for prohibiting certain heavy goods vehicles from using a major transit motorway in Tyrol<sup>22</sup>;

The Court of Justice delivered the following judgments, thereby further clarifying the scope of Articles 28 to 30 of the EC Treaty.

- In case C-227/06, the Court declared that, by encouraging economic operators to obtain Belgian marks of conformity prior to marketing in Belgium construction products lawfully manufactured and/or marketed in another Member State, Belgium had infringed free movement of goods principles.<sup>23</sup>
- In case C-265/06, the Court held that by prohibiting the affixing of tinted film to the windows of motor vehicles Portugal had contravened Article 28 EC.<sup>24</sup>
- In case C-286/07 concerning the registration of second-hand cars originating in other Member States, the Court considered that the requirement that, prior to the registration of a car in Luxembourg, the owner of a used car must submit an excerpt from the commercial register of the seller (not required in relation to cars bought from a seller in Luxembourg) constituted an obstacle to free movement of goods<sup>25</sup>
- In case C-170/07, the Court held that a Polish measure requiring used vehicles which had previously been registered in other Member States to undergo testing as to their general condition prior to registration is in breach of Article 28 EC.<sup>26</sup>
- In case C-249/07, the Court held that a system requiring prior authorisation for the seeding, in Dutch coastal waters, of oysters and mussels coming lawfully from other Member States and being of species native to the Netherlands, was contrary to Articles 28 EC and 30 EC.<sup>27</sup>
- In case C-524/07, the Court pointed out that, by making the registration of imported used vehicles dependent on more stringent provisions than applied to domestic vehicles, Austria was in breach of Article 28-30 EC.<sup>28</sup>

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<sup>20</sup> Case C-294/08, *Commission v Czech Republic*, following an amendment of the Czech legislation the Commission abandoned its action.

<sup>21</sup> Case C-100/08, *Commission v Belgium*, pending.

<sup>22</sup> Case C-28/09, *Commission v Austria*, pending.

<sup>23</sup> Judgment of 13 March 2008, C-227/06, *Commission v Belgium*.

<sup>24</sup> Judgment of 10 April 2008, C-265/06, *Commission v Portugal*.

<sup>25</sup> Judgment of 24 April 2008, Case C-286/07, *Commission v Luxembourg*.

<sup>26</sup> Judgment of 5 June 2008, Case C-170/07, *Commission v Poland*.

<sup>27</sup> Judgment of 4 December 2008, Case C-249/07, *Commission v Netherlands*.

<sup>28</sup> Judgment of 11 December 2008, Case C-524/07, *Commission v Austria*.

In two judgments the Court dismissed the proceedings brought by the Commission. In case C-201/06 it clarified the conditions under which an authorisation for the parallel import of plant protection products should be granted, rejecting the interpretation proposed by the Commission.<sup>29</sup> In case C-141/07 on the supply of medicinal products directly to hospitals, the Court confirmed that German law created a trade restriction but held that it was justified to protect public health.<sup>30</sup>

The Commission continued to find pro-active solutions outside or in parallel with the infringement procedure under Article 226 EC through the SOLVIT problem-solving network, the preventive mechanism of Directive 98/34/EC (whereby Member States are obliged to notify new national technical rules to the Commission at the draft stage) and bilateral meetings organised with Member States to discuss active complaints and infringement cases as well as various horizontal issues. In 2008 the new EU PILOT mechanism was used to facilitate contacts with Member States and resolve some complaints more swiftly.

### *Changes underway*

National rules on the characteristics and performance of products continue to fragment the internal market, especially for SME's which often face the costly choice of either adapting their products to the requirements of the Member State of destination, or refraining from entering the national market. This should change when Regulation (EC) 764/2008 (the so-called "Mutual Recognition Regulation") begins to apply on 13 May 2009.

This regulation puts an end to the unlimited powers of national authorities to withdraw from their market a product lawfully marketed in another Member State. Before taking any action against a product lawfully marketed in another Member State, they will have to start a dialogue with the business and indicate the technical or scientific reasons why the product constitutes a risk for the user or the environment. The dialogue will give the economic operator the opportunity to challenge these reasons and to discuss the matter with the competent authorities before any final decision is taken.

Another new aspect is the establishment of one or more "Product Contact Points" in each Member State. Their main task will be to help SME's in getting access to another national market by providing them with information about technical rules on products. The Regulation also aims to clarify the product categories to which the principle of mutual recognition applies by creating a non-exhaustive list of products which are not subject to EC harmonising legislation. The list will be accessible on the Europa website from 13 May 2009.

In 2009, attention will focus on ensuring the correct application of the regulation. Work has already begun with the creation and first meeting in March 2009 of the Mutual Recognition Advisory Committee set up by the regulation and further consideration of a telematic network to facilitate the exchange of information between product contact points and competent authorities. Further meetings of the committee are planned for 2009. Work is also underway on a website providing information on the practical functioning of the regulation. The first annual reports from Member States will be received and reviewed in 2009.

### *Evaluation*

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<sup>29</sup> Judgment of 21 February 2008, Case C-201/06, Commission v France.

<sup>30</sup> Judgment of 11 September 2008, Case C-141/07, Commission v Germany.

Article 28 EC remains an essential legal instrument in the evaluation of cross-border obstacles to trade. As this provision applies only to the non-harmonised area, its scope fluctuates in accordance with developments in secondary Community legislation.

In 2008 a further slight decrease in the number of open infringement cases was observed, thereby confirming a longer term trend. Nevertheless, the volume of infringement cases remains substantial and shows that there is still a significant degree of non-compliance with the principle of the free movement of goods and a lack of understanding of the concept of mutual recognition, resulting in practical barriers to cross-border trade in goods.

As regards mutual recognition, Regulation (EC) No 764/2008 should reduce the number of problems and complaints occurring as a result of Member States incorrectly applying recognition procedures and thereby denying access to their markets.

As regards the specific sector of vehicle registration, which still triggers a lot of citizen complaints, new framework Directive 2007/46/EC, to be transposed by the end of April 2009, may create more legal certainty, which could facilitate the re-registration of used vehicles in other Member States.

## **2.18. Preventive rules of Directive 98/34/EC**

### *Current position*

In 2008, preventive action continued under Directive 98/34/EC through the provision of information, advice, interpretation and guidance with regard to draft national technical regulations of the 27 Member States, the EFTA countries and Turkey concerning products and Information Society Services.

In 2008, there was more fruitful collaboration between the Member States and the Commission on several levels. Firstly, three meetings of the Committee on “Standards and Technical Regulations” were held to discuss current problems connected with the implementation of Directive 98/34/EC. These meetings not only play an important role in supervising the operation of the 98/34 procedure and in the examination of policy issues raised by the notifications, but also remind the Member States to notify regularly to the Commission all their draft technical regulations.

Secondly, seminars were held in Malta, Greece, Denmark, Bulgaria, Belgium, and Estonia on the operation of the notification procedure. The seminars were attended by representatives of national authorities and industry. These seminars are an excellent opportunity for the Commission to present Directive 98/34/EC as a key instrument of the Internal Market, which prevents problems ex-ante and avoids infringement procedures. Moreover, the seminars strengthen relations between the Commission and representatives of the national authorities. The opportunity to present information about the obligation to notify national technical regulations and the notification procedure itself, as well as discussions and exchanges of views on all problems connected with the operation of the 98/34 procedure, are all very important. In addition, IT meetings were held in France, Spain and Germany to present the new version of the Technical Regulations Information System application. Last but not least, a conference to celebrate the 25<sup>th</sup> anniversary of the notification procedure took place in November which gathered together national authorities, economic operators and services of the Commission. On that occasion, several proposals regarding improvement of the Directive 98/34/EC procedure were made by the Member States and economic operators that will be further investigated by the Commission.

As to the future, the figures for the first quarter of 2009 suggest that a high number of notifications will be received and acted upon over the year.

### *Changes underway*

There were 3 new complaints in 2008, all concerning failures to notify national technical regulations under Directive 98/34/EC. These are classified as priority cases for the Commission services. 6 complaints registered in 2007 and one registered in 2006 were closed in 2008.

### *Evaluation*

The steady high number of notifications (634) and reactions from the Commission (199) and the Member States (184) underlines the importance of Directive 98/34/EC as a tool for the prevention of barriers to intra-Community trade - and indeed for better regulation since it provides a forum for making suggestions to improve the quality of national legislation. Its ex ante operation means that time-consuming and sometimes controversial infringement procedures can be avoided.

## **3. COMPETITION**

### **3.1. Current position**

#### *3.1.1. General Introduction*

The infringement-related work in the competition sector focuses on

- the monitoring of Member States' behaviour in relation to liberalized network industries and financial services,
- non-compliance with Commission recovery decisions,
- the correct transposition and implementation of secondary legislation.

Most of the infringement cases handled by the Commission services in this sector have their origin in a complaint submitted by undertakings or citizens that are based on a breach of Article 86(1) EC in conjunction with Articles 81 and/or 82 EC or Articles 81, 10, 3(g) EC by the Member State concerned. Out of a relatively stable number of 35-45 pending infringement cases, 76% are complaints, 14% of the cases concern the wrong transposition or non-communication of Directives, and 10% of the cases deal with the non-recovery of State aids pursuant to Art. 228 EC.

The relatively low number of infringement cases dealt with by the Commission services in the competition sector can be explained, on the one hand, by the very stable *acquis* – no new Directives in the field of competition law have been adopted in 2008 – and, on the other hand, by the fact that most cases in the competition field derive from the infringement of Treaty provisions by undertakings (antitrust, mergers) or by Member States granting State aid, none of which constitutes an infringement covered by this Annual Report.

As in 2007, the control of the transposition of Directives in 2008 focused on

- the Financial Transparency Directive in the field of State aid (80/723/EEC as subsequently amended); and

- the field of electronic communications, particularly with regard to the Directive on Competition in the Markets for Electronic Communications and Services (2002/77/EC).

Proceedings pursuant to Art. 228 EC constitute another important component of the Commission infringement work in the competition sector as they not only seek to remedy an infringement of competition rules by the Member State but also because the recovery of incompatible state aid is necessary to remove the distortion of competition resulting from the granting of incompatible aid. These proceedings are initiated where a Member State does not comply with a Commission decision requiring the recovery of incompatible state aid. In a first step, the Commission may refer the Member State directly to the ECJ pursuant to Art. 88(2) EC in derogation of Art. 226 EC. If the Member State still fails to recover the aid although the Court has found that this failure constitutes an infringement, the Commission may refer the Member State again to the ECJ, this time pursuant to Art. 228 EC. This Annual Report only covers the last stage of the recovery proceedings, i.e. from the sending of the Letter of Formal Notice pursuant to Art. 228 EC onwards.

### *3.1.2. Work done in 2008*

In 2008, the main focus in competition policy in relation to State conduct was to improve competitive conditions in liberalised network industries (e.g. post and telecommunication, electricity, electronic communications) and financial services and to ensure non-discriminatory access to infrastructure, as well as full and proper transposition of legislation. The implementation of these priorities is reflected in the infringement cases dealt with in 2008 on which significant progress has been made over the year.

For instance in the energy sector, the Commission handled a number of complaints based on Art. 86 in conjunction with Art. 82 EC and investigated an infringement of Article 21 of the Merger Regulation with a view to opening up national energy markets allowing companies to enter and compete with incumbents. In the same vein, the Commission services have actively pursued infringement cases in the field of electronic communications to open up the recently liberalised broadcasting markets and allow competitors to benefit from the technological developments. A more detailed account of the cases handled in 2008 that have entered the formal infringement procedure can be found below.

#### **Postal sector**

On 7 October 2008, the Commission adopted a decision pursuant to Art. 86(3) EC finding that, by extending the monopoly of the postal incumbent, Slovenská Pošta, to delivery services of hybrid mail, a sector which was so far open to competition, the Republic of Slovakia had infringed Art. 86 in conjunction with Art. 82 EC. It also set a one-month deadline to inform the Commission of the measures undertaken to put an end to the infringement. As this deadline passed without having informed the Commission of the adoption of any such measures, the Commission adopted on 16 December 2008 a Letter of Formal Notice pursuant to Art. 226 EC for non-compliance with the decision of 7 October 2008.

#### **Energy sector**

In its efforts to promote competition in the recently liberalised energy markets, the Commission adopted a Decision on 5 March 2008 pursuant to Art. 86(3) EC concerning the Greek lignite and electricity markets. The Decision concerns the privileged rights to extract

and exploit lignite granted by the Hellenic Republic to Public Power Corporation S.A. (PPC), the former electricity monopolist. The Commission found that the granting of these privileged rights to PPC has created inequality of opportunity between economic operators. The Commission also concluded that by granting PPC the quasi-exclusive right to exploit lignite – the cheapest available fuel in Greece – and thereby enabling PPC to protect and reinforce its dominant position on the wholesale electricity market to the detriment of its competitors, Greece has violated Art. 86(1) in conjunction with Art. 82 EC. Following the Decision and in the course of 2008, the Commission continued to work together with Greece on the remedies to be implemented to end the infringement and to ensure that PPC's competitors gain access to the lignite market.

On 31 January 2008, the European Commission sent Spain a Letter of Formal Notice for failure to comply with a Commission decision of 5 December 2007 finding that Spain had breached Article 21 of the Merger Regulation<sup>31</sup> by subjecting the approval decision of the acquisition of control over Endesa by Enel and Acciona to a number of conditions, thereby unduly interfering with the Commission's exclusive competence to decide on a concentration with Community dimension.<sup>32</sup> As the Spanish authorities' reply to the Letter of Formal Notice did not remove all the Commission's concerns and as Spain did not take any measures to comply with the Commission decision of 5 December 2007, the Commission sent Spain on 15 May 2008 a Reasoned Opinion asking it to withdraw the conditions imposed on the takeover.<sup>33</sup>

### **Electronic communications**

In the context of an infringement procedure in the broadcasting sector against Italy<sup>34</sup> for failure to comply with the EC regulatory framework on electronic communications, the Commission continued in 2008 to closely monitor the transition (switch-over) from analogue to digital terrestrial broadcasting. The Italian legislation regulating the switch-over placed unjustified restrictions on the provision of broadcasting transmission services and attributed unjustified advantages to incumbent analogue operators, thereby creating the risk of reinforcing their market power in the provision of digital TV broadcasting transmission services. In June 2008, the Italian authorities adopted new amendments with the aim of removing the Commission's concerns expressed in the Reasoned Opinion. The Commission has been in contact with the Italian authorities since then on the elaboration of new criteria for the "digitization" of terrestrial television networks, which should lead to a situation where more frequencies will be available to newcomers and to smaller existing broadcasters.

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<sup>31</sup> OJ 2004, L 24/1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT>

<sup>32</sup> This case is linked to another infringement action concerning the takeover of Endesa by E.ON which was also made subject to a number of conditions imposed unilaterally by Spain. In this case, after sending a Reasoned Opinion on 7 March 2007, the Commission decided on 28 March 2007 to refer Spain to the Court of Justice pursuant to Art. 226 EC. In its judgment handed down on 6 March 2008 (C-196/07), the Court declared Spain to be in violation of Community law by not lifting the conditions and thereby not complying with the Commission's Article 21 decision.

<sup>33</sup> On 17 July 2008, the European Court of Justice delivered its judgment on the infringement action brought by the Directorate General for Internal Market against Spain concerning the Royal Decree n. 4/2006, which was the legal basis for imposing the conditions on the acquisition of Endesa. The Court declared the Decree incompatible with Community law.

<sup>34</sup> A Reasoned Opinion in this case was sent to Italy on 18 July 2007.



On 6 June 2008, the Commission sent a Letter of Formal Notice to the Slovak Republic concerning Section 2(6) of the Slovak Competition Act which excludes the applicability of the Competition Act in situations where the conduct of the undertakings is at the same time subject to sector specific ex-ante regulatory obligations, such as in the electronic communications, energy or postal sectors. As a result of the provision, the Slovak national competition authority cannot exercise its powers to apply EU competition law, namely Articles 81 and 82 EC, and the national regulators' competence to apply (ex ante) regulatory measures cannot replace the role of competition law that is applied ex post. The Commission therefore considered this provision of the Competition Act to be incompatible with Article 10 EC and Regulation 1/2003<sup>35</sup> and initiated infringement proceedings.<sup>36</sup>

### **Financial services**

On 10 May 2007, the Commission adopted a decision on the basis of Article 86(3) EC finding that the exclusive right for the distribution of a savings book product (Livret A) granted by France to three banks (Banque Postale, Caisses d'Épargne and Crédit Mutuel) constituted an infringement of Article 86(1) EC in conjunction with the freedom of establishment and the freedom to provide services (Articles 43 and 49 EC) due to the resulting obstacles for French and foreign competitors to enter and develop the market for liquid savings in France. The decision also set a deadline to amend the legislation within nine months. As no such amendment was adopted within the prescribed period, the Commission sent a Letter of Formal Notice on 5 June 2008 with a view to obliging France to end the infringement. As a result of the infringement proceedings, France opened up the distribution of Livret A on 1 January 2009.

### **Art. 228 EC cases**

On 31 January 2008, the Commission issued a Reasoned Opinion pursuant to Art. 228 EC against Italy for failure to comply with a judgment of the ECJ<sup>37</sup> condemning Italy for non-execution of the Commission's recovery decision of 11 May 1999 regarding employment aid. The Reasoned Opinion informed Italy that the measures it had taken to implement the Commission decision were insufficient, also due - to a very significant extent - to the willingness of domestic courts to suspend the execution of recovery orders. Italy has adopted a series of legislative measures to speed up the recovery proceedings by imposing strict legal limitations on the ability of national judges to issue suspension decisions where the recovery of illegal State aid is at stake. However, in spite of this law, the Commission to date has not been informed of a complete recovery of the aid. The Commission is currently assessing whether to refer the case to the ECJ pursuant to Art. 228(2) EC, allowing the ECJ to impose a lump sum and a daily penalty payment until the aid has been recovered.

In a similar case against Italy for the non-recovery of aid to publicly-owned utility companies ("municipalizzate"), the Commission sent a Reasoned Opinion on 1 February 2008 after the ECJ had condemned Italy on 1 June 2006 for failure to comply with the obligations stemming from the Commission's recovery decision of 5 June 2002.<sup>38</sup> Also in this case, the key issue is

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<sup>35</sup> OJ 2003 L 1/1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT>

<sup>36</sup> This case raises similar issues to those raised in a previous infringement proceeding against the Czech Republic. That case was closed in 2007 after the contested provision was amended.

<sup>37</sup> C-99/02, Commission v Italy.

<sup>38</sup> C-207/05, Commission v Italy.

the lack of effectiveness of recovery procedures under Italian law whereas the new legislative measures adopted by Italy to remedy this situation have not had the desired effect on the overall recovery process. Therefore, the Commission is currently assessing whether to refer this case to the ECJ pursuant to Art. 228(2) EC with a view to imposing a lump sum and daily penalty payments on Italy.

On 26 June 2008, the Commission issued a Reasoned Opinion against Spain for failure to comply with the judgment of 14 December 2006 in which the ECJ confirmed that Spain had failed to fulfil its obligations under six Commission recovery decisions of 20 July 2000 concerning two incompatible tax regimes.<sup>39</sup> Although significant progress has been made in the recovery of the incompatible aid, the decisions are still not fully implemented.<sup>40</sup> The Commission services are therefore assessing whether to propose that Spain be referred to the ECJ pursuant to Art. 228(2) EC.

In the area of recovery of incompatible state aid, the Commission has made significant progress with respect to the execution of recovery decisions by Member States. For instance, the amount of illegal and incompatible aid recovered has increased from € 2.3 billion in December 2004 to € 9.3 billion at 31 December 2008 (i.e. 90.7% of the total amount to be recovered). Accordingly, the percentage of illegal and incompatible aid still to be recovered at the end of 2008 has fallen from 75% to 9.3%. This is due to the efficient enforcement of recovery decisions by the Commission pushing Member States to recover incompatible aid from the beneficiaries.

### **3.2. Evaluation based on the current situation**

Against the background of the stable *acquis* in the competition law field and the relatively constant if not decreasing number of pending infringement cases in this sector, the situation can be described as stable and satisfactory, not indicating any particular problems that would require urgent attention or the modification of the Commission priorities in this sector. Likewise, there are no new measures due to be adopted in the near future nor relevant implementation plans, guidelines, expert group meetings, transposition workshops or management networks.

The current financial and economic crisis has no immediate impact on the Commission infringement work in this sector, as it cannot constitute a justification to delay recovery because the beneficiary became insolvent or otherwise entered into financial difficulties. On the contrary, Commission services will continue to pursue their infringement cases on the basis of Art. 228 EC and see to it that all incompatible aid is recovered. This is necessary to ensure a level playing field between competitors and a market of undistorted competition – a requirement which becomes all the more important in the current economic circumstances where companies struggle to stay on the market even in conditions of undistorted competition. As already explained before, the Commission has achieved a very good track record in the recovery field. The enforcement action of the Commission services can therefore focus on those instances where Member States have still not shown the desired results in their recovery efforts, mainly because of national legislation creating obstacles to effective recovery.

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<sup>39</sup> Joined Cases C-485/03 to C-490/03, *Commission v Spain*.

<sup>40</sup> Among others, The Commission Services have requested a certification by an independent body that the lists of beneficiaries are completed and that the amounts recovered are correct. This certification has not been submitted to date.

The primary focus of attention for 2008 as set out in the 25<sup>th</sup> Annual Report - the improvement of the competitive conditions in the liberalised markets and in financial services - have been fully taken up in the infringement work of the Commission services in the sector of "Competition". The infringement procedures in the energy, postal and financial services sectors have made important progress which have – or will in the very near future - result either in the closing of the case or have already led to the sending of a Letter of Formal Notice or Reasoned Opinion in 2008. Infringement action on the basis of Art. 86 EC complaints thereby has to be seen as a complementary tool to, firstly, Community legislation aimed to liberalise certain sectors of the economy (which is mainly adopted by other Commission services) and, secondly, to the direct application of Articles 81, 82 and 87 EC (the assessment of which falls outside the scope of this Annual Report). The infringement cases dealt with by the Commission services in the context of liberalisation therefore concern the residual problems of the granting of special or exclusive rights by Member States, i.e. instances of such rights which "survived" the liberalisation and which have not been tackled on the basis of the direct application of Art. 81, 82 or 87 EC.

In the field of electronic communications and the correct implementation of the Directive on Competition in the Markets for Electronic Communications and Services (2002/77/EC), the Commission services have actively monitored changes to the relevant provisions in the Italian broadcasting market and maintain its efforts to ensure effective competition in this sector.

With respect to the transposition of the Financial Transparency Directive (80/723/EEC as subsequently amended), the Commission could close in 2008 infringement proceedings with Denmark, Italy, Luxembourg, Slovakia and Latvia. Yet, two Member States (UK and Belgium) have still not fully transposed or communicated the national transposition measures to the Commission within the prescribed period, i.e. 20 December 2006. It is therefore envisaged to proceed with the sending of the Reasoned Opinion to these two Member States in the first half of 2009 as a matter of priority.

### **3.3. Priorities and planned action**

For 2009, infringement action is envisaged in sectors that have recently been liberalised or are in the process of liberalisation, such as energy or postal services. The main focus of attention for the year 2009 will therefore follow closely that established for 2008: the Commission services will continue to focus on these sectors by, for instance, proceeding with the infringement procedure against Slovakia for closing a part of the postal market to competition; or by ensuring, in cooperation with the Greek authorities, that the lignite market is open to undertakings wishing to compete with the incumbent in the provision of wholesale electricity.

Another area of priority action in 2009 concerns the continued monitoring of the transposition of the Financial Transparency Directive and the Electronic Communications and Services Directive by Member States. The former will result in the sending of two Reasoned Opinions to the UK and Belgium for the non-communication of measures to implement the Transparency Directive correctly and in time.

In the field of complaints-handling, the current economic crisis will require the Commission to ensure that Member States do not violate Art. 86(1) EC by granting special or exclusive rights to their own companies in an effort to protect national markets from competition.

Finally, long standing non-recovery cases will if necessary in 2009 be referred to the ECJ pursuant to Art. 228 EC with a view to imposing a lump sum and daily penalty payments on the Member State concerned to ensure effective recovery of the aid granted.

#### **4. EMPLOYMENT, SOCIAL AFFAIRS AND EQUAL OPPORTUNITIES**

##### **4.1. Free movement of workers and coordination of social security schemes**

###### *4.1.1. Current Position*

###### 4.1.1.1. Introduction

In the field of free movement of workers, the Commission deals with problems linked to an incorrect application of the relevant provisions of the EC Treaty and of regulations existing in that area. Over the years, problems have been brought to the attention of the Commission through individual complaints which has led the Commission to increase its recourse to problem-solving mechanisms and it intensifies communication to prevent problems.

###### 4.1.1.2. Report on progress made in 2008 regarding free movement of workers

1. The Commission carried out a systematic review of the legislation of all Member States following two preliminary judgments of the ECJ regarding the nationality condition for posts of master and chief mate of ships where the prerogatives of public authority are exercised by private sector workers. Out of 20 procedures opened on this issue in 2004, 7 were still ongoing in 2008. In three cases the Court of Justice confirmed its previous judgments: France, Italy and Spain<sup>41</sup>. The cases against France and Italy were closed in 2008 after the nationality condition was abolished. After the Czech rules had been brought into line with Community law, the Commission decided to withdraw its case from the Court. The Commission decided to refer one more case to the Court of Justice (Greece) and 2 cases (Finland, Lithuania) were closed after the national rules had been correctly amended.
2. In relation to the issue of the recognition of previous professional experience acquired in one Member State for the purpose of access to the public sector as well as for determining the working conditions (e.g. salary, grade) in another Member State, again good progress was made. Following a judgment of the Court of Justice<sup>42</sup>, the Commission closed one case against Italy as the national rules had been correctly amended and subsequently four cases which were dealt with under this infringement procedure were also closed. Several other cases on this topic were closed after the reform of the national rules before the cases were transmitted to the Court of Justice (France – recognition of professional experience of doctors; Austria – change of legislation concerning recognition of professional experience completed in Switzerland by no longer restricting such recognition to periods completed after the entry into force of the free movement of persons Agreement with Switzerland).

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<sup>41</sup> C-89/07 (Commission v. France) ECR [2008] I-00045; C-447/07 (Commission v. Italy) judgment of 11.09.08, not yet published; C-94/08 (Commission v. Spain) judgment of 20.11.08, not yet published.

<sup>42</sup> Case C-371/04, Commission v. Italy, ECR [2006] I-10257.

3. The Commission services have received many queries and complaints concerning the residence rights of migrant workers in the host Member State. It is partly due to the fact that in May 2006, Directive 2004/38/EC effectively entered into force introduced new residence formalities and some important new rights (such as the right of permanent residence). As the Commission indicated in its report on the application of the Directive presented in December 2008 (COM (2008)840)<sup>43</sup>, the result of the transposition was rather disappointing. Not one single Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States. Consequently, there were still many problems in practice regarding the correct application of the Directive. In particular, the rights of family members of migrant workers, who are third country nationals, were often not respected. Those cases were dealt with by SOLVIT centres which were very efficient in this field as they could often ensure an appropriate and quick solution for the complainants (such as ensuring the actual granting of a residence card to a third country family member).
4. In the situation of economic crisis, more and more replies had to be provided concerning the rights of jobseekers – questions on how long they are entitled to stay in the host Member State, whether they have access to social benefits and social assistance, and whether they are protected against expulsion if they are unsuccessfully seeking employment for a long time in another Member State. There were also a number of queries about insufficient assistance provided by national employment agencies to migrant workers.
5. Citizens' complaints concern also the violation of their rights as migrant workers by private employers such as discriminatory treatment in access to work or working conditions. However, as in this case the Commission cannot intervene, it can only limit itself to provide the information about the migrant's rights and advise them to seek solutions through means available at the national level. The Commission notes however that enforcement of these rights at a national level is often problematic.
6. A recurring topic of queries was also the application of transitional arrangements for workers from EU8 and EU2. There were both requests for information and complaints about the existence of restrictions as such (by citizens) and calls to end them (parliamentary questions). However, on this basis the Commission services have not identified complaints which would demonstrate an incorrect application of transitional arrangements. Therefore, on the basis of last year's experience, it seems that there was no general problem of application of the transitional arrangements.
7. Employment in the public sector represents in many Member States an important part of the labour market. Therefore, the action of the Commission in this field has a significant effect on the migrant workers' rights; in particular there is a lot of labour mobility in the public teaching and health sectors.

The Commission dealt in particular with the following issues:

- abolition of nationality conditions access for employment in the public sector in line with the jurisprudence of the Court on Article 39 (4) EC.

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<sup>43</sup> [http://www.cc.cec/sg\\_vista/cgi-bin/repository/getdoc/COMM\\_PDF\\_COM\\_2008\\_0840\\_F\\_EN\\_RAPPORT.pdf](http://www.cc.cec/sg_vista/cgi-bin/repository/getdoc/COMM_PDF_COM_2008_0840_F_EN_RAPPORT.pdf)

The effect of the actions of the Commission carried out in this field since 1988 was that many Member States undertook extensive reforms opening their public sectors. There are however still posts where access is limited to nationals even if the post in question does not involve the exercise of public authority and the responsibility for safeguarding the general interest of the State. The difficulty of dealing with this issue is that it requires case-by-case analysis in view of the nature of the tasks and responsibilities covered by each post.

- the issue of taking into account of periods of employment acquired in another Member State for the purposes of access to the public sector and for determining working conditions (e.g. salary, grade) in the same way as applies to comparable experience acquired in the host Member State.

The Commission was very active also in this field before 2008. Due to many complaints received in the past on this issue, infringement procedures were carried out against nearly all EU15 Member States concerned (which have statutory rules on this issue). Thanks to this activity all of these Member States reformed their legislation. Nevertheless, the Commission received other complaints in 2008 which reveal remaining problems. This problem also has not yet fully been tackled in the "EU10 and EU2" Member States. The Commission received also a number of complaints regarding incorrect interpretation or wrong application of the national rules even if they were reformed in conformity with Community law. In these cases, the Commission services advised the complainant to seek redress at national level and possibly via the SOLVIT system. The Commission pays particular attention to evidence of general problems of wrong application.

- Other complaints regarding public sector concerned: discriminatory working conditions (unrelated to the issue of recognition of professional experience), no equal treatment in relation to the taking into account of foreign diplomas for the purpose of access to the public sector and for determining working conditions, disproportionate language requirements in access to posts.

8. Sport: for many years the Commission has been dealing with the issues of Community law related to free movement of professional sportsmen and sportswomen. In 2008, the Commission services have in particular focused on the following points:

- The quotas on nationality applied in professional sport: in the follow-up to the Bosman's ruling<sup>44</sup> the Commission undertook extensive action, in order to assure the respect of EC law. The Commission analysed and discussed proposals of European and international sport governing bodies, which were aiming at the establishment of quotas on nationality or regulating the transfers of players. However, given the fact that infringement proceedings for breach of Community law in accordance with Article 226 of the EC Treaty can only be initiated against a Member State of the European Union, the Commission services have sometimes

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<sup>44</sup> C-415/93.

encountered difficulties in enforcing EU law in Member States where a behaviour of private actors violating EU law could not be attributed to the State.

- The Commission was also closely involved in the analysis and the discussions surrounding the UEFA's rule "home grown players". Its analysis was made public through a Press Release<sup>45</sup>.

9. The issue of equal treatment of third country nationals, citizens from countries with which the European Union has signed an international agreement. It is within this framework that the Commission has prepared and ensured the follow-up of the case-law of the Court of Justice, namely in the cases Kolpak<sup>46</sup>, Simutenkov<sup>47</sup> and Kahveci<sup>48</sup>. The follow-up has consisted in answering individual requests as well as disseminating information on the obligation for professional sport clubs to treat equally third country nationals, coming from countries with which the European Union has signed an international agreement containing an equal treatment clause.

#### 4.1.1.3. Report on progress made in the field of social security coordination

1. A number of infringements concerning benefits for disabled persons were closed in 2008. In 2004, the Commission started infringement procedures against Finland, the UK and Sweden as it took the view that a number of benefits for disabled persons provided by these Member States have been unjustifiably categorised as "special non-contributory benefits" by the co-legislators in the framework of Regulation (EC) No 647/2005<sup>49</sup> and that these benefits were in fact common social security benefits and therefore exportable. In addition to these infringement procedures, the Commission also lodged an annulment procedure based on Article 230 of the EC Treaty (case C-299/05). In its judgment of 18 October 2007, the Court stated that the benefits concerned must be qualified as "social security benefits" and not as "special non-contributory benefits". As the 3 Member States involved confirmed their willingness to abide with the judgment of the Court and taking into account that the necessary steps have been made in the Administrative Commission on Social Security for Migrant Workers (CASSTM) and the fact that the Commission did not receive any complaints in this respect, the Commission closed the 4 infringement procedures in June 2008.
2. In the field of social security coordination, the Commission services have received many queries and complaints concerning the application of Regulation (EEC) No 1408/71 and its implementing Regulation, in particular, from migrant workers about their social security rights, e.g. which legislation applies to them, their entitlement to sickness insurance benefits and family benefits, how to apply for a pension. Complaints concerned residence clauses in national legislation for various kind of social security benefits, incorrect application of the principle of aggregation of

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<sup>45</sup> IP/8/807 of 28 May 2008.

<sup>46</sup> C-438/00.

<sup>47</sup> C-265/03.

<sup>48</sup> C-152/08.

<sup>49</sup> Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to the members of their families moving within the Community and Council Regulation (EEC) No 574/72 laying down the procedures for implementing Regulation (EEC) No 1408/71, OJ L 117, 4.5.2005.

insurance periods, cumbersome or incorrect administration of cases involving a EU element.

As regards sickness insurance benefits, 4 major issues have been dealt with.

- Following the introduction of a general sickness insurance scheme in the Netherlands on 1.1.2006, the Commission services received more or less four hundreds complaints from Dutch pensioners residing in another Member State, who suddenly fell under the scope of Regulation 1408/71, in particular Article 28 or 28a stipulating that a person in receipt of a legal old-age or invalidity pension and who resides in another Member State than the one that pays the pension, is entitled to sickness benefits according to the legislation of the Member State of residence on behalf of the Member State that pays the pension. The latter may withdraw sickness insurance contributions from the pension paid. The Dutch pensioners claimed that they could not be obliged to pay Dutch sickness insurance contributions and that they were entitled to opt-out. The Commission examined the Dutch legislation and concluded that it was in line with Regulation 1408/71.
- Another issue dealt with by the Commission concerned a decision of the French sickness insurance institution to exclude EU nationals residing in France, who are non-active but not yet in receipt of a state old-age pension from access to the Couverture Maladie Universelle (CMU). According to the French legislation, all persons residing for more than 3 months in France and who are not covered by a French or foreign legal sickness insurance scheme are obliged to join the CMU (which is a contributory sickness insurance scheme). Following the intervention of the Commission, the French authorities reconsidered their decision and maintained the CMU coverage of EU nationals residing in France for more than 3 months.
- The Commission services received many queries from pre-retired British nationals residing in the Valencia region. Many of them moved to Spain following the decision of the Valencia authorities to offer free health care to EU-nationals owning a property in the Valencia region. In 2008, the Valencia health authorities decided to stop the free health coverage for non-active EU nationals who are not in receipt of a state old-age or invalidity pension. The analysis carried out demonstrated that as the persons concerned are not in receipt of a state pension, they cannot rely on Regulation 1408/71 to claim sickness insurance benefits at the expenses of the Member State that pays the pension. According to Article 13(2)(f) of Regulation 1408/71, post-active persons are covered by the social security legislation of the Member State of residence, namely Spain. As a consequence, the Spanish social security legislation determines the conditions of eligibility of post-active EU nationals to health care and no action could be initiated at Commission level.
- The Commission services received many queries about the European Health Insurance Card (EHIC), namely how to apply for it or how to use it. The Commission opened infringement procedures against Cyprus, as regards the eligibility conditions for receiving a European Health Insurance Card and against Italy where EU students who are studying temporarily in Italy are required to present a form E-106 instead of a European Health Insurance Card.



As regards pensions, the Commission received various complaints about the payment of pensions into the beneficiary's bank account in the Member State of residence. It seems that several Member States have problems with such payments. The SEPA (Single Euro Payment Area) should be the answer to this problem. However the Commission opened an infringement procedure against Belgium, where legislation does not allow the payment of the pension directly to an account without having the foreign bank guarantee that it will repay the amount, should payments have been wrongly made.

1. The Commission presented a proposal for a new Regulation implementing Regulation 883/2004 on 31 January 2006. The new simplified and modernised Regulation 883/2004 will apply on the date of entry into force of this implementing Regulation.
2. The Commission presented three other proposals for a Regulation in the framework of Regulation 883/2004:
  - a proposal determining the content of Annex XI of Regulation 883/2004 (COM (2006) 7)
  - a proposal modifying Regulation 883/2004 and its Annexes (COM (2007) 376).
  - a proposal aiming at extending the provisions of Regulation 883/2004 and its implementing Regulation to third country nationals who are not yet covered by these provisions solely on the ground of their nationality (COM(2007) 439).

Proposals (1) and (2) has been merged by the EP and Council during the first reading since both proposals relate to the Annexes to Regulation 883/2004 and both amend some of the same Annexes.

In 2008, significant progress was made in view of the entry into application of Regulation 883/2004 which involved:

- the follow-up of the work done in the Council Working Group and the EP. This has implied in particular the deliverance of the opinion on EP's amendments at the first reading and the Communication concerning the common position of the Council (COM(2008) 896).
- the organisation of the electronic exchange of data. The implementation of Regulation requires that the transmission of data between institutions should be carried out by electronic means under a common secure network. The EESSI system is an **ambitious and unique tool of e-administration** and will enable 31 countries to exchange electronically social security information between their administrations thereby fulfilling the ultimate aim of strengthening the protection of mobile citizens' social security rights. This will in turn facilitate and speed up the decision-making process for the actual calculation and payment of benefits to citizens who move around Europe.

#### 4.1.2. *Evaluation of the current situation*

In 2008, the services of the Commission received for both sectors (free movement and social security coordination) an impressive number of letters and petitions (3000) of European

citizens, approximately balanced between both sectors. Globally, the volume of incoming queries and complaints is relatively stable.

The nature of the queries remains more or identical but obviously takes into account new legislation such as Directive 2004/38/EC and the development of the economic crisis.

The total number of infringements concerning free movement of workers and social security coordination evolved in 2008 from 49 procedures at the beginning of the year to 38 in December 2008. 25 files were closed during this year and 14 new procedures were opened. The priority was put on procedures that were opened before 2006 and as result 13 could be closed after solutions were found to problems. Monthly decision-taking in the framework of infringement allowed the service to speed up and make more efficient dealing with procedures.

Since the introduction of EU Pilot in 15 April 2008 a number of complaints have been dealt with successfully through this instrument. This has enabled to solve problems raised by complainants without initiating an infringement procedure. It is complemented by a system of filtering of letters concerning social security in cooperation with the representatives of the Member States in the CASSTM put in place in 2005. Solving problems mechanisms are privileged tools to favour quick and rapid solutions to citizens' queries and complaints.

The Commission services also use in their monitoring task the work done by networks of academic experts, whose reports on the application of Community law in the field of free movement of workers and coordination of social security are published on the website<sup>50</sup>.

In view of the very high number of queries which does not decrease over the years, substantial effort was made in terms to supplement monitoring with improved communication tools to better inform the citizens about their rights as regards free movement of workers and social security coordination. In particular, a brochure on rights of migrant workers "Do you want to work in another EU Member State? Find out about your rights! (Update 2007)" has been made available on the website.<sup>51</sup> In the field of social security the brochure "The Community provisions on social security. Your rights when moving within the European Union" is available on the website<sup>52</sup>. The brochure "Moving in Europe. Your social security rights", containing information about national social security rights of 25 Member States, available on the website<sup>53</sup>.

#### 4.1.3. Evaluation results - priorities for 2009/2010

The monitoring work presented above cannot be strictly planned as it depends largely on the number and type of complaints sent to the Commission. However, in order to set priorities,

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<sup>50</sup> Network of experts on free movement of workers:  
<http://ec.europa.eu/social/main.jsp?catId=475&langId=en>; Tress network:  
<http://ec.europa.eu/social/main.jsp?catId=600&langId=en>

<sup>51</sup> [http://bookshop.europa.eu/eubookshop/download.action?fileName=KE3008406ENC\\_002.pdf&eubphfUid=10049296&catalogNbr=KE-30-08-406-EN-C](http://bookshop.europa.eu/eubookshop/download.action?fileName=KE3008406ENC_002.pdf&eubphfUid=10049296&catalogNbr=KE-30-08-406-EN-C)

<sup>52</sup> [http://bookshop.europa.eu/eubookshop/bookmarks.action?target=EUB:NOTICE:KE6404022:EN:HTML&request\\_locale=EN](http://bookshop.europa.eu/eubookshop/bookmarks.action?target=EUB:NOTICE:KE6404022:EN:HTML&request_locale=EN)

<sup>53</sup> [http://ec.europa.eu/employment\\_social/social\\_security\\_schemes/national\\_schemes\\_summaries/index\\_en.htm](http://ec.europa.eu/employment_social/social_security_schemes/national_schemes_summaries/index_en.htm)

the importance of the file, from the point of view of its political impact is taken into account. The problems which seem to be widespread in several Member States are also given priority. As described above, the horizontal exercise regarding the nationality condition for posts of master and chief mate of ships was very successful. However, due to diversity of problems brought up constantly to the attention of the services of the Commission, it is not easy to concentrate the effort on only one particular issue. As during the last year, in 2009 particular attention will be paid to the ongoing infringement procedures which have been opened more than 3 years ago.

To supplement monitoring activities and in response to the calls by the EPSCO Council<sup>54</sup> and European Parliament<sup>55</sup>, the Commission will also step up its efforts to provide better information to citizens on their rights as migrant workers.

In the field of social security coordination, the Commission has launched a pan-European information campaign in January 2009. The objective of this campaign is to raise awareness on the benefits of the EHIC, both among people who travel and among health professionals who welcome patients from other EU countries and presenting a European Health Insurance Card. The campaign started with 11 priority Member States identified on the basis of the number of cards in circulation while concerned with either many tourists, or study destination for students.

In the framework of the entry into application of Regulation (EC) No 883/2004 and its implementing Regulation in 2010, the Commission is planning a major information campaign on the new social security coordination rules targeting on the one hand the European citizens and on the other hand the social security institutions of the Member States which have to apply the new provisions.

One communication is foreseen for 2010: a communication on the rights of migrant workers – updating and reviewing the Communication of 2002 (COM (2002) 694). Also in 2010 the Commission is planning to launch an information campaign on workers' rights.

#### 4.1.3.1. Priorities regarding free movement of workers

The Commission services have asked Member States (members of the Technical Committee on free movement of workers) to provide up-to-date information on issues related to the **free movement of public sector workers** (in particular nationality condition; recognition of professional experience for the purposes of access to posts and for determining working conditions [e.g. salary; grade]; other legal aspects of free movement of public sector workers e.g. language requirements; taking into account of diplomas in the recruitment process etc). Depending on the outcome of the information collection and also in view of the information contained in other reports<sup>56</sup> and in view of the citizens' complaints, the monitoring follow-up will have to be decided on in relation to the different issues at stake (possibly more systematic infringement procedures against Member States from 2010 onwards).

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<sup>54</sup> Conclusions of the EPSCO Council of 9 May 2009.

<sup>55</sup> Vălean report on the application of Directive 2004/38/EC and Gacek report "Problems and prospects concerning European citizenship".

<sup>56</sup> Reports of the "Network on free movement of workers" of the last years; Report of the Human Resources Working Group of the European Public Administration Network (EUPAN) on "Cross-Border Mobility of Public Sector Workers" published in 2006.

Another primary focus for the Commission services will be to **ensure the respect of provisions of the Directive 2004/38/EC** regarding migrant workers and their family members. The Commission will work together with the Member States to make sure that the Directive is correctly transposed and implemented across the EU. In order to achieve this result, the Commission will fully use its powers conferred to it by the Treaty and launch infringement procedures when necessary.

Open infringement procedures against Spain and Greece where the issue of nationality condition for access to posts of master and chief mate of ships remains will be pursued.

The Commission services have launched a study aiming to provide information on the involvement of the different Member States in the organisation and the functioning of **professional sport activities**. The results of this study will permit the Commission services to obtain a general overview of the question and take into consideration the possibility to undertake infringement actions against Member States, which can be held responsible for the behaviour of national professional sport associations violating the free movement of workers provisions.

The Commission services will still be working in close cooperation with International and European governing bodies (the FIFA and UEFA authorities) on proposed rules which could have an impact on the fundamental principle of free movement of workers.

#### 4.1.3.2. Priorities regarding social security coordination

The objective is that the new system of coordination enters into application in the first half of 2010. In order to realise this objective, two Regulations were adopted. The first Regulation contains provisions necessary to implement Regulation (EEC) No 883/2004. The second Regulation adopted aims at amending a number of provisions of Regulation (EEC) No 883/2004 and at determining the content of Annex XI of Regulation (EEC) No 883/2004.

The proposal concerning the extension of the provisions of Regulation 883/2004 and its implementing Regulation to third country nationals who are not yet covered by these provisions solely on the ground of their nationality is based on Article 63 (4) EC Treaty and will be adopted according to the consultation procedure. The Social Question Working Party of the Council started its discussion of the proposal under the Czech Presidency. The EP and the European Social and Economic Committee adopted their (favourable) opinion respectively in July 2008 and January 2008.

In order to prepare the entry into force of the new system of coordination, the Commission has organised a number of thematic training seminars on the different social security sectors for institutions between June and October 2009. Together with the Member States in the framework of the CASSTM, the Commission intends to publish series of Explanatory notes for the social security institutions at the beginning of 2010. The purpose of these Explanatory notes will be to explain the background of the new provisions and some key concepts to social security institutions.

Moreover, as regards the decision of the French sickness insurance institution to refuse access to the CMU for non-active EU nationals, further appropriate steps should be taken in 2009.

#### 4.1.4. *Summary*

Priorities set up for 2008 have been met with many infringements procedures successfully closed and many issues resolved through problem-solving mechanisms. The forthcoming years should follow the same trend with the positive impact of the preventive approach based on administrative cooperation and on an increased communication towards citizens and national authorities.

Nevertheless, in view of the forthcoming entry into force of Regulation 883/04, and during the period of adjustment for national authorities, it can not be excluded that more complaints will have to deal with and will increase the already workload in that area.

## 4.2. **Labour Law**

### 4.2.1. *Current position*

#### 4.2.1.1. Introduction

At present, in the area of labour law, the deadline for transposition has expired for all directives in force, with the exception of one, i.e. Directive 2008/104/EC on temporary agency work, for which the transposition deadline will expire by 5 December 2011.

Furthermore, Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)<sup>57</sup>, as well as Council Directive 2009/13/EC implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006 and amending Directive 1999/63/EC<sup>58</sup> have been recently formally adopted.

The Directives applicable in the area of labour law cover a variety of issues and subjects, such as collective redundancies, European Works Council, information and consultation of employees, posting of workers in the context of the provision of services, fixed term and part-time work, temporary agency work, transfer of undertakings, employer insolvency, protection of young people at work, and working time.

For a list of the measures in force in that sector please refer to Annex I

Further details can also be found on:

[http://ec.europa.eu/labour\\_law](http://ec.europa.eu/labour_law)

#### 4.2.1.2. Main activities in 2008

Monitoring the application of labour law implies the management of infringement procedures, the preparation of monitoring reports and the setting up and activation of various expert groups.

### 1. Management of infringements

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<sup>57</sup> OJ L 122, 16.05.2009

<sup>58</sup> OJ L 124, 20.05.2009

Along the lines set out horizontally by the Commission for 2008, giving priority to the handling of Article 228 procedures and of non communication procedures, efforts were stepped up in order to close a considerable number of open infringements for non communication and non conformity. The significant decrease in the total number of outstanding cases, as well as the considerable shortening of delays in handling these, were nevertheless compensated by 17 new infringements which had to be opened for non transposition of Directive 2005/47. Also there remains a large number of "old complaints" [29<sup>59</sup>] concerning the application of the working time Directive 2003/88 following the SIMAP-Jaeger rulings<sup>60</sup> which are pending since the Commission proposed amendments revising this Directive in September 2004. As a result, the total number of outstanding infringements (including those related to the consequences of the SIMAP-Jaegerrulings) is currently 76 (compared to 78 on 31.12.2007). Without the latter, the total number of open infringements procedures would have decreased by 31%.

With regard to the non communication cases, the infringement proceedings against Member States which had *failed to notify* the national measures transposing Directive 2002/14/EC, establishing a general framework for informing and consulting employees in the European Community, continued. The case brought against Belgium continued under Article 228 EC, following the judgment from the Court of Justice<sup>61</sup>, but was closed following the adoption of the necessary transposition measures.

As regards Directive 2002/74/EC, due for transposition by 8 October 2005, the case against France continued under Article 228 of the EC Treaty following the judgment from the Court of Justice<sup>62</sup>, but was closed following the adoption and notification of the necessary national measures transposing the Directive.

Regarding Directive 2003/72/CE due for transposition by 18 August 2006, the cases against Belgium<sup>63</sup> and Greece<sup>64</sup> referred to the Court of Justice were withdrawn following adoption of the necessary transposition measures, while the case against Luxembourg following the ruling of the Court of Justice<sup>65</sup> continued under Article 228 EC.

With respect to Directive 2006/109/EC (adaptation of Directive 94/45/EC on the establishment of European Works Council following accession of Bulgaria and Romania), due for transposition by 1 January 2007, the remaining 5 infringement proceedings for non communication could be closed following the adoption of the necessary national measures.

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<sup>59</sup> However, the extent of non conformity in Greece in the medical sector led the Commission to send a letter of formal notice covering 10 complaints concerning working hours which greatly exceed the limits to weekly working time set up in Directive 2003/8/EC

<sup>60</sup> Judgment of 3.10.2000 in case C-303/98 and judgment of 9.09.2003 in case C-151/02

<sup>61</sup> Judgment 29.3.2007, C-320/06

<sup>62</sup> Judgment 27.9.2007, C-9/07

<sup>63</sup> Pending case C-92/08

<sup>64</sup> Pending case C-82/08

<sup>65</sup> Judgment 9.10.2008, case C-70/08

With respect to Directive 2005/47/EC<sup>66</sup> of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector, due to be transposed by 27 July 2008, infringement proceedings for non communication were launched against 17 Member States that had failed to take the necessary transposition measures within the required time limit.

As regards problems of non-conformity of the national transposition measures of Directives in the area of labour law, a number of proceedings in progress continued. For example, the case against Luxembourg for incorrect transposition of Directive 96/71/EC ('posting of workers') continues under Article 228 EC following the judgment of the Court of Justice<sup>67</sup>. The case against France for incorrect and insufficient transposition of Directive 80/987/EEC, and in particular Article 8, is also still open.

## 2. Monitoring reports

In order to have a comprehensive picture regarding labour law in Member States, a series of studies were commissioned, with a view to taking stock of the state of play regarding the transposition and application in the national legal orders of EU 10 member States of all labour law directives. The final output of this exercise, launched in 2005 (see previous reports), consists in a series of reports, which will be completed with reports concerning Bulgaria and Romania (for which the necessary studies were commissioned at the end of 2008) expected for the second semester of 2009.

The contents of these reports have in the meantime started to be used in recently published implementation reports required by Directives. An example is the Communication on the review of the application of Directive 2002/14/EC (information and consultation of workers) in the EU<sup>68</sup>, and an accompanying Staff Working Document<sup>69</sup>. The analysis has enabled the Commission to identify a number of outstanding issues where correct and full transposition of the Directive's requirements by Member States may be at stake, necessitating further clarification or verification. These issues raise either questions of interpretation of the Directive or doubts as regards the compliance of implementing measures with the Directive. As indicated in the implementation report, the Commission intends to examine such issues more closely in co-operation with the national authorities of the Member States concerned.

Also, the importance of occupational pension schemes increases and the employer's insolvency is a risk associated to their operation, the implementation of Article 8 (concerning old-age benefits under supplementary company or inter-company pension schemes) and related provisions of Directive 80/987/EC ('employer's insolvency') was examined in a Staff Working Document<sup>70</sup>. Most Member States

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<sup>66</sup> OJ L 195, 27.7.2005, p. 15–17

<sup>67</sup> Judgment 19.6.2008, case C-319/06, Commission vs Luxembourg.

<sup>68</sup> COM (2008) 146 final, 17.3.2008

<sup>69</sup> SEC (2008) 334

<sup>70</sup> SEC (2008) 475 of 11 April 2008.

having in place specific measures aimed at meeting the requirements of Article 8 of Directive 80/987/EEC, the results of the examination and analysis revealed nevertheless that, in certain cases, issues can be raised as regards the extent to which some of these measures are sufficient to protect the interests of employees and retired persons in the event of insolvency of the employer. Further investigation is therefore needed in order to address the following issues:

- how to protect employees and retired persons against the risk of under-funding of the pension schemes, and to what extent;
- how to guarantee any unpaid contributions to the pension schemes;
- how to deal with cases where the supplementary pensions scheme is managed by the employer himself.

As a follow-up of this Staff Working Document, the Commission services will pursue this investigation through bilateral contacts with Member States and will launch a further study on the above topics in 2009.

Following the publication of a Staff Working Document in 2006<sup>71</sup> concerning the implementation of Directive 99/70 on fixed-term work by EU-15 countries, a new Staff Working Document was published in 2008 on the implementation of this Directive in EU10<sup>72</sup> to have a full picture regarding the application of that Directive. Also in this case, the analysis has enabled the Commission to identify a number of outstanding issues where correct and full transposition of the Directive's requirements by Member States may be at stake, necessitating further clarification or verification. The Commission intends to examine such issues more closely in co-operation with the national authorities of the Member States concerned.

### 3. European network of legal experts in the field of labour law

To complete the horizontal analysis of conformity of labour law, the European Network of Labour Law Experts was created as of 23.12.2007 and produced quarterly flash-reports providing information on recent key legal developments in the area of labour law, particularly in those areas that are most relevant for the control of EU legislation. This systematic reporting and monitoring of recent developments, carried out under Commission supervision allowed the Commission services to identify problems encountered in the national legislation, its application and administrative practice, and to act in a preventive manner, if necessary.

### 4. Strengthening pro-active co-operation : committee of experts

Moreover, as regards the *posting of workers Directive*, in view of the problems encountered by companies willing to post workers, with authorities in another Member State, and following an extensive monitoring exercise carried out in 2006 and 2007 with respect to application measures, including controls and administrative cooperation (of which the outcome was presented in the Commission's Communication of 13 June 2007 'Posting of workers in the framework of the

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<sup>71</sup> SEC (2006) 1074, 11.8.2006.

<sup>72</sup> SEC (2008) 2485, 17.9.2008



provision of services: (maximising its benefits and potential while guaranteeing the protection of workers<sup>73</sup> and a attached Staff Working Document<sup>74</sup>) on 3 April 2008, the Commission adopted a Recommendation on enhanced administrative cooperation in the context of posting of workers in the framework of the provision of services<sup>75</sup> as a first, concrete follow-up of the measures indicated in the June 2007 Communication. This Recommendation calls on national governments to take urgent action to remedy shortcomings in the implementation, application and enforcement of the legislation pertaining to posting of workers through better cooperation between national administrations and improving access to information. Furthermore, following endorsement of the main points of this Recommendation by Council in its conclusions on 9 June 2008, the Commission adopted a Decision setting up the Committee of Experts on Posting of Workers<sup>76</sup> on 19 December 2008.

#### 4.2.2. *Evaluation based on the current situation*

The importance of labour law for workers in Member States, as well as its importance for the perception of the European Union as a whole, has justified a horizontal analysis of the implementation of the Directives in Member States. Thanks to that systematic, horizontal analysis of the implementation of all labour law Directives, launched in 2005, and to the contribution of the experts network and other expert groups, the Commission has a fairly good view of the legal situation in all Member States as regards the implementation of those Directives. While, by and large, all Directives are now transposed in all Member States, and the Commission has made visible progress in 2008 to prioritise and accelerate the handling of open infringements,, there are still a number of critical areas where the application of Community law is far from satisfactory.

First and foremost, this is the case with the Working Time directive, where the law or legal and administrative practice in many Member States does not comply with jurisprudence or certain provisions of the Directive 2003/88 (particularly as regards on-call time, compensatory rest, multiple contracts, doctors in training, public sector workers and the individual opt-out). A very substantial action is needed in order to clarify the application of the Directive, ensure effective conformity across the EU and provide a response to the numerous complaints introduced by citizens or professional organisations.

Moreover, the implementation of Directive 96/71 concerning the posting of workers in the framework of cross-border service provision has raised some critical issues, given the variety of industrial relations systems, particularly in the light of recent case-law (Viking-Line, Laval, Rûffert and Commission v/ Luxembourg) which will be necessary to follow closely. The analysis of the implementation of Directives 99/70 on fixed-term work and 97/81 on part-time work, both resulting from agreements between social partners, revealed a number of deficiencies which have to be addressed via EU Pilot or administrative letters.

Finally, the current economic crisis has put to a severe test those legal provisions which aim at providing protection to workers in the event of major restructuring operations. This is the case in particular of the Directives on information and consultation of workers, collective dismissals, transfer of undertakings and the protection of employees in the case of insolvency.

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<sup>73</sup> COM (2007) 304 final

<sup>74</sup> SEC (2007) 747

<sup>75</sup> OJ 2008 C85/1, 4.4.2008; see also corrigenda OJ C89/18 of 10.4.2008

<sup>76</sup> OJ 2009 L8/26

It seems justified to inquire whether the objectives of such provisions have been effectively reached.

#### 4.2.3. *Translation of the evaluation into priorities and actions in 2009*

Four implementation reports currently under preparation are expected to be adopted in 2009. Such reports may identify situations in Member States deserving further examination and eventually may justify the launch of infringements: a Commission Report on the implementation of Directive 94/33 (Young People at Work), of Directive 91/383/EC (Health and Safety of atypical workers), of Directive 2003/72/EC (Employee Involvement in the European Cooperative Society) as well as of the Article 25 of Directive 2003/88 (working time of fishermen).

The Commission intends to bring further clarity to the implementation, application and enforcement of the Directive 96/71 on posting of workers. It will launch a study on the legal aspects and another on the economic and social impact of the Directive, and will promote exchange of information and debate on the implementation of the Directive in the framework of the Expert Committee which was launched in line with the Commission Decision of 19 December 2008. It will also monitor closely the legal changes implemented in some member States in response to the recent Court rulings.

On the basis of the contents of the implementation reports drafted following examination of the legal situation in the Member States after the 2004 enlargement, follow-up actions of clarification with respect to the *fixed term* Directive 99/70, as well as *part time* Directive 97/81 will be carried out through bilateral contacts (*EU-PILOT* or administrative letters) .

It is also the intention to proceed, in 2009, to further analysis and examination of a number of problems/issues identified in the context of Directive 2002/14 (information and consultation). Moreover, in the conclusions of the Communication on the review of the application of Directive 2002/14/EC, the Commission indicates that it intends to take further action aimed at facilitating correct enforcement of the Directive.

Knowledge by management and labour of their respective rights and obligations in the area of information and consultation is an indispensable prerequisite for the full and effective exercise of these rights in the workplace. Therefore Commission also intends to undertake action geared to awareness-raising, as well as to promote exchange of best practices and to enhance capacity-building of all stakeholders, by way of seminars, training courses, studies and financial support for projects submitted by representatives of employers and employees.

In addition, in 2009 an expert working group will be established to discuss a number of outstanding issues re the application of the *insolvency* Directive (Council Directive 80/987/EEC and its codified successor Directive European Parliament and Council Directive 2008/94/EC) in transnational situations, taking into consideration the clarifications given by the ECJ in its judgment in the Holmquist case (C-310/08), as well as address the issue of administrative cooperation required by the Directive. The protection to be provided to employees and retirees of insolvent companies where these are covered by complementary pensions deserves special attention and will be the subject of an evaluation study in 2009

Last but not least, with respect to planned actions for 2009, the Commission will strengthen preventive measures by providing technical assistance to the Member States in the process of transposition and implementation of the recently adopted Directive 2008/104/EC on temporary agency work. For this purpose a group of governmental experts will be set up. The Commission will also establish a group of experts to assist Member States in the

implementation process of the recast European Parliament and Council Directive 2009/38/EC on European Works Councils adopted on 23 April 2009.

#### 4.2.4. *Summary*

With all the ongoing initiatives, including the establishment of several expert groups, the Commission has increased capacity to analyse and identify problematic issues, pursue its activities of control of Community legislation as well as to strengthen the range of preventive measures available.

This should further improve the implementation, application and enforcement in practice of the 'acquis' in labour law, with a special focus on the critical areas identified above. However, the sensitive and often highly controversial nature of the issues at stake may hamper achieving effective progress.

It is expected that the launching of new procedures, including through the EU-Pilot, may increase the workload considerably, which may require further prioritization.

### **4.3. Health and safety at work**

#### 4.3.1. *Current Position*

##### 4.3.1.1. Introduction

Health and safety at work is the most developed corpus of legislation in the field of employment and social affairs. Its application over the last 15 years has, inter alia, contributed to a substantial reduction of the accidents at work.

##### 4.3.1.2. Main activities in 2008

Monitoring the application of health and safety at work law implies different activities at various levels such as initiating and follow-up of infringement procedures, management of complaints, involvement of committees and expert groups, drafting and adoption of practical implementation reports and non-binding good practice guides and initiating legal measures if necessary.

#### 1. Management of infringements:

As for infringements it should initially be highlighted that during 2008 it was possible to close all infringement proceedings for non communication.

– Non-communication infringement cases:

The case against Austria for failure to transpose Directive 2003/18/EC was withdrawn upon notification of the necessary transposition measures, although it had already been referred to the Court of Justice.

In all the 8 cases against Austria, Czech Republic, Germany, Denmark, Hungary, Italy, Luxembourg and the United Kingdom for the failure to transpose Directive 2006/15/EC establishing a second list of indicative occupational exposure limit values, the necessary transposition measures were received and thus the cases could be closed. In the cases against Germany, Luxembourg and the United Kingdom a

reasoned opinion had already been sent, while in the Austrian case, a decision had already been taken to refer the case to the Court of Justice.

– Non-conformity infringement cases:

Given the persistent problems of non-conformity of the transposition of the framework directive 89/391/EEC and of its individual directives, many proceedings in progress have continued. For example, the case against Germany related to the responsibility of the employer for accidents at work was closed. In the case against France concerning the application of the provisions of Directive 89/391/EEC to RATP and SNCF, the Court of Justice ruled in favour of the Commission<sup>77</sup> and the proceedings continued. In the case against Poland on this directive, a reasoned opinion was sent. In November 2008, Poland changed the legislation in accordance with the reasoned opinion and the infringement procedure could subsequently be closed at the beginning of 2009.

In relation to individual directives, in the proceedings against Italy on Directive 92/57/EEC on the construction sites, the Court of Justice ruled in favour of the Commission<sup>78</sup> indicating that the Italian transposition of Article 3(1), which provides for an obligation to appoint one or more coordinators for safety and health matters for any construction site on which more than one contractor is present, was not conform. In addition, infringement proceedings against Austria were opened concerning this Directive, while the procedures against Denmark and Sweden followed their course.

The analysis of the national measures transposing Directive 93/103/EC continued and Italy (through the EU Pilot project) and Greece were asked to provide several clarifications and an infringement proceeding was launched against Spain in 2009.

The monitoring activities performed by the Commission in 2008 have not been limited to the infringements proceedings since the work on the analysis of the national legislation has also been continued; for instance clarifications were asked to Italy as regards the transposition of certain provisions of Directive 2003/18/EC on asbestos.

## 2. Complaints management

During 2008, more than 10 complaints concerned Health and Safety at Work. Some of these complaints resulted in the launching of infringement procedures. In particular, a letter of formal notice was sent to Sweden in respect of a complaint regarding the implementation of Directive 89/391/EEC. Following a complaint, a complementary letter of formal notice was also sent to Denmark concerning several points of Annex IV to Directive 92/57/EEC, in the framework of the on-going infringement proceedings concerning Directive 92/57/EEC.

Furthermore, a letter of formal notice was sent (in 2009) to the UK, following a complaint concerning the transposition of Article 3 of Directive 2003/18/EC.

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<sup>77</sup> Case C-226/06, judgment of 5 June 2008.

<sup>78</sup> Case C-504/06, judgment of 25 July 2008.

### 3. Management of the acquis through committees and expert groups

The Committee of Senior Labour Inspectors (SLIC) assists the Commission on problems relating to the enforcement of Community law on health and safety, and encourages its effective enforcement, notably by means of a closer cooperation between the national labour inspection services.

In order to allow the members of the Committee to engage in a practical, interactive exchange of experience and opinion, the number of its members per Member State will be reduced from two to one as from 1 January 2010 (Commission Decision 2008/823/EC of 22 October 2008, OJ L 288, 30.10.2008, p. 5).

One mechanism to fulfil its tasks is the rapid exchange of inspection-related problems and solutions amongst the EU-27 Member States and EFTA countries. In 2008, the Committee developed further its use of the Commission's CIRCA extranet as a practical information exchange system. The Committee may expand its use to support discrete topics such as chemical substances and machinery. In the latter case, to enhance its work on market surveillance, the Committee will promote the sharing experience on compliance and enforcement about issues identified at the national level with the Machinery Directive and on the use of machinery.

### 4. Practical Implementation Reports

During 2008, a Communication was adopted by the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions on the practical implementation of Health and Safety at Work Directives 92/57/EEC (temporary and mobile sites) and 92/58/EEC (safety signs at work)<sup>79</sup>.

In addition, during 2008, a draft was finalised for a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the practical implementation of the provisions of the Health and Safety at Work Directives 93/103/EEC (fishing vessels) and 92/29/EEC (medical treatment on board vessels).

Also during 2008, a draft was finalised for a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the practical implementation of the provisions of the Health and Safety at Work Directives 92/91/EEC (mineral-extraction through drilling) and 92/104/EEC (surface and underground mineral extraction).

### 5. Information and risk awareness raising campaigns of Senior Labour Inspectors Committee (SLIC)

The European campaigns launched under the initiative of the Senior Labour Inspectors Committee (SLIC)<sup>80</sup> largely contribute to better compliance in the field with EU legislation. European campaigns are indeed an effective means by which the

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<sup>79</sup> COM(2008) 698 of 6 November 2008.

<sup>80</sup> Commission Decision 95/319/EC of 12 July 1995, OJ L 188, p. 11.

labour inspection services can cascade a common message to stakeholders. In 2008, the Member States of the SLIC designed and delivered a joint-initiative targeting the risk of injury from the manual handling of loads in the construction and retail trade employment sectors. The campaign was supported by straightforward brochures and posters, available free on the Internet, together with an e.learning toolkit about risk assessment and practical ways to avoid and reduce the risk of injury (available on the web site of the European Agency for Safety and Health at Work).

#### 6. Non-binding good practice guides

In 2008 the Commission has drawn up a practical non-binding guide in order to help the employers, and in particular those from SME's, to implement the provisions of Directive 2003/10/EC<sup>81</sup> dealing with the risks arising from noise at work.

#### 7. Enlargement

During 2008, works continued as regards the EU enlargement area, namely as far as health and safety at work issues are concerned in EU candidate and potential candidate countries. Several tasks in this respect were performed during 2008 inter alia on the analysis of the Croatian legislation with the health and safety at work acquis, on the contributions provided to the Annual Progress Reports, on the eligibility of certain applications for TAIEX funding, on the analysis of certain projects under Instrument of Pre-Accession assistance. Participation was ensured in bilateral meetings with Turkey, FYROM, Croatia, Albania (twice) and Serbia to cover the aspects of health and safety at work and contributions were made to the bilateral meetings with Bosnia and Herzegovina, Kosovo, Montenegro. Participation was also ensured in several training sessions/seminars dedicated to the acquis in the field of health and safety at work in candidate and potential candidate countries.

All these initiatives constitute important prevention instruments aiming at ensuring a complete and correct implementation of the acquis by the candidate and potential candidate countries.

#### 4.3.2. *Evaluation of the current situation*

Accidents at work and work-related diseases are a heavy burden in social and economic terms, and action to improve health and safety standards at work offers great potential gains not only to employers, but also to individuals and society as a whole.

It is essential that the Community acquis is implemented effectively in order to protect the lives and health of workers and to ensure that the companies operating within the large European market are placed on an equal footing.

The implementation of the EU directives in the field of health and safety at work is bearing fruit at European level. According to European Statistics on Accidents at Work methodology (ESAW), the latest statistics show that less than 4 million accidents at work resulting in more than three days of absence from work occurred in the EU-15 in 2006. In absolute terms, this corresponds to a 33.3% decrease compared to 1995. For fatal accidents, this trend is more marked with a reduction of 40.3% over the same period. In terms of incidence rate (per 100

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<sup>81</sup> OJ L 42, 15.2.2003, p. 38

000 workers) for accidents in the nine main branches of economic activity of the employer (NACE), non-fatal accidents at work were down by 29.4% against 40.7% for fatal accidents.

Priorities set for 2008 were largely met but it should be borne in mind that the work performed in the EU enlargement domain is time consuming and demanding as well as certain tasks to be performed within short deadlines. These activities therefore had a certain impact on the priorities set regarding the control and monitoring of the application of Community law in the EU Member States.

#### *4.3.3. Evaluation results (priorities and planned actions for 2009)*

The Resolution of European Parliament of 15 January 2008 on the Health and Safety Strategy 2007-2012<sup>82</sup> expressly requests to the Commission to intensify its work on the monitoring of the transposition of the health and safety at work directives.

The analysis of the conformity of all the health and safety at work directives should continue to be indicated as a priority issue as an incorrect transposition could be a source of occupational accidents or diseases, with particular serious negative consequences in terms of human lives or physical integrity and/or important economic impact for the society and the concerned enterprises.

However, as the analysis of the transposition of all provisions and annexes of the health and safety at work directives is a highly time-consuming task requiring highly specialised human resources (not only lawyers but also doctors, chemical engineers, mines engineers, etc.), a prioritisation was essential.

Priority continued to be given to the analysis of the conformity of the transposition of Framework directive 89/391/EEC, which establishes the main principles of prevention of occupational risks that apply to all sectors of activity. To continue these works as regards the correct transposition in the 12 new Member States will remain a priority for the Commission, which will launch infringement proceedings when necessary.

Work on the analysis of the conformity of Framework Directive 89/391/EEC is particularly complex and time-consuming due to the high number of pieces of legislation communicated by Member States to the Commission as implementing measures (eg. in some cases more than 70 separate measures). Another main priority for 2009/2010 will continue to be the analysis of the conformity of 5 individual directives related to the highest risk sectors: construction (directive 92/57/EEC), maritime sector (directives 92/29/EEC and 93/103/EC) and extractive industries (directives 92/91/EEC and 92/104/EEC).

These priorities are in line with the main objectives of the Community Strategy 2007-2012 on Health and safety at Work<sup>83</sup> in particular those of reducing occupational accidents and diseases and guaranteeing the proper implementation of EU legislation.

In particular, during 2009, the Communication from the Commission on the practical Implementation of the provisions of the Health and Safety at Work Directives 93/103/EEC (fishing vessels) and 92/29/EEC (medical treatment on board vessels) will undergo inter-service consultation and will be submitted to the Commission for adoption and subsequently

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<sup>82</sup> Resolution 2007/2146

<sup>83</sup> COM(2007) 62

to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions.

In addition, the Communication from the Commission on the practical Implementation of the provisions of the Health and Safety at Work Directives 92/91/EEC (mineral-extraction through drilling) and 92/104/EEC (surface and underground mineral extraction) will undergo inter-service consultation in 2009 and will be submitted to the Commission for adoption and subsequently to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions.

It should also be noted that a meeting will be held in October 2009 to discuss with Member States the transposition of Directive 2006/25/EC (artificial optical radiation) for which the period for transposition expires in April 2010.

#### *4.3.4. Summary*

In general the difficulties with establishing and following a rigid prioritisation for the monitoring of EU directives in the field of health and safety at work should be highlighted.

On the one hand, Member States continuously adopt new national legislation in the field of Directive 89/391/EEC and its individual directives, requesting the Commission to focus on these new changes that often are not officially communicated to it. This makes the conformity analysis a never ending exercise. On the other hand, the dialogue established with the national administrations determines the follow-up and calendar of the procedure. Moreover, complaints, petitions, Parliamentary questions or mail from the citizens in certain cases raise non-conformity issues that need to be urgently investigated, requesting an adaptation of the work plan.

The *acquis* in the field of health and safety at work constantly needs to be up-dated or completed with a view to adapting it to new risks or to technical changes. Furthermore, the *acquis* is subject to periodical reviews as regards possibilities for simplification. The current exercise on the measuring of administrative costs that includes two directives (Framework Directive 89/391/EEC and Construction sites directive 92/57/EEC) is particularly time-consuming for lawyers and has a serious impact on the progress of other activities in the area.

In addition to this, the workload for legal experts is increased by replies to EP and citizens questions and by multiple requests for briefings whenever a fatal accident at work attracts the attention of media. These reasons, as well as short-term changing political considerations evolving make out-of-date any rigid prioritisation.

### **4.4. Antidiscrimination and gender equality**

#### *4.4.1. Current position*

##### 4.4.1.1. Introduction

The legislative domain of anti-discrimination and gender equality represents the highest number of infringement proceedings within the whole sector of employment social affair and equal opportunities (i.e. over 100 currently). The handling and monitoring of all these cases is a heavy workload and in future when at all possible alternatives to infringement proceedings will be initiated.



#### 4.4.1.2. Report on progress as regards anti-discrimination

##### 1. Monitoring of infringements

All the Member States have now transposed Directives 2000/43/EC and 2000/78/EC based on Article 13 EC. Infringement proceedings remain open for incorrect transposition of these Directives.

At the end of 2008, the situation is as follows:

- Concerning Directive 2000/43/EC, two Member States have received a letter of formal notice (AT and DE), two Member States have received a complementary letter of formal notice (NL and MT) and 16 Member States have been notified a reasoned opinion.
- Concerning Directive 2000/78/EC, 6 Member States have received letters of formal notice (LT, PT, SK, BE, AT and DE), 4 have received complementary letters of formal notice (LV, LT, PL and UK), 9 have received reasoned opinions and one has received a complementary reasoned opinion.

In this field dealing with fundamental rights, the Commission departments made a detailed monitoring of national laws. This might explain the high number of infringement cases, together with other factors, in particular the novelty of the legislation, the complexity of transposing highly complex notions (direct and indirect discrimination, reasonable accommodation, etc.).

The infringement proceedings raise complex issues, connected with different areas of law, as the Directives (essentially Directive 2000/43/EC) have a large material scope which led to the organisation of bilateral meetings with national authorities and brought clarification on a number of issues.

##### 2. Preparation of legislation

The Commission has adopted in July 2008 a proposal for a Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation outside employment.

The proposal mirrors the material scope of Directive 2000/43/EC and builds upon legal notions and standards used in this Directive as well as in Directive 2000/78/EC.

From this point of view, the monitoring of the conformity of Directives 2000/43/EC and 2000/78/EC has an evident impact on the negotiations since the Commission is challenging some interpretations at national level of notions also being discussed in the context of this proposal. It is therefore necessary to ensure a separation between the two exercises.

#### 4.4.1.3. Report on progress made regarding gender equality

##### 1. Monitoring of infringements procedures

The proceedings concerning non-communication of the national measures to transpose Directive 2004/113/EC have progressed. Six Member States have not yet

communicated their national measures and the infringement proceedings remain therefore open. In 3 cases, the issue has been already referred to the European Court of Justice (CZ, EL and UK), in two cases, a reasoned opinion has been notified (PL and Estonia) and in one case, a letter of formal notice has been sent to the Member (Latvia).

As regards Directive 2002/73/EC, one infringement procedure for non communication remains open, against Belgium. Following the judgment of the Court of Justice of 17 July 2008, a procedure under Article 228 EC has been engaged.

As regards the monitoring of the conformity of national measures transposing Directive 2002/73/EC, the Commission departments made a detailed monitoring of national laws. This might explain the high number of infringement cases, together with other factors, in particular the complexity of transposing complex notions.

The situation of infringement proceedings is as follows:

- 11 Member States have received a letter of formal notice (CZ, DE, DK, FR, IE, LV, PL, PT, SE, SK and UK).
- One Member State has received a complementary letter of formal notice (NL).
- 8 Member States have received reasoned opinions (AT, EE, FI, HU, IT, LT, MT and SI).

Following the first two stages of the infringement proceedings, the dialogue between the Member States and the Commission was initiated and new texts of law adopted by certain Member States which were scrutinised.

Concerning the monitoring of Directive 96/34/EC, two cases have been closed following the reply of the Member States to the letters of formal notice (CY, LV) three remain open (MT, HU and EE).

There are currently five cases under Article 228 of the EC Treaty.

## 2. Preparation of new legislation

The Commission has adopted in October 2008 two legislative proposals to review Directives 92/85/EEC and 86/613/EEC.

Both proposals are to be adopted by the European parliament and the Council under the procedure laid down in Article 251 (co-decision).

At this stage, it does not seem likely that any of the texts is adopted after the first reading. Inter-institutional negotiations should therefore continue during the whole year 2009.

Recently, the European cross-industry social partners (ETUC, BUSINESSEUROPE, CEEP and UEAPME) concluded an agreement which revises their former agreement on parental leave of 14 December 1995. Upon, their request, the Commission will adopt a proposal for a Directive giving legal effect to the new agreement during summer 2009.

The effectiveness of the existing Community law concerning the principle of equal pay for equal work or work of equal value has been analysed in 2008. If necessary, legislative proposals could be made in 2009, based on this analysis.

#### 4.4.2. *Evaluation of the current situation*

The co-existence of three legislative proposals in discussion and a high number of infringement proceedings had some negative implications with regard to keeping deadlines for dealing with infringements. On the other hand, the simultaneous challenge of the transposition of certain provisions by Member States and the inter-institutional discussion of similar provisions in the new proposals presents the risk of "contamination" that should be prevented.

#### 4.4.3. *Evaluation results (priorities and planned actions for 2009)*

The number of legislative proposals on the table and the high number of infringement cases open impose a prioritisation of the work in that field. On that basis, in addition to the inter-institutional negotiations of the legislative proposals, the main priorities for 2009 will be:

- Cases under Article 228 EC;
- Proceedings for non-communication of national measures to transpose Directive 2004/113/CE; The deadline for transposition of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services was 21 December 2007. Its Article 16 states that the Commission shall present a report on the practices of Member States concerning insurance. The Commission announced, during the negotiations in Council of this Directive, its intention to set up a working group composed of representatives of Member States and stakeholders. The group held its first meeting beginning of 2009.
- Proceedings for non-communication of national measures transposing Directive 2006/54/EC; The monitoring of the conformity of national measures to transpose Directive 2006/54/EC will start in the second half of 2009. Since this Directive recasts several existing Directives but does not introduce very significant substantial changes, it is expected that the monitoring will lead to only a small number of infringements
- Cases concerning the transposition of Directive 96/34/EC;
- Cases concerning the transposition of Directive 2002/73/EC;
- Cases concerning the transposition of Directives 2000/43/EC and 2000/78/EC.

Close cooperation with National Equality Bodies and the use of tools like EU Pilot could allow a quicker handling of complaints. Furthermore, at national level, Equality Bodies which contribute to a better application of Community law in Member States could lead to a reduction of the number of complaints lodged by citizens with the Commission.

In addition, it has become evident that bilateral discussions with national administrations regarding the implementation of Directive 2000/43/EC are a useful tool to better understand the issues at stake and the complexities of each national legal framework. These bilateral meetings will continue being organised in 2009 and it is expected that following the dialogue between the Member States and the Commission, the Commission will be able to close a substantive number of cases and reduce the number of remaining grievances.

It should be stressed that, still in the field of gender equality, Directive 2006/54/EC (the Recast Directive) had to be transposed by Member States by 15 August 2008 at the latest. Nevertheless, according to Article 33 of the Directive "Member States may, if necessary to take account of particular difficulties, have up to one additional year to comply with this Directive". Since there is no obligation to inform the Commission of the need to use this additional period, the Commission will launch (if needed) infringement proceedings for non-communication of the national measures to transpose this Directive only after 15 August 2009.

#### 4.4.4. *Summary*

In gender equality, although most of the legislation has been in place for a long time, two Directives are recent (2004/113/EC and 2006/54/EC). The monitoring of the transposition is very likely to lead to an increase of the number of cases open.

On the other hand, it is expected that most of the cases concerning non-communication of national measures for Directive 2002/73, as well as some cases concerning Directive 2002/73 will be closed in 2009.

The legislative proposals recently adopted essentially update and modernize the existing legal framework, with less substantial changes in this area and should therefore imply less infringement proceedings. In addition, it is expected that national Equality Bodies will contribute to a reduction of the number of complaints concerning this area of Community law.

As far as anti-discrimination is concerned, the Commission has adopted a proposal for a new Directive on the 2<sup>nd</sup> July 2008. Once adopted, the Directive will extend the protection outside employment for age, religion, sexual orientation and disability.

Based on previous experience it is likely that this new legal text will require comprehensive monitoring to ensure its transposition and conformity.

In both areas, the Commission will anticipate the number of infringement proceedings by the setting-up of a group of experts in order to discuss the implementation of the Directives by Member States.

In general, it is expected that national Equity Bodies will contribute to a reduction of the number of complaints concerning this area of Community law.

For the future, the Commission intends to use extensively ways of problem resolution alternative to infringement proceedings (EU Pilot) but also external expertise (Equality Bodies, Network of Independent Legal Experts). Together with the prioritisation set above, this should allow the management of a workload which is not expected to decrease.

## 5. AGRICULTURE AND RURAL DEVELOPMENT

### 5.1. Current position

#### 5.1.1. General introduction

Since 1962 the Common Agricultural Policy (CAP) has established a comprehensive legal framework for European agriculture aiming to achieve the objectives set out in the EC Treaty. As a fully integrated common policy it replaces a significant amount of national legislation. It has largely accomplished its objectives while alleviating the social impact of agricultural restructuring. As a corollary, farmers and administrations have to deal with a complex set of rules and measures contained in 1730 acts of secondary law currently in force. Most of those acts are Council or Commission Regulations that are "binding in their entirety and directly applicable in all Member States". Access to agricultural legislation has been improved by developments in IT tools. All Community legislation is now freely available via the EUR-Lex website. Consolidation and codification of legal texts both make the "acquis" more accessible to citizens and improve legal certainty.

The CAP is unique in the extent to which it is regulated and financed at EU level. Its common approach, in particular, to the single market, makes it possible to guarantee the functioning of an internal market of agricultural products. An EU framework ensures that rural development programs are carried out under common rules without creating unfair competitive advantages. Basic standards in the field, for example, of organic farming and labelling are settled on a common basis. This requires robust legislation, and effective financing and monitoring mechanisms to protect the public interest and ensure accountability.

Taking into account the significant volume of agricultural law and the 50 years history of the CAP (Stresa Conference dated July 1958), it may be considered as a quite stable "acquis" that, on the one hand, is subjected to frequent technical modifications under the comitology procedure, and on the other hand, undergoes on a regular basis, much more profound modifications. The last one of these, the 2003 reform, brought about radical change to the CAP, especially its income support policy. It established the single payment scheme and the single area payment scheme where direct income support for farmers is largely decoupled from production and introduced the cross-compliance system, (see Council Regulation (EC) No 1782/2003<sup>84</sup> repealed by Regulation (EC) N° 73/2009). It also established comprehensive common rules for direct support in most sectors. The effect of these reforms has been reviewed in the "Health Check" 2008, based on which the Council decided on adjustments in policy and budgetary priorities.

The policy is divided into two pillars: the first pillar consists of a framework for supporting the income of farmers through the payment of direct aid and a system for managing and supporting agricultural markets. The second pillar of the CAP provides a framework to support the development of rural areas of the Community. The first pillar is 100% financed by the Community budget, whereas the second pillar is co-financed by the Community budget and those of the Member States. Beginning on 1st January 2007 the programmes for rural

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<sup>84</sup> Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001.

development have been implemented on the basis of a new strategic planning model based on a Community framework positions and national strategic plans (see Council Regulation (EC) No 1698/2005<sup>85</sup>).

To these two principal pillars could be added another important element of the policy consisting of the quality policy: notably four specific EU quality schemes have been introduced to develop geographical indications, organic farming, traditional specialities, and products from the outlying regions of the EU. These schemes identify to consumers products having specific qualities resulting from a particular origin and/or farming method.

Since the 2007 financial year the financing of the CAP is regulated by Regulation (EC<sup>o</sup> No 1290/2005<sup>86</sup>), which introduced two distinct funds. The first pillar is now financed by the European Agricultural Guarantee Fund (EAGF) and the second pillar (rural development) is financed by the European Agricultural Fund for Rural Development (EAFRD).

The implementation of the CAP is a joint responsibility between the Commission and the Member States, referred to as shared management. While the Commission is responsible for the overall legal framework and for implementation of the budget, under the shared management concept, the responsibility for implementation at the level of final beneficiaries has been delegated to the Member States. The extent of the responsibilities of the Member States may in particular be considered very extensive as regards the implementation of the measures of the second pillar for which a "bottom up" approach has been followed that leaves to the Member States, regions and Local Action Groups much more latitude in adjusting the programmes to local needs.

Since the Green Paper of 1985, the CAP has been the subject of a continuing and regular process of reform. This policy also contributed significantly to the regulatory simplification process notably in 2007 - 2008 by the adoption of the single Common Market Organisation regulation. A common market organisation (CMO) in the agricultural sector governs 21 sectors which until 2007 were individual CMOs. It provides a single legal framework governing the domestic market, trade with third countries and rules regarding competition<sup>87</sup>.

### 5.1.2. *Report of work done in 2008*

#### 5.1.2.1. Management of the "acquis" through committees and experts groups

To ensure that the European Commission's responsibility for the adoption of secondary legislation is exercised in close consultation with the governments of the Member States, various committees of government representatives have been set up by the Commission and

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<sup>85</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) – See also Commission Regulation (EC) No 1974/2006 of 15 December 2006 laying down detailed rules for the application of Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and Commission Regulation (EC) No 1975/2006 of 7 December 2006 laying down detailed rules for the implementation of Council Regulation (EC) No 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures.

<sup>86</sup> Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy.

<sup>87</sup> Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation).

are chaired by a Commission's representative. The Commission has thus developed a long tradition of cooperation with Member States that presents the opportunity to discuss and prepare the implementation of common rules and to prevent or solve problems related to their application at an early stage.

In this regard, 226 meetings of 25 management and regulatory committees presented the opportunity to discuss the implementation of CAP legislation with the representatives of the Member States. This process also has the effect that Member States are reminded of their duty to comply with Community law. It should also be noted that as of 1st January 2008 the application of the “single CMO Regulation” (EC) No 1234/2007 was gradually phased in to the extent that the previously existing sector-based management committees for the common organisation of the markets were replaced on a step by step basis by one single management committee for the Common Organisation of Agricultural Markets (cf. Article 195 of that Regulation). The transition was finalised in October 2008. The “single CMO-committee” with 5 experts groups replaced 15 sectoral management committees.

Moreover, in 2008 the Commission was assisted by a number of advisory, permanent and temporary groups of experts (in total 128). These contacts helped to clarify facts and rule out misunderstandings.

#### 5.1.2.2. Enquiries, problems and complaints management

The examination of complaints from citizens and companies and internally detected cases gave grounds for the Commission to intervene with the Member States on the basis of article 226 EC in 72 cases covering various fields of the Common Agricultural Policy. In several cases the Commission referred questions relating to the application of Community law to Member States using the new EU Pilot system. The eight cases opened in 2008 in the EU Pilot system concerned different sectors of the CAP.

Particular attention was drawn to the correct application of the Community legislation in the field of direct payments. This question was raised in two cases. A case concerned the establishment of the Farm advisory system in Portugal. Two cases concerned the application of Community legislation in the field of the rural development, namely the eligibility criteria for Less Favoured Area aids in Finland and the separation between the Managing Authority and the Paying Agency in Germany. The remaining cases related to other fields of the CAP such as export refunds, quality of agricultural products or the transparency of beneficiaries of CAP payments.

#### 5.1.2.3. Management of infringements

In the area of agriculture and rural development, monitoring the application of Community law under Article 226 of the EC Treaty procedure concentrates on two main objectives: removing barriers to the free movement of agricultural produce and ensuring that the more specific mechanisms of agricultural regulations are applied effectively and correctly.

In the context of ensuring that the specific mechanisms of the agricultural regulations are properly applied in the Member States, specific attention continued to be paid in 2008 to the application of the milk quota regime. Particular attention was devoted to its application in new Member States, in parallel with a special enquiry in this area conducted by the Court of Auditors.

Furthermore, the Commission also examined the compatibility of certain national rules on the obligatory indication of origin for olive oil in Italy.

Particular attention has been paid to the treatment of instances of non-compliance with the Court judgments. In 2008, this resulted in following the progress made by Portugal to implement a judgment of the Court where the Court declared that, by levying charges on beneficiaries during the programming period 1994-1999 which were neither voluntary nor optional and which did not constitute remuneration for services rendered by the administration, but rather served to finance tasks for which the Portuguese State is responsible, the Portuguese Republic failed to fulfil its obligations under Council Regulation (EEC) No 4253/88, as amended by Council Regulation (EEC) No 2082/93<sup>88</sup>. The Commission considers that by limiting, for administrative reasons, the reimbursement of the illegal charges to beneficiaries introducing a request within the final deadline of one month, Portugal did not fulfil its obligation to implement the Court's judgment correctly in view of the principles of effectiveness and proportionality. For this reason the Commission opened Article 228 infringement proceedings against Portugal in 2007. Portugal presented a plan programming the reimbursement of the amounts resulting from the charges illegally collected from the beneficiaries.

Furthermore the Commission continued monitoring the application of the so-called "Breakfast directives", which lay down particular compositional and labelling requirements for the products including honey, chocolate, jams and fruit juices.<sup>89</sup> In line with the other priorities defined in the communication "Europe of results", in 2008 the Commission monitored the transposition of one agricultural directive. Following the adoption of the Council Directive 2007/61/EC<sup>90</sup>, which provided for the deadline for transposition of 31st August 2008, the Commission, taking account of its priorities, closely scrutinised the communication of the national transposition measures. In October 2008 the Commission has opened infringement proceedings against Belgium, the Czech Republic, Greece, Italy, Cyprus, Luxembourg, Portugal and Romania for non-communication of national transposition measures of Council Directive 2007/61/EC.

More specifically, concerning chocolate (Directive 2000/36/EC), the Commission has decided to refer Italy to the Court of Justice for failing to amend its legislation on the labelling of chocolate products. Infringement proceedings have been opened against Italy because the Commission considers that the indication "pure chocolate" cannot guarantee accurate and impartial information for the consumer. In fact, this system of labelling creates a situation in which chocolate containing vegetable fats other than cocoa butter may be perceived by the consumer as being a lower-quality product than "pure chocolate" – which would contain fat exclusively in the form of cocoa butter. But in its judgment of 16 January 2003 in Case C-14/00 *Commission v Italian Republic* the Court of Justice considered that the addition to cocoa and chocolate products of vegetable fats other than cocoa butter did not entail substantial alteration of their composition or nature. In order to comply with the mechanism

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<sup>88</sup> Judgment of 5 October 2006 in case C- 84/04, *Commission v. Portuguese Republic*, Rec 2006, p.I-9843.

<sup>89</sup> The list of products is not exhaustive. The products referred to above due to their nature and constant consumption require particular supervision of the application of the following directives: Council Directive 2001/110/EC of 20 December 2001 relating to honey, Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption, Council Directive 2001/113/EC of 20 December 2001 relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption and Council Directive 2001/112/EC of 20 December 2001 relating to fruit juices and certain similar products intended for human consumption.

<sup>90</sup> Council Directive 2007/61/EC of 26 September 2007 amending Directive 2001/114/EC relating to certain partly or wholly dehydrated preserved milk for human consumption.



introduced by Directive 2000/36/EC for providing the consumer with neutral and objective information, the Italian rules should refer either to the absence of vegetable fats other than cocoa butter or to the sole presence of the fat concerned, namely cocoa butter.

#### 5.1.2.4. Petitions

In 2008 the Commission received 5 petitions related to agriculture which covered a wide range of issues such as obtaining EU agricultural subsidies under the single farm payment system in Romania, implementation of agricultural policies in the Republic of Bulgaria, and suspension of production at the 'Lublin' sugar factory in Poland.

#### 5.1.2.5. New legislation

2008 has been a very active year in pursuing the reforms of the Common agricultural Policy and particularly with the successful outcome of the "Health check" reflection process launched in 2007 on how to improve the efficiency of the Common Agricultural Policy in the future.

#### *Approval of the "Health check"*

Indeed, on 20 November 2008 EU agriculture ministers reached a political agreement on the Health Check of the Common Agricultural Policy. These political adjustments have been formalised by Council Regulations (EC) N° 72/2009, 73/2009 and 74/2009<sup>91</sup>. The Health Check modernises, simplifies and streamlines the CAP and removes restrictions on farmers, thus helping them to respond better to signals from the market and to face new challenges. The modifications concern the main areas of the CAP: direct aid system, market instruments and rural development policy. Among a range of measures, the agreement abolishes arable set-aside, increases milk quotas gradually leading up to their abolition in 2015, and converts market intervention into a genuine safety net. The Health Check also concluded that rules for direct payments have been reviewed and simplified. Ministers also agreed to increase modulation, whereby direct payments to farmers are reduced and the money transferred to the Rural Development Fund. This will allow a better response to new challenges and opportunities faced by European agriculture, including climate change, the need for better water management, the protection of biodiversity, and the production of green energy. Member States will also be able to assist dairy farmers in sensitive regions adjust to the new market situation.

#### *Reform of specific market instruments*

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<sup>91</sup> Council Regulation (EC) No 72/2009 of 19 January 2009 on modifications to the Common Agricultural Policy by amending Regulations (EC) No 247/2006, (EC) No 320/2006, (EC) No 1405/2006, (EC) No 1234/2007, (EC) No 3/2008 and (EC) No 479/2008 and repealing Regulations (EEC) No 1883/78, (EEC) No 1254/89, (EEC) No 2247/89, (EEC) No 2055/93, (EC) No 1868/94, (EC) No 2596/97, (EC) No 1182/2005 and (EC) No 315/2007; Council Regulation (EC) No 73/2009 of 19 January 2009 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 and Council Regulation (EC) No 74/2009 of 19 January 2009 amending Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD).

2008 was not only the year of the Health Check. The Commission also launched the School fruit programme, encouraging good eating habits in young people<sup>92</sup>. It took an important step in simplifying the marketing standards for fruits and vegetables<sup>93</sup>. Besides simplification of CMO rules (for instance simplifying and reducing the number of products for which import and export licences are required and with a horizontal Regulation concerning private storage replacing sectoral ones), the *acquis* concerning several sectors was modified to a greater or lesser extent in 2008.

The spirit drinks Regulation (EC) No 110/2008 established a clear and simplified framework for the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks<sup>94</sup>.

The wine reform initiated in 2006 resulted in Council Regulation (EC) No 479/2008 on the common organisation of the market in the wine sector which had as its principal aim to reinforce competitiveness<sup>95</sup> entered into force on 1st August 2008 except for certain regulatory measures (wine making practices, geographical indications and labelling) which enter into force one year later. This new organisation is simpler than its predecessor, transfers considerable power and responsibility to Member States via the national support programmes and strengthens the legislative support for quality via the registration and protection rules for products with designation of origin or geographical indication status. It also sets a clear framework for the production potential in the sector, provides a solution to the long-standing problem of non-respect of planting restrictions and also fixes an end date for these planting restrictions (1.1.2016 with an option for Member States to extend for some cases). The Commission adopted Regulation (EC) No 555/2008 implementing the first phase of the reform concerning support programmes, trade with third countries, production potential and controls in the wine sector<sup>96</sup>. Further implementing rules are being prepared concerning wine making practices and geographical indications.

The single CMO project was continued. The Council adopted Regulation (EC) No 361/2008<sup>97</sup> which integrated fruit and vegetables into the single CMO following the reform of the sector. The Commission also made a proposal to the Council<sup>98</sup> for the integration of wine into the

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<sup>92</sup> Council Regulation (EC) No 13/2009 of 18 December 2008 amending Regulations (EC) No 1290/2005 on the financing of the common agricultural policy and (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) in order to set up a School Fruit Scheme.

<sup>93</sup> Commission Regulation (EC) No 1221/2008 amending Regulation (EC) No 1580/2007 laying down implementing rules of Council Regulations (EC) No 2200/96, 2201/96 and 1182/2007 in the fruit and vegetable sector as regards marketing standards.

<sup>94</sup> Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89.

<sup>95</sup> Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organization of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No 1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999.

<sup>96</sup> Commission Regulation (EC) No 555/2008 laying down detailed rules for implementing Council Regulation (EC) No 479/2008 on the common organisation of the market in wine as regards support programmes, trade with third countries, production potential and on controls in the wine sector.

<sup>97</sup> Council Regulation (EC) No 361/2008 of 14 April 2008 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation).

<sup>98</sup> COM (2008) 489 final.

single CMO. Adoption of this proposal would complete the simplification process by bringing the last free-standing sector into the single CMO.

The tobacco and hops "acquis" were modified by the adoption of Commission regulations following the application of the single CMO Regulation to those sectors on 1 July 2008.

### ***Direct payments and cross compliance***

Beyond the scope of the "Health check" exercise, Community law in the direct payments sector was subject to several changes aiming, for instance, to adapt the implementation rules<sup>99</sup>. As regards cross compliance changes were made to improve in terms of efficiency and simplification the rules governing the implementation of this system according to the conclusions of the report to the Council<sup>100</sup> on this matter (minor infringements and a "de minimis" rule for sanctions)<sup>101</sup>.

### ***Rural development***<sup>102</sup>

Designed to take further the policy review initiated with the 2003 reforms some of the main issues addressed by the "Health Check" were climate change, bio-energy, water management, and biodiversity and identified as crucial and new challenges for European agriculture. A specific support for innovation related to these priorities shall facilitate the strengthening of these priorities.

Additionally accompanying measures in the dairy sector have been identified as a further crucial and new challenge for European agriculture. As of 1st January 2010 Member States shall provide support in their rural development programs in accordance with their specific needs for types of operations addressing the new challenges which will be equal to the amounts from modulation.

More funding will be available to the Member States via an increase in compulsory modulation and the introduction of progressive modulation in order to address these challenges, beginning in 2009 (available in rural development from 2010). A higher Community co-financing rate on increased modulated funds will be available for these new challenges but also for the amounts from unspent funds from the 1st pillar (standard rate: 75%; convergence regions: 90%).

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<sup>99</sup> Commission Regulation (EC) No 319/2008 of 7 April 2008 amending Regulation (EC) No 795/2004 laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, and Regulation (EC) No 796/2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulation (EC) No 1782/2003.

<sup>100</sup> COM(2007) 147 final, 29.3.2007.

<sup>101</sup> Council Regulation (EC) No 146/2008 of 14 February 2008 amending Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD).

<sup>102</sup> The picture given in this paragraph indicates the evolutions occurred in 2008 and does not take into account the modifications introduced by Council Regulation (EC) XXXX/XXXX [amending Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and Regulation 1290/2005 on the financing of the common agricultural policy] which had not yet been adopted when this report was drafted.

Selecting which of the new challenges will be reinforced with the additional resources from the 'Health Check' should be based on an assessment of the needs in each Member State. Member States will therefore have to revise their national strategy plans and their rural development programs and have to submit them to the Commission no later than 30th June 2009. New Member States will not have to modify their national strategy plans and the deadlines to revise and submit their rural development programs will be 30th June 2012 regarding the EU-10. As for Bulgaria and Romania the rules for modulation will not apply at all before 2013.

### *Quality policy*

**Quality:** Quality being one of the EU's strengths to compete on a global market and respond to consumer demand, the Commission decided to launch a reflection process to improve European quality policy. In order to be in a position to do so, the Commission wished to first have the benefit of being appraised of the opinion of stakeholders. For that reason, the Commission released, on 15 October 2008, a “*Green Paper on Agricultural Product Quality Policy: product standards, farming requirements and quality schemes*” (COM (2008) 641 final), opening a public consultation exercise until 31.12.2008. Building on the operation of current EC quality policy instruments, the conclusions of the Food Quality conference in 2007, and studies on food quality assurance and certification schemes, the Green Paper refers to a range of policy ideas and options and is a first step towards a possible revision of policy.

**Organic:** The Community organic farming legislation underwent a profound revision process based on the European Action Plan for Organic Food and Farming (COM (2004) 415 final). A milestone of this process is the new Council Regulation (EC) No 834/2007 on organic production and labelling of organic products<sup>103</sup>, supplemented by implementing regulations adopted in 2008 (Regulations (EC) No 889/2008<sup>104</sup> on production, labelling and control and Regulation (EC) No 1235/2008<sup>105</sup> on import of organic products). These Regulations replace the old Regulation (EEC) No 2092/91 as from 1 January 2009 onwards.

### *Clearance of accounts*

In 2008, the Commission adopted Regulation (EC) No 1034/2008<sup>106</sup> amending Regulation (EC) No 885/2006 with a view to strengthening and improving the recovery of irregular payments from final beneficiaries.

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<sup>103</sup> Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91.

<sup>104</sup> Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control.

<sup>105</sup> Commission Regulation (EC) No 1235/2008 of 8 December 2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries.

<sup>106</sup> Règlement (CE) n o 1034/2008 de la Commission du 21 octobre 2008 modifiant le règlement (CE) n o 885/2006 portant modalités d'application du règlement (CE) n o 1290/2005 du Conseil en ce qui concerne l'agrément des organismes payeurs et autres entités ainsi que l'apurement des comptes du FEAGA et du FEADER.

#### 5.1.2.6. Preventive measures

In the field of prevention the Commission continues to be active as the following actions demonstrate.

##### *Comitology*

As already referred to, the Commission makes use of the management and regulatory committees, advisory, permanent and temporary groups of experts to promote better implementation and identifying and addressing potential problems as early as possible.

In order to contribute to the smooth application of sectoral regulations, bilateral meetings were organised regularly with Member States in the margins of the Committee meetings. Where needed, missions to MS capitals to receive a global view of procedures and practices at national level were also organised. "Bilaterals" with MS provided the competent services of the Commission with the opportunity to deal positively with some recurrent problems encountered by MS in the drafting of applications as well as in interpretation of a number of legislative provisions. The Commission also provided practical suggestions to improve the quality of applications, for instance in the quality sector, for registration and amendments. This contributed to reducing time-consuming formal exchanges concerning Commission requests for additional information. Regarding the preparation of the transposition of Council Directive 2007/61/EC, the Commission placed the question on the agenda of the single CMO committee on several occasions in order to follow the progress made by the Member States and to offer any assistance if needed for transposition. In the context of the implementation of the fruit and vegetable reform, the responsible agricultural department prepared 32 interpretation notes, including 94 FAQ.

Moreover, a register of interpretative notes on agricultural law (called RIPAC) has existed for a long time and new interpretative notes are regularly being created and put in that register accessible for the Member States. The notes are usually drawn up as a result of a written or oral question posed by a Member State.

##### *Technical standards directive (Directive 98/34/EC)*

Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations requires Member States and Members of the European Free Trade Association who have signed the Agreement on the European Economic Area plus Switzerland and Turkey to give each other and the Commission prior notification of all draft rules containing technical standards or rules in order to avoid creating new barriers to trade in the internal market. As such, this directive can be considered as an ideal preventive instrument enabling the filtering of any national technical rule that could jeopardize the functioning of the internal market.

In this context, in 2008 the relevant departments of the Commission were formally consulted on 74 notifications relating to the agricultural sector. Examination of these draft texts subsequently led to the issuing of five comments and six detailed opinions.

Furthermore, concerning the obligatory indication of origin for olive oil in Italy the Commission issued a "blockage" on a notified draft national measure intended to replace a decree which is the subject of on-going infringement proceedings. The notified measure was

therefore subject to both a detailed opinion and a blocking decision by the Commission until 1<sup>st</sup> May 2009.

### *Simplification*

The Commission strategy for simplifying the regulatory environment (COM(2005)535) set out an ongoing simplification programme of measures to be adopted between 2005 and 2008 with a view to improving the quality and effectiveness of the "acquis". As far as the agricultural sector is concerned, the Communication on Simplification and Better Regulation for the Common Agricultural Policy (COM (2005) 509) led to the creation of the rolling Common Agricultural Policy Simplification Action Plan. The Action Plan is used to identify, plan and monitor the implementation of the simplification projects within the agricultural sector. Launched at the end of 2006, it has evolved from 20 to around 50 projects; 43 projects have already been implemented (removal of the obligation to have a licence for beef exports without export refunds, end of the obligation for a farmer to have a plot of land at his disposal for at least 10 months in order to apply for direct payments, for imports, licence requirements were reduced from 500 to 65 and for exports, only 43 licence requirements remain., etc). Simplification is aided by the reforms of the sugar, wine and fruit and vegetable sectors and the inclusion of these sectors into the Single Payment Scheme and the single CMO.

On technical aspects, it is interesting to mention that almost 300 obsolete acts have been repealed. The adoption of the single CMO replaces 21 individual common market organisations with one, reducing the number of articles from around 920 to around 230 and repealing 78 Council acts. The number of legal instruments for State Aid has been reduced from six to three. A new IT system ISAMM, to facilitate the exchange of information between the Commission and the Member States, is in its final development phase<sup>107</sup>.

### *Assessment of rural development programs*

In 2008 Commission went on with the appraisal of the new rural development programs. Indeed, 2008 was marked by the completion of the approval of rural development programs, as 25 out of the total of 94 programs which had already received a favorable opinion of the Rural Development Committee in December 2007 or for which the main preparatory work was finished by the end of 2007 were formally approved by the Commission in early 2008 following the carry-over of commitment appropriations from 2007 to 2008, according to Article 9 (2) of the Financial Regulation. The remaining 15 programs were approved throughout the year. The Commission launched the European Network for Rural Development provided for in Article 67 Council Regulation (EC) No. 1698/2005. In February 2008 also three pre-accession assistance programs under IPARD were formally approved by the Commission after having received a favorable opinion of the Rural Development Committee in December 2007 and after the related commitment appropriations were carried over from 2007 to 2008, according to Article 9 (2) of the Financial Regulation. The programs were modified by Commission decisions in October and December 2008 to take account of the 2010 financial allocations as decided in the multi-annual indicative planning documents (MIPDs and to remove certain inconsistencies and to amend editorial shortcomings).

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<sup>107</sup> For a comprehensive updated presentation on simplification in agriculture, see: Communication from the European Commission to the Parliament and the Council "A simplified CAP for Europe - a success for all (COM(2009) 128 final).

Moreover, in the framework of the design of the modifications of the implementing rules of the EAFRD (amending Regulation (EC) No 1974/2006) the new rules have been explained to Member States in order to provide clarity. Desk officers are given guidance through training courses in order to give the necessary assistance to the Member States during the consultation processes regarding the modification of programs including monitoring and evaluation issues.

### *Clearance of accounts*

EAGF and EAFRD expenditure is implemented under shared management through a comprehensive management and control system based on four levels consisting of<sup>108</sup>:

- A compulsory administrative structure at the level of the Member States: management and control of the expenditure is entrusted to dedicated paying agencies, which prior to their operation must be accredited by the Member States on the basis of a comprehensive set of accreditation criteria laid down in Community law.
- Detailed systems for ex-ante controls and dissuasive sanctions: These systems are to be applied by the paying agencies and contain some common features and special rules tailored to the specificities of each aid regime. The systems generally provide for exhaustive ex-ante administrative controls of 100% of the aid applications, cross-checks with other databases where this is considered appropriate as well as pre-payment on-the-spot controls of a sample of transactions ranging between 1% and 100%, depending on the risk associated with the regime in question. If the on-the-spot controls reveal a high number of irregularities, additional controls must be carried out.

In this context, the by far most important system is the IACS (Integrated Administration and Control System), which in financial year 2008 covered 87.5% of EAGF expenditure (EUR 36 906.5 million out of EUR 42 181.2 million). To the extent possible, the IACS is also used to manage and control rural development measures relating to parcels or livestock, which in 2008 accounted for around 73% of payments under the EAFRD (excluding advances).

- Ex-post controls: In addition to the ex-ante controls, all aid measures other than direct payments covered by the IACS are subject to ex-post controls under either Council Regulation (EC) No 485/2008 or, for rural development measures, Commission Regulation (EC) No 1975/2006. Moreover, the paying agencies' annual accounts and the functioning of their internal control procedures are verified and certified on an ex-post basis by the certification bodies.
- Clearance of accounts: The clearance of accounts through the Commission consists of both an annual financial clearance and a multi-annual conformity clearance.

Taken together, these four levels are designed to ensure the legality and regularity of the transactions at the level of the final beneficiaries. In the current context of the report on the application of Community law, the conformity clearance mechanism is particularly worth

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<sup>108</sup> For more explanations on the management of the agricultural budget and its audit tools, see: [http://ec.europa.eu/agriculture/fin/clearance/factsheet\\_en.pdf](http://ec.europa.eu/agriculture/fin/clearance/factsheet_en.pdf).

mentioning as it pertains to the correct application of the legislation establishing the common agricultural policy.

Indeed, meanwhile the financial clearance covers the integrality, accuracy and veracity of the paying agencies' accounts, the conformity clearance relates to the legality and regularity of the underlying transactions. It is designed to exclude from Community financing expenditure which has not been executed in compliance with Community rules, thus shielding the Community budget from expenditure that should not be charged to it (financial corrections). In contrast, it is not a mechanism by which irregular payments to beneficiaries are recovered, which according to the principle of shared management is the sole responsibility of Member States. Financial corrections are determined on the basis of the nature and gravity of the infringement and the financial damage caused to the Community. Where possible, the amount is calculated on the basis of the loss actually caused or on the basis of an extrapolation. Where this is not possible, flat-rates are used which take account of the severity of the deficiencies in the national control systems in order to reflect the financial risk for the Community. Where undue payments are or can be identified as a result of the conformity clearance procedures, Member States are required to follow them up by recovery actions against the final beneficiaries. However, even where this is not possible because the financial corrections only relate to deficiencies in the Member States' management and control systems, financial corrections are an important means to improve these systems and, thus, to prevent or detect and recover irregular payments to final beneficiaries. The conformity clearance thereby contributes to the legality and regularity of the transactions at the level of the final beneficiaries.

In 2008, the Commission adopted three conformity clearance decisions:

- Decision 2008/321/EC of 8 April 2008 excluding an amount of EUR 83.00 million from Community financing;
- Decision 2008/582/EC of 8 July 2008 excluding an amount of EUR 410.31 million from Community financing;
- Decision 2008/960/EC of 8 December 2008 excluding an amount of EUR 528.53 million from Community financing.

Moreover, in 2008, the Commission carried out 120 on-the-spot missions in the Member States and launched 138 desk checks. These audits covered 47.6% of total EAGF and EAFRD expenditure.

While the financial consequences will only be determined at the end of the conformity clearance procedures, the results of the audits are already known. Most of the audits performed in 2008 have not revealed any deficiencies in the control systems which would suggest that those systems are ineffective in determining the eligibility of claims or preventing irregularities<sup>109</sup>.

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<sup>109</sup> For a more detailed description of the conformity clearance activities, see the 2008 Annual Activity Report of the Directorate General for Agriculture and Rural Development



## 5.2. Evaluation

### 5.2.1. General evaluation

Taking into account the volume of Community law currently in force in the agricultural sector, the "acquis" in the agricultural sector may be considered as globally stable and manageable or subjected to technical up-dating or clarification effected through Comitology (see above). This updating is not generally expected to be controversial or difficult to implement due to the well-established and well-understood framework in which this will take place and given previous experience of the relatively smooth adoption and timely entry into effect of this type of measure.

In the agricultural sector it may be considered that preparatory working contacts between experts, review of problems arising and multilateral and/or bilateral exchange of information constitute proportionate and sufficient means to ensure correct implementation. Furthermore, besides its role in the adoption of implementing rules, the Management Committees, which meet regularly, are a privileged forum for the exchange of information and best practise between MS and the Commission.

In any case, as already explained, the agricultural sector makes use of the clearance of accounts mechanisms to monitor through its audits the application of secondary agricultural legislation.

### 5.2.2. Sector based remarks

#### 5.2.2.1. Market instruments

As regards the functioning of this sector-based "acquis", no major problems were encountered in 2008. The "acquis" can be considered as stable providing a generally satisfying situation.

In line with the priorities defined in the 25<sup>th</sup> report to EP for agricultural sector, particularly regarding the follow up of the application of the fruit and vegetables CMO reform, this new legislation has being monitored and managed through the adoption of implementation measures and through interpretative notes regarding Regulation (EC) N°1580/2007 that led to a globally satisfying situation. No new enforcement proceedings were required. The same may be stated concerning the wine and sugar sectors subject to reform.

The audits performed in 2008 (covering such aid schemes as export refunds, sugar and industrial use, fruits and vegetable, wine restructuring and grubbing up, public storage, etc) generally show a very high degree of conformity by Member States<sup>110</sup>.

#### 5.2.2.2. Direct payments and cross compliance

##### *Direct payments scheme*

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<sup>110</sup> Deficiencies which would suggest that the control system in question is ineffective in determining the eligibility of claims or preventing irregularities, were detected in only the following Member States for quite specific schemes or geographical regions that were: Bulgaria (wine restructuring, France (POSEIDOM implementation in Réunion), Greece (dried grapes expenditures), Italy (Citrus processing in Sicily and Calabria).

The "acquis" in the direct payments sector is stable and its application by the Member States was generally satisfactory but some specific issues have created implementing difficulties for Member States, for example regarding the ownership of payment entitlements.

One of the principles behind the CAP Reform is that EU support should benefit the active farmer. However, in some Member States (Germany, Finland, The Netherlands) a legal controversy arose between tenants and landowners about the ownership of entitlements. Landowners want to recover entitlements from tenants upon expiry of the lease agreement. A ruling of the Dutch lease tribunal confirmed that the entitlements shall return to the landowners. The granting of direct payments was never based on the ownership of the land but on the agricultural activity exercised on that land. The purpose of the Single Payment Scheme (SPS) is to provide security of income for active farmers, thus making the SPS entitlements personal in character and therefore tied to the individual concerned. Unless agreed otherwise by private contract, a landowner who had leased out his land would not have any right to intervene in what happens to payment entitlements allocated to his tenant, even upon expiry of the lease agreement (ref. Article 46 of Council Regulation 1782/2003). The Commission requested Finland to change a provision in its national law and it subsequently amended it. The Commission is seeking further clarifications on this amendment. According to the Commission, the Dutch law is in conformity with Community rules. However, the ruling of the Dutch lease tribunal is not in line with Regulation (EC) No 1782/2003. This case is now subject to a referral to the Court of justice for preliminary ruling (Case C-470/08 – Van Dyck).

As regard the implementation of control mechanisms by the Member States, audits performed in 2008 showed that the basic elements of IACS were established and generally operational. Significant IACS control deficiencies which would suggest that the system is ineffective in determining the eligibility of claims or preventing irregularities, were only detected in Cyprus, Malta and Romania. As regards Greece, it has to be noted that the most recent on-the-spot audit in this Member State has shown that it has carried out its action plan and that an operational LPIS-GIS is now in place. Regarding the entitlements, in the period 2005-2007 all Member States except Malta and Slovenia (envisaged 2009) have been subject to audits. These audits showed generally no major weakness.

### *Cross compliance*

Regarding cross compliance, which was identified as a priority in the 25<sup>th</sup> report to the EP on monitoring the application of Community law, its scope was subject in the past to criticisms from both farmers and national administrations (report to the Council on the application of the system of cross compliance establishing common rules for the direct support schemes under the common agricultural policy and establishing certain support schemes for farmers<sup>111</sup>). The main problems highlighted were that certain provisions were not directly related to farming activity. The lack of flexibility of the GAEC framework was also emphasised. The management of cross compliance was also subject to criticisms because it was seen as too complicated. In particular the improvements made to the first pillar in 2007 following the report to the Council were not applicable to the second pillar.

The Health Check has addressed these issues. The provisions not related to farming activity have been withdrawn from the scope of cross compliance and the possibility to apply certain

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<sup>111</sup> COM(2007)147final of 29 March 2007.

GAEC standards on an optional basis has been recognised, while clarifying that no standards may be defined which are not provided for in the EU context. The management rules have also been reviewed at Council level to extend the simplification already made to direct payments also to rural development. Changes to the implementing rule have furthermore better harmonised the management rules between direct payments, rural development and wine. The Council has however concluded the Health Check discussion on cross compliance with a request to pursue the efforts of simplification.

The European Court of Auditors has issued in 2008 a report on cross compliance<sup>112</sup>. It recommends *inter alia* that Member States better define obligations at farm level and recommends also further streamlining of the functioning of the system of cross compliance.

#### 5.2.2.3. Rural development

Taking in account the approval procedure by the Commission of rural development programmes (see above), the global situation of their application may be considered as stabilised and globally satisfactory, unless, in the light of the recent approval of these programmes, experience is not enough to base clear conclusions on what the main problems could be. The audits performed in 2008, mainly concentrated on Axis 2 and more specifically on agri-environmental measures, did not reveal control deficiencies which would suggest that the system in question is ineffective in determining the eligibility of claims or preventing irregularities. However, the control systems in relation to Axis 2 measures could still be further improved.

#### 5.2.2.4. Quality policy

##### *Quality*

Whilst Community agricultural product quality legislation could be described as a fairly stable "acquis" characterised by a globally satisfactory situation, nonetheless, in the course of analysis of this field, it has become clear that a strategic framework for EU action is needed in the short term and could usefully be included in a Communication. Moreover, the existing EU quality schemes (geographical indications and traditional specialities) and measures are in need of attention and a policy review could be envisaged. In particular, procedures should be streamlined and simplified, as applications from Member States are often incomplete and it appears that in a number of cases Member States do not carry out their examination of applications properly before submission to the Commission. These problems should be tackled within the framework of the above mentioned revision of the Quality Policy.

##### *Organic*

Regarding the implementation of the Community rules regarding organic products, with this new legislative framework (see above), the situation is significantly improved. For the first time, the objectives and principles of organic farming are defined at EU level. Competences between the Commission and the Member States are clearly fixed. Controls are under the responsibility of Member States and logically placed under the roof of the Official Food and Feed Control (OFFC) established by Council Regulation (EC) No 882/2004. The implementing rules have been simplified wherever it was possible with the agreement of the Member States in

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<sup>112</sup> Special Report 8/2008.

the relevant Regulatory Committee, and derogations made truly exceptional. However no new development was undertaken, apart from organic yeast rules.

Against this background, the global situation of application of these rules may be considered as stabilised and globally satisfactory. Furthermore, given the recent approval of these rules, experience is not enough to base clear conclusions on what the main problems could be. It is not expected that application or enforcement would create special difficulties as most of the new legislation is directly inspired by the previous one. However, some recent cases seems to indicate that the accreditation of control bodies which is now a formal obligation to be respected by the Member States when they delegate their control tasks, may be a field where certain control bodies experienced difficulties, apparently due to delays in obtaining the necessary accreditation certificate from the relevant authority.

#### 5.2.2.5. Technical standards directive (Directive 98/34/EC)

Following the information available to the Commission the functioning of Directive 98/34/EC in the agricultural sector appears to be satisfactory. In 2008 there were, for example, no infringement procedures launched against the Member States for not following detailed opinions.

One less significant exception to the smooth functioning of Directive 98/34/EC was the Latvian request in May 2008 to get one of their notifications, regarding requirements for integrated production, treated in accordance with the urgent procedure laid down in Article 9(7) of Directive 98/34/EC. This provision stipulates that certain cases, occasioned by serious and unforeseeable circumstances relating to the protection of public health or safety, the protection of animals or the preservation of plants must be treated urgently.

Latvia justified their request for an urgent procedure by stating that unless the notified rules were adopted urgently the legal basis for integrated agricultural production and the control of this process would not be possible. This would, in turn, prevent the Latvian farmers from profiting from the aid foreseen in the Rural Development Plan (RDP) for 2007-2013. However, Commission's examination of the request showed that the reasons given by Latvia would not satisfy the requirements for an urgent procedure as laid down in Article 9(7) of Directive 98/34/EC as the notified measure did not relate to a serious and unforeseeable situation. The Latvian request was therefore rejected.

### 5.3. Evaluation results

#### 5.3.1. *Priorities and action planed 2009*

##### 5.3.1.1. Legislative and management priorities and action programming 2009

#### ***Market instruments***

Beyond the ongoing pursuit of legal and operational simplification, , including the completion of the single CMO by the integration of the wine sector, balanced against protection of the budget expenditures and the principles of subsidiarity and shared management of the budget, or simplification of the hops regime by eliminating the burdensome requirements to register cultivation contracts, the Commission will launch the process needed for the adoption of the second phase of the wine reform notably concerning three draft regulations, two of which are subject to consultation of WTO partners in the context of the Agreement on Technical Barriers to Trade. These regulations concern wine-making practices and restrictions,

Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI) wines, traditional terms, labelling and presentation of certain wine sector products, the vineyard register, obligatory declarations and accompanying documents. Simplification initiatives are still being drafted for intervention, electronic data communication, food aid for most deprived persons, and the fruit juice directive. Moreover, the Commission is taking necessary step to contribute to the evaluation of the tobacco and hops regimes and to amend the "acquis" if necessary, to establish new procedures for Community registration of PDOs and PGIs in the wine sector and of PGIs in the spirit drinks sector. The adoption of the draft amendments to Regulation (EC) N° 1019/82 on marketing standards for olive oil which introduces an obligation to indicate the origin on the labels of extra virgin and virgin olive oils should put an end to the difficulties encountered in this sector with Italy that had established a system of compulsory origin labelling on olive oil packaging.

The financial and economic situation in Member States and globally are having an impact on agricultural products. An additional priority for the moment is to monitor the market situation for each of the products. The price volatility, in particular in the milk sector, requires sharp market monitoring and quick reactions by using the existing market measures as reviewed under the "Health check".

### ***Direct payments and cross compliance***

The proper application of the newly revised legislation in the context of the Health check requires the adoption of detailed implementing rules, particularly for Regulations (EC) N°73/2009 and 74/2009. New implementing regulations will include recasts of Commission Regulations (EC) No 795/2004, 796/2004 and 1973/2004 to establish the implementing rules of Regulation (EC) No 73/2009 needed for 2009 and a cleaning up of obsolete rules as well as implementing rules needed as from 2010 (especially regarding Articles 68 to 72 of Regulation (EC) No 73/2009). Moreover, the Commission intends to provide advice to Member States regarding the implementation of these regulations and to continue with efforts on simplification of the functioning of cross compliance.

### ***Rural development***

The implementation of the Health Check implies the modification of the Implementing Rules of the EAFRD (amending Regulation (EC) No 1974/2006). The implementing rules for controls in rural development, Regulation (EC) No 1975/2006, will be amended in order to clarify and simplify it and to take into account changes made to Regulation (EC) No 796/2004 which has been amended several times and to which there are cross-references.

Regulation (EC) No 1975/2006 already sets out an application deadline for payment claims for area and animal-related measures. This deadline is in accordance with that one set for the first pillar and aligns the system with IACS. In order to guarantee better cash flow for the beneficiaries and to further streamline the controls of area and animal-related measures under the first and second pillar and to guarantee the quality of the controls, a payment deadline for these measures is proposed to be set in Council Regulation (EC) No 1698/2005.

As a consequence of the Health Check and the European Economic Recovery Package, which will imply additional financial resources for rural development, all National Strategy Plans and consequently Rural Development Plans have to be revised.

### ***Quality policy***

**Quality:** In order to ensure a more efficient application of the Regulations, the ongoing productive bilateral "dialogue" with MS will be enhanced. A priority will be also to build on continuous improvements in scrutinizing techniques applied to applications, so as to further accelerate the treatment of files and management of the relevant procedures. In the light of the potential for inconsistencies stemming from the independent development of the diverse instruments that comprise agricultural product quality policy, the need to ensure overall coherence cannot be overstated. Therefore, a comprehensive and coherent global package on Quality will be the essential element. Contributions received from respondents to the public consultation of the Green Paper on agricultural product quality policy provide the basis for the Commission's Communication, to be adopted in May 2009.

**Organic:** The proper application of the newly revised organic Community legislation requires the adoption of detailed implementing rules also in new fields like organic aquaculture and organic wine. The scope of the Community rules was extended to these fields so as to harmonize private and national rules for a better functioning of the market and to respond to increased consumer demand. The implementing rules will be adopted within the framework of the Comitology procedure. A Regulatory Committee, namely the Standing Committee for organic farming (SCOF) must deliver its opinion before adoption of the new rules by the Commission. Beside this role, the SCOF meets regularly to exchange information and to discuss best practices in Member States. Regarding the difficulties encountered with accreditation bodies, if they cannot be solved by MS, before opening infringement proceedings, a satisfactory solution will be looked for through bilateral contacts and open discussion of problems encountered by the Member States within the Standing Committee of Organic Farming (SCOF).

#### *Clearance of accounts*

For 2009, the annual work plan foresees 139 conformity audits with missions plus 5 IT audits and several desk checks of which the number is estimated to be around 50 based on last years' experience.

#### 5.3.1.2. Enforcement priorities

As already mentioned, in the area of agriculture and rural development, monitoring the application of Community law under Article 226 EC proceeding concentrates on two main objectives: removing barriers to the free movement of agricultural products and ensuring that the more specific mechanisms of agricultural regulations are applied effectively and correctly.

In the use of the infringement procedure, priority will be granted to cases which raise issues concerning the compatibility of Member States' legislative, regulatory or administrative measures with Community agricultural rules and to cases where Member States concerned refrain from applying the aforementioned common rules, in both cases where such problems jeopardize the effectiveness of important mechanisms of the common agricultural policy, particularly regarding the 1st pillar.

For the years 2009 and 2010, the Commission will in particular be vigilant in pursuing infringements of the type described in the previous paragraph challenging the application of

the CMO's reform in the fruit and vegetable and wine sectors and those which would affect the application of the direct payment regime, and in particular "cross compliance"<sup>113</sup>.

Furthermore, if the bilateral contacts established with MS with the aim to convince them to accredit correctly the control bodies in the organic products sector fail, the Commission would make use of the infringement procedure.

## **6. ENERGY AND TRANSPORT**

### **6.1. ENERGY - Internal electricity and gas market**

#### *6.1.1. Current position*

##### 6.1.1.1. General introduction

Relevant legislations for the internal electricity and gas market are: Directives 2003/54 and 55, of 26 June 2003 concerning common rules for the internal market in electricity and gas, respectively; Directive 2005/89 of 18 January 2006, concerning measures to safeguard security of electricity supply and infrastructure investment; Regulation 1228/2003 of 26 June 2003, on conditions for access to the network for cross-border exchanges in electricity; Regulation 1775/2005 of 28 September 2005 on conditions for access to the natural gas transmission networks.

##### 6.1.1.2. Report of work done in 2008

#### *Enquires, problems and complaints*

Some complaints were received in 2008. Problems reported mainly refer to the malfunctioning of cross-border trade, the preferential treatment of national supplier in the electricity sector and to the protection of national markets through the imposing of electricity export fees. In the gas sector, the publication of the relevant entry and exit points, contracted and available capacities, and historical flows was found to be unsatisfactory in a number of Member States.

Coexistence of open energy markets and regulated energy prices was still to be registered quite commonly among EU Member States in 2008: more than half of the Member States have regulated prices which in the majority of Member States are not confined to household customers. The negative effects of regulated energy prices was and still is to be a major concern in terms of the proper functioning of the internal energy market. Indeed regulated prices can lead to a distortion of competition and do not send the right price signals to the market (influencing investments and incentives for energy efficiency).

#### *Management of infringements*

More than four years after the time-limit (1 July 2004), the implementation of the Electricity 2003/54/EC and Gas Directives 2003/55/EC ("second package") is still not entirely complete. Several Member States have correctly implemented both Directives through appropriate national legislation and some progress has also to be registered in other Member States. In

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<sup>113</sup> The use of the infringement procedure will be favoured in cases where the absence of financial consequences of the infringement would not allow for recourse to the clearance of accounts procedure.

some cases Member States brought their national laws into line with EU legislation after reasoned opinions being issued by the Commission.

As regards Directive 2005/89 Member States were obliged to transpose and implement provisions of the Directive by 24.02.2008. Ten Member States notified complete transposition before the time-limit. Infringement cases for non communication were started against the remaining 17 Member States. Twelve of these notified the transposing measures by the end of 2008.

### *New legislation*

In 2008 the Commission negotiated with the Council and the Parliament five new legislation acts (third internal energy market package)<sup>114</sup>, which identified several malfunctions in the electricity and gas markets and proposed remedies. In June and July 2008, the package passed its first reading in the European Parliament; in October 2008, the common position was adopted by the Council. The third package was finally adopted mid 2009<sup>115</sup>.

#### *6.1.2. Evaluation of the current position*

In 2008 a great deal of effort was put into enhancing competition on the wholesale market; significant progress was made through the regional initiatives. There also seems to be a new trend towards building new energy infrastructure. However in spite of some encouraging results and the benefits of the liberalisation process, the full potential of liberalisation has not yet been realised. While the situation in more mature markets is demonstrating the potential benefits of energy market liberalisation, there are still a number of areas and Member States where significant obstacles to the efficient functioning of the electricity and gas market persist. A major concern is the incomplete implementation of European electricity and gas legislation. There are still some areas and Member States where the existing legislation (second internal market package) has not yet been properly implemented or where the need for new legislation has become evident. For this reason, during 2008 the Commission has taken actions, on the one hand, to ensure the correct implementation of EU legislation at national level through the application of infringement procedures and, on the other hand, to complement the internal market legislation with the third internal energy market package.

#### *6.1.3. Evaluation results*

The Commission's services have identified the main areas where there is failure to comply with the electricity and gas Directives and Regulations and the main actions to be undertaken. In particular, infringement proceedings will focus in the gas and electricity sector on specific items such as: regulated prices, penalties, transparency and capacity allocation of networks; third party access and consumer protection, all in both sectors, and security of supply in the electricity sector.

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<sup>114</sup> The package comprises:  
An Electricity Directive amending and completing the existing Electricity Directive 2003/54  
A Gas Directive amending and completing the existing Gas Directive 2003/55  
An Electricity Regulation amending and completing the existing Electricity Regulation 1228/03  
A Gas Regulation amending and completing the existing Gas Regulation 1775/05  
A Regulation establishing an Agency for the Cooperation of Energy Regulators

<sup>115</sup> [http://ec.europa.eu/energy/gas\\_electricity/third\\_legislative\\_package\\_en.htm](http://ec.europa.eu/energy/gas_electricity/third_legislative_package_en.htm)



In addition meetings with MS are planned in order to facilitate the transposition of the third package.

#### *6.1.4. Sector summary*

While the situation in more mature markets is demonstrating the potential benefits of energy market liberalisation, there are still some areas and Member States where significant obstacles to the efficient functioning of the electricity and gas market persist. While there are still some areas and Member States where the existing legislation (second internal market package) has not yet been properly implemented, the need for new legislation has become evident.

The Commission's efforts are therefore concentrating in ensuring an efficient implementation of the existing and forthcoming legislation, by combining action in two fields:

- Remedial field: The main areas where there is failure to comply with the electricity and gas Directives and Regulations and the main actions to be undertaken have been identified, on this basis, infringement proceedings will focus in 2009 on specific items such as: regulated prices, penalties, transparency and capacity allocation of networks; third party access and consumer protection, all in both sectors, and security of supply in the electricity sector.

- Preventive field: different actions will be planned in order to facilitate the transposition of the third internal energy package.

## **6.2. ENERGY - Coal and Oil**

### *6.2.1. Current position*

#### *6.2.1.1. General introduction*

Of the relevant legislation in the area of coal and oil, the bulk of the Commission's work in Community law management in 2008 concerned Directives 2006/67 (Council Directive 2006/67/EC of 24 July 2006 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products – Codified version ; OJ L 217, 8.8.2006, p. 8) and 94/22 (Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons; OJ L 164, 30.6.1994, p. 3).

Other relevant legislation includes:

Council Directive 73/238/EEC of 24 July 1973 on measures to mitigate the effects of difficulties in the supply of crude oil and petroleum products (OJ L 228, 16.08.1973, p1-2), Council Decision 68/416/EEC of 20 December 1968 on the conclusion and implementation of individual agreements between Governments relating to the obligation of Member States to maintain minimum stocks of crude oil and /or petroleum products (OJ L 308, 23.12.1968, p.19).

#### *6.2.1.2. Work done in 2008*

### ***Infringements***

With respect to Directive 94/22, the Commission continued to process publication requests received from Member States pursuant to the provisions of the Directive but also followed

implementation of the same Directive in Member States. Several infringements procedures were pursued in 2008: as regards the obligation of Member States to duly notify competent authorities, the Commission issued both a letter of formal notice and a reasoned opinion in 2008 in a procedure opened against Belgium; in a file concerning Poland, an infringement procedure reached the stage of the reasoned opinion, where the Commission asked Poland to correct its procedures for granting rights over oil and gas resources.

As regards Directive 2006/67, infringement cases were also treated in 2008, related either to the non-compliance with the obligatory stocks minima set in the legislation or with other aspects of the legislation. An infringement procedure against Belgium for insufficient stock levels resulted in an ECJ ruling in favor of the Commission (case C-510/07) in July 2008. An infringement procedure against Ireland was launched in 2008 on the grounds that its national legislation allows stocks to be used as collateral.

### *New legislation*

The March 2007 European Council underlined the need to enhance the security of supply for the EU and highlighted the need to review EU oil stocks mechanisms.

Though no particular system in a Member State has to date demonstrably failed to provide for adequate supplies in case of crisis nor has been ruled as inadequate e.g. by the ECJ, the number and character of infringement proceedings in specific instances cast strong doubts on current practices, especially when considered together with other circumstantial evidence of possible irregularities in the current system found e.g. through International Energy Agency and/or Commission activities and/or assessments.

In particular, analysis of the current system reveals flaws which might prevent it from functioning suitably in case of an actual supply disruption. There are doubts whether the current system could guarantee that the stocks held for emergencies would be fully available and could be effectively mobilized as needed. The EU also lacks coordinated intervention procedures, rendering prompt decision making and effective actions very difficult in practice. Finally, the current system exists in parallel with an IEA system, resulting in dual obligations for Member States who are also members of the IEA.

A public consultation was carried out between April and June 2008 to ascertain the views of all interested parties on possible revision of the existing legislation on emergency oil stocks, including platforms such as the Oil Supply Group and the Fossil Fuels (also known as Berlin) Forum, informal meetings with Member States, the stakeholder community and external experts, and the external expertise of the International Energy Agency (IEA).

Based on the results of these consultations, the Commission adopted in November 2008 a Proposal for a Council Directive imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products (COM/2008/0775 final). The proposal pays special attention to the provisions addressing availability of stocks, administrative arrangements needed for proper stocks management and rules for an EU crisis mechanism that could work complementarily with the IEA rules.

#### *6.2.2. Evaluation of the current position*

The draft legislation is presently discussed in the Council. Its adoption is foreseen for late 2009 and will represent a satisfactory development which will improve the current situation.

Once adopted, the proposal will replace the current three pieces of EU legislation on emergency stocks. By aligning the stockholding obligation with that of the IEA, it will also simplify Member States' administrative procedures.

#### *6.2.3. Evaluation results*

The Commission's resources will be concentrated on the negotiation and adoption of the new Directive, and its correct implementation afterwards.

#### *6.2.4. Sector summary*

Analysis of the current system for the security of supply in oil and petrol revealed some weaknesses that might prevent it from functioning suitably in case of an actual supply disruption, due in particular to the lack of coordinated intervention procedures at EU level, that would rend a prompt and effective reaction very difficult in practice, and to the co-existence of the EU system with the IEA system, resulting in dual obligations for Member States who are also members of the IEA.

The proposal for a new Directive that intends to replace the current three pieces of EU legislation on emergency stocks pays special attention to the provisions addressing availability of stocks, administrative arrangements needed for proper stocks management and rules for an EU crisis mechanism that will be complementary to the IEA rules, and will contribute to simplify Member States' administrative procedures.

### **6.3. ENERGY - Renewable energy sources**

#### *6.3.1. Current position*

##### *6.3.1.1. General introduction*

Main pieces of Community acquis are:

- Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity from renewable energy sources in the internal electricity market
- Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport.
- Directive 2009/28/EC of the European Parliament and of the Council of 5 June 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

##### *6.3.1.2. Report on the work done in 2008*

A range of infringement procedures have been launched to encourage Member States to take further action; 16 cases are still open. The inadequate action by Member States reflects the need for a stronger regulatory framework. The Commission is still pursuing Member States who are not making sufficient progress towards their targets. In 2008 several cases were successfully closed.

But in addition, in January 2008 the Commission proposed a new Directive on the promotion of the use of energy from renewable sources, which imposes legally binding targets and a range of supplementary measures that should spur growth in the future, to enable the EU to reach the new 20% 2020 target.

The successful negotiations on this proposal resulted in political agreement in December and adoption of Directive 2009/28/EC. Thus the Community will have a new legal framework for the promotion of renewable energy from 2010 and the two existing directives will be repealed.

### 6.3.2. *Evaluation of the current position*

Whilst some progress has been made, the EU is unlikely to meet the 2010 targets established by the Directives.

Regarding Directive 2001/77/EC only six Member States have made over 50% of the effort needed to reach their 2010 target (based on their reference year); eight Member States actually have the same or even a lower share of renewable electricity than in their reference year and five Member States had negative growth in their renewable electricity share in the last two years.

Regarding Directive 2003/30/EC, five Member States had not made any of the effort needed to reach their 2010 targets and only one Member State has reached its target. In addition 15 Member States achieved zero or even negative growth in their share of renewable energy in transport in the last two years.

### 6.3.3. *Evaluation results*

#### 6.3.3.1. *Priorities*

A progress report issued in [April 2009 (COM(2009)192)] on the Directives builds on the findings of the earlier progress reports (COM(2006)849 and SEC(2008)57).

#### 6.3.3.2. *Planned action*

As the 2010 target is essentially a minimum requirement for the agreed 2020 targets in each Member State, efforts will be dedicated to ensure the enforcement of the existing directives.

In addition, the Commission will open proceedings against the worst performing Member States as a signal that the 2010 targets must still be achieved.

### 6.3.4. *Sector summary*

The Commission has continued to enforce the existing *acquis* on renewable energy and the progress reports it has prepared over the years have highlighted the inadequate attention given to this issue by most Member States. The Commission therefore proposed a new, broader legislative regime, in the context of the energy and climate package. Many resources were devoted in 2008 to prepare, explain and then negotiate the new Directive, which was agreed in December 2008. Year 2009 will be spent helping Member States implement the new Directive (preparing the template for the national action plans, guidance on biofuel sustainability, transparency platform...). This will ensure that the ground is prepared for Member States to develop their renewable energy sources to achieve their 2020 objectives.

## **6.4. ENERGY - Energy Efficiency of Products**

### *6.4.1. Current position*

#### 6.4.1.1. General introduction

Main provisions in this field are as follows:

- Directive 2005/32/EC of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products
- Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances

#### 6.4.1.2. Report on the work done in 2008

With regard to the energy efficiency of products the activity was focused on:

(a) the implementation of Framework Directives 2005/32/EC and 92/75/EEC. To this end 6 public consultations and 4 meetings of the Committee on the Ecodesign and Energy Labelling of Energy-using Products (EELEP) were held. This has led to the endorsement by the Committee and a subsequent adoption by the Commission of 5 implementing regulations of Directive 2005/32/EC, setting ecodesign requirements for standby and off mode electric power consumption of electrical and electronic household and office equipment, for external power supplies, for simple set-top boxes, for tertiary and domestic sector lighting equipment (including a phase-out of incandescent bulbs). These implementing measures will be directly applicable in Member States and are expected to result by 2020 in annual energy savings amounting to 125 TWh. In parallel there was ongoing work (preparatory studies, impact assessments, stakeholder meetings) for the preparation of additional implementing measures for almost 20 product groups. In what regards the transposition of Directive 2005/32/EC, out of the 21 infringement procedures for non-communication of transposition that were initiated in September 2007 all but 5 could be closed by the end of 2008.

(b) the revision of Framework Directives 2005/32/EC<sup>116</sup> and 92/75/EEC<sup>117</sup>, the latter as a part of the Commission's Second Strategic Energy Review - Securing our Energy Future adopted in November 2008. The two proposals essentially aimed at broadening the scope of the two directives, to include also energy-related products. Furthermore the recast of Directive 92/75/EEC aimed at simplifying legislation and ensuring a uniform implementation on the internal market by using implementing Regulations instead of implementing Directives. It also clarifies the respective responsibilities of manufacturers and distributors as regards labelling by aligning the according definitions with the newly adopted 'New Approach' package. Both proposals were preceded by public consultations and were accompanied by impact assessments.

(c) the tabling of a new legislative proposal on the labelling of tyres with respect to fuel efficiency and other essential parameters (COM/2008/0779) which aims at increasing vehicles

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<sup>116</sup> Proposal for a Directive of the European Parliament and of the Council establishing a framework for the setting of ecodesign requirements for energy related products (COM(2008)399)

<sup>117</sup> Proposal for a Directive on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (COM(2008)778)

fuel efficiency while supporting the market transformation towards fuel efficient tyres. The proposal was preceded by a public consultation and was accompanied by an impact assessment.

All of the above activities contributed to the EU goals on energy efficiency.

#### *6.4.2. Evaluation of the current position*

The activities carried out in 2008 resulted in the tabling of several legislative proposals that are expected to have a significant contribution to the EU goals on energy and climate change. These activities also paved the way for the adoption of additional measures in 2009.

#### *6.4.3. Evaluation results*

##### *6.4.3.1. Priorities*

Priority will be given to the enforcement of the existing legislation and to ensuring that, as from 2009, the forthcoming legislation and accompanying measures are applied by Member States as swiftly and quickly as possible.

##### *6.4.3.2. Planned Action*

Efforts will be concentrated in the negotiation and forthcoming adoption by the Council and the European Parliament of the three legislative proposals on energy labeling, ecodesign and labeling of tyres.

Resources will also be devoted to the preparation of implementing measures concerning the ecodesign and labeling of such products as televisions, refrigerators, washing machines, motors, water heaters and other.

#### *6.4.4. Sector summary*

In the context of the Second Strategic Energy Review adopted in November 2008, the Commission's activities in the field of Energy Efficiency of Products are concentrated in the enforcement of the existing *acquis* and in the negotiation and forthcoming adoption by the Council and the European Parliament of the three legislative proposals on energy labeling, ecodesign and labeling of tyres. It is also expected that the Commission will adopt several implementing measures under Directive 2005/32/EC and Directive 92/75/EEC addressing such products as televisions, refrigerators, washing machines, motors, water heaters and other.

### **6.5. ENERGY - Energy performance of buildings**

#### *6.5.1. Current position*

##### *6.5.1.1. General introduction*

Main piece of Community *acquis* is Directive 2002/91/EC of the European Parliament and of the Council of 16 December on the energy performance of buildings.

##### *6.5.1.2. Report on the work done in 2008*

The main activity in the field of energy efficiency in the building sector was the tabling of a proposal for a recast of the Directive of the European Parliament and of the Council on the

energy performance of buildings (COM(2008)780final), as a part of the Commission's Second Strategic Energy Review - Securing our Energy Future in November 2008. This proposal intends to simply and strengthen the provisions of current Directive 2002/91/EC on the energy performance of buildings (hereafter: "EPBD") and thus to increase the energy efficiency of Europe's building stock, to tackle climate change and to contribute to an increased security of energy supply.

In order to provide the Commission with the necessary input and background information, several consultation rounds and events were organised.

During the second EU Sustainable Energy Week in January 2008 a specific conference focused on the Commission's ideas for extending the scope of the Directive and discussed the practical aspects of its implementation with the involvement of different stakeholders who are engaged in the daily application of the EPBD. This stakeholder conference was supplemented by 2 meetings of the Member States' representatives of the Energy Demand Management Committee (buildings formation). The public had a chance to express its views during the public consultation that was held between April and June. Apart from the organised consultation initiatives, a great effort was made in answering numerous individual opinions and requests for information.

This effort in dissemination and consultation was continued with the further development of the Buildings Platform ([www.buildingsplatform.org](http://www.buildingsplatform.org)) as an information point with regard to the Energy Performance of Buildings Directive. To support European countries in implementing the Directive, the Concerted Action EPBD was further developed by the Commission. This instrument is intended to promote dialogue and exchange of best practice. As an active forum of national authorities from 29 countries, it focuses on finding common approaches to the most effective implementation of this EU legislation.

The work on the new proposal did not divert the attention from the enforcement of the existing legislation. Infringement proceedings continued against 13 Member States for failure to notify the transposing measures for the Directive; 13 cases could be closed in the course of the year, after notification of the relevant texts. The examination of the notified national implementing measures having highlighted some shortcomings, the Commission opened a total of 6 new non-conformity cases.

#### *6.5.2. Evaluation of the current position*

Overall, it can be concluded that the present situation is evolving according to the priorities. The Commission has tabled an ambitious proposal that strengthens the current legislation; it also made considerable progress in enforcing its existing legislation.

#### *6.5.3. Evaluation results*

##### *6.5.3.1. Priorities*

Attention will focus on the enforcement of the existing legislation and to ensuring that, as from 2009, the forthcoming legislation and accompanying measures are applied by Member States as swiftly and quickly as possible.

### 6.5.3.2. Planned Action

Efforts will be concentrated in addressing the shortcomings in the implementation of Directive 2002/91/EC and in paving the way for the implementation of the newly proposed legislation recasting this Directive.

### 6.5.4. Sector summary

In the context of the Second Strategic Energy Review adopted in November 2008, the Commission's activities in the field of Energy Performance of Buildings are concentrated in the enforcement of Directive 2002/91/EC and in the negotiation and forthcoming adoption by the Council and the European Parliament of the newly proposed recasting Directive.

## 6.6. ENERGY - Energy end-use efficiency and energy services

### 6.6.1. Current position

#### 6.6.1.1. General introduction

Main piece of Community acquis is Directive 2006/32/EC of the European Parliament and the Council of 5 April 2006 on energy end-use efficiency and energy services.

#### 6.6.1.2. Report on the work done in 2008

With regard to Energy end-use efficiency and energy services, the efforts in consolidating the existing legislation were continued. Focus was laid on the implementation by the Member States and the follow-up of their National Energy Efficiency Action Plans (NEEAPs). After ensuring that all Member States complied with their reporting obligations, the Commission started with the assessment the submitted reports.

The Plans submitted varied considerably in quality, and since this reporting effort was a first for the Member States, the Commission attached great importance to consultation and dialogue. In meetings with representatives of the Member States the Commission conveyed its observations, giving them the opportunity, where necessary, to review/improve their Plans. An overall discussion was organised under the umbrella of the EU Sustainable Energy Week. By helping the Member States meeting their obligations, the Commission contributed to the strengthening of their energy policy and to the sustainability of their individual goals.

The Commission also pursued the implementation of the Directive by organising two Energy Demand Management Committee meetings (energy services formation) and an equal number of expert working groups. Apart from discussing the progress on the NEAAPs, a major effort was made in preparing the development of a set of harmonised energy efficiency indicators.

The overall effort on energy end-use efficiency and energy services resulted in the Communication "Energy efficiency: delivering the 20% target" (COM(2008)772 final). This document provides an analysis of the efforts made in the field of energy efficiency. Although it is too early to assess the full effects the existing legislation, a quantitative evaluation of the expected impact of the most relevant efficiency measures when fully implemented, reveals that the EU and Member States are not doing well enough and that more action is needed.



### *6.6.2. Evaluation of the current position*

As far as the establishment of the NEEAPs is concerned, the situation is stable and acceptable. The Member States have generally reacted positively to our remarks on their first NEEAPs and this should bode well for the quality of the subsequent NEEAPs, the next of which, the second, is to be submitted not later than 30 June 2011.

Regarding transposition, the Commission will start an in-depth analysis of the notified legislation and, where necessary, start infringement proceedings for non-compliance.

### *6.6.3. Evaluation results*

#### *6.6.3.1. Priorities*

Primary attention will be paid to the enforcement of the existing legislation.

#### *6.6.3.2. Planned Action*

Efforts will be concentrated in making sure that Member States are taking appropriate measures to transpose the provisions of the Directive 2006/32 into national law and that they are applied and enforced effectively.

### *6.6.4. Sector summary*

With regard to Energy end-use efficiency and energy services, focus was laid on the implementation by the Member States of the Directive and the follow-up of their National Energy Efficiency Action Plans (NEEAPs). Although it is too early to assess the full effects of the existing legislation, a quantitative evaluation of the expected impact of the most relevant efficiency measures when fully implemented, reveals that more action is needed at EU and national level. Efforts will therefore concentrate in consolidating the existing legislation, monitoring the actual implementation and enforcement of Directive 2006/32 and addressing cases of non-compliance.

## **6.7. ENERGY - Combined heat and power generation (cogeneration, CHP)**

### *6.7.1. Current position*

#### *6.7.1.1. General introduction*

Main piece of legislation is Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market.

#### *6.7.1.2. Report on the work done in 2008*

Work done during 2008 with regard to cogeneration is well reflected in the Commission's Second Strategic Energy Review - Securing our Energy Future adopted in November 2008.

The main achievement was the approval of the detailed guidelines for calculation of electricity from cogeneration (C(2008) 7294) in November 2008. These guidelines are the result of an extended dialogue between the Commission and the Member States. In the framework of the adoption procedure, 2 committee meetings have been organised. The unanimous approval by the Committee Members showed the general acceptance of the

Commission's proposal. The decision on the detailed guidelines is a key element in the implementation process of the Directive.

The adoption of the guidelines also allowed the Commission to step up its efforts in enforcing the implementation of the Directive. Member States now dispose of all elements necessary for a complete transposition of all their obligations.

In addition the Commission also issued the communication "Europe can save more energy by combined heat and power generation" (COM(2008) 771 final). With this Communication the Commission intended to report on the current status of the combined heat and power generation in the EU, and to present possibilities for its development.

#### *6.7.2. Evaluation of the current position*

In general, the situation regarding cogeneration is evolving. Although some Member States encounter difficulties in meeting their reporting and transposition obligations, the overall trend is positive.

The Guidelines for calculation of electricity from cogeneration having been adopted, there is no remaining obstacle for full transposition of the Directive.

#### *6.7.3. Evaluation results*

##### *6.7.3.1. Priorities*

Primary attention will be paid to achieving full transposition in the Directive in all Member States and to remove outstanding barriers to the development of cogeneration.

##### *6.7.3.2. Planned action*

The Commission will increase its efforts with regard to the follow-up and enforcement of the existing legislation. Six months after the publication of the Guidelines, infringement procedures will be opened for failure to implement the Directive provisions, as relevant.

The Commission will continue to monitor the process and will present further proposals if appropriate to foster cogeneration. As a first step, the Commission will evaluate the Energy Efficiency Action Plan in 2009 with a view to producing an update.

#### *6.7.4. Sector summary*

As monitoring of the implementation continues, despite the absence of or late reporting by Member States, the Commission acknowledges the administrative and non-administrative barriers hampering the development of cogeneration. Some of these barriers have been already addressed by the Commission, such as the set-up of harmonised efficiency reference values and the adoption of Community detailed guidelines for the calculation of electricity produced from cogeneration, as previously mentioned.

## **6.8. ENERGY - Nuclear Energy**

### *6.8.1. Current position*

#### 6.8.1.1. General introduction

In terms of control of implementation, the main piece of secondary legislation is Directive 96/29/Euratom laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation (Basic Safety Standards Directive), as supplemented by a series of directives covering fields such as medical applications of ionising radiation (Directive 97/43/Euratom), information in case of radiological emergency (Decision 87/600/Euratom and Directive 89/618/Euratom); protection of so-called "outside workers" (Directive 90/641/Euratom); shipments of radioactive waste and substances (Directive 2006/117/Euratom and Regulation (Euratom) No 1493/93), and the control of high activity sealed radioactive sources (Directive 2003/122/Euratom).

Commission Regulation (Euratom) No 302/2005 defines the nature and extent of the requirements referred to in Articles 78 and 79 of the Euratom Treaty on the application of nuclear safeguards.

#### 6.8.1.2. Report of work done in 2008

The Group of Experts provided for in Article 31 of the Euratom Treaty met twice in June and November 2008. One of the June meeting's main topics was the positive opinion given by the Group on the draft proposal for a Euratom Council Directive on radioactive substances in water intended for human consumption. The November meeting discussed mainly the ongoing recast of the Basic Safety Standards Directive. During this meeting the Group delivered a positive opinion on the extension for 10 years of Council Regulation 733/2008 (EC) No 733/2008 (codified version of Council Regulation (EEC) No 737/90) on the conditions governing the import of agricultural products following the Chernobyl accident.

The European High level Group on Nuclear Safety and Waste Management or European Nuclear Safety Regulators Group (HLG or ENSREG) met five times. In particular, it gave its input to the Commission's draft proposal on the nuclear safety directive. The Group has to submit regular reports on its activities to the Commission, the European Parliament and the Council. The first report of the Group is expected by 17 July 2009, two years after its creation.

The European Nuclear Energy Forum (ENEF), endorsed by the European Council in March 2007, is a platform to engage in a broad discussion among all stakeholders on the opportunities and risks of nuclear energy. Hosted successively in Bratislava and Prague, ENEF held its two biannual meetings on 22-23 May and 3-4 November 2008. It gave a supportive opinion on the requirement to propose a revised nuclear safety directive. The next plenary session of the Forum will take place in Prague under the Czech Presidency on 29 May 2009.

In 2008, the Commission dealt with 31 notifications under Article 33 Euratom. Most of them concerned the implementation of Directive 2006/117/Euratom of 20 November 2006 on the supervision and control of shipments of radioactive waste and spent fuel, whose correct implementation was one of the main priorities of the Commission Services in 2008. The submission of draft texts under Article 33 Euratom allows the Commission to make appropriate recommendations or remarks before the finalisation of the national procedure for

the adoption of transposition measures, so that possible instances of non-compliance can be identified even before the texts are adopted.

The Commission services conducted seven verification missions under Article 35 Euratom. The purpose was to provide an independent assessment on the adequacy of facilities intended to monitor levels of radioactivity in the environment. All verifications started with a preliminary audit of the monitoring and inspection activities carried out by the relevant national authorities and of the legal framework in force.

Seven opinions were adopted by the Commission in accordance with Article 37 of the Euratom Treaty, concerning plans for the disposal of radioactive waste.

On 15 July 2008, the Commission issued its opinion under Article 43 Euratom Treaty concerning the completion on units 3 and 4 of Mochovce Nuclear Power Plant in the Slovak Republic. In its viewpoint the Commission underlined, inter alia, the need of additional security requirements to be fully in line with the Euratom Treaty requirements.

On external relations, Article 103 Euratom establishes a procedure for the preliminary examination of the compatibility with the Treaty of draft agreements or contracts which are about to be concluded, within the scope of the Treaty, between a Member State and a third party. In 2008, a total of 23 notifications were examined by the Commission.

Under Article 105 Euratom, new Member States communicate to the Commission, within 30 days from their accession to the EU, the agreements or contracts they may have concluded with a third party prior to their accession. Concerning the two newest Member States, Bulgaria and Romania, the contracts and agreements that could not be dealt with in 2007 were checked and grandfathered in 2008.

In the Euratom area, several long-standing infringement procedures could be closed in 2008 and the total number of infringement procedures decreased to a total of 6 at the end of the year. Prioritisation was not applied in the management of infringement procedures, as all files could be managed in the normal timeframe and fell roughly under the same level of priority.

During 2008, 6 petitions were dealt with related to the Euratom provisions. Adequate answers were provided but the EP's Petitions Committee did not yet accept the closure of the cases.

A proposal for a Council Directive (Euratom) setting up a Community framework for nuclear safety was adopted by the Commission on 26 November 2008. It transposes into Community law the IAEA Fundamental Safety Principles and the obligations of the Convention on Nuclear Safety. It strengthens substantially the independent role of national Regulators and improves transparency on nuclear safety.

As part of the Second Strategic Energy Review, the 2007 Nuclear Illustrative Programme (PINIC) was updated, making a number of recommendations: proposing that future new build is of the latest technology; ensuring the highest standards of nuclear safety as well as simplifying and harmonising the currently differing licensing requirements and procedures in the Member States. It highlights that by 2020, nearly two-thirds of EU electricity production could be carbon free if rapid investment decisions are taken with regard to renewable energy sources as well as nuclear energy.

The revision of the Basic Safety Standards Directive is also the opportunity for the consolidation of existing radiation protection legislation involving four other Directives and

incorporating one Commission Recommendation. In 2008, the revision and consolidation made good progress and a first entire draft text was prepared. Part of the draft text was presented to the Article 31 Group of Experts for a first discussion.

The Commission undertook the revision of its Recommendation on the implementation of Art. 37 of the Euratom Treaty with a view to clarify, simplify and improve its provisions based on the experience. In 2008 the revision made good progress and after 3 meetings of the assigned Working Group of Article 37 Experts, the Commission will be in a position beginning 2009 to prepare a consolidated draft revised text to be presented mid 2009 to the Article 37 Group of Experts.

As potential co-sponsor, the Commission took a very active part in the ongoing revision of the International Basic Safety Standards, prepared by the International Atomic Energy Agency.

Based on the experience with two radiological alert situations in 2008 (Krsko NPP, IRE Fleurus), the Commission undertook the revision of the ECURIE<sup>118</sup> emergency communication guidelines, amongst other reasons to allow for a reduced threshold for international communications on nuclear incidents.

Preparations are underway to move towards a broad cooperation agreement with Russia on the peaceful uses of nuclear energy, covering nuclear trade based on reciprocity and market access (as the current negotiating mandate from 2003 provides) as well as nuclear safety, waste management, physical protection, non-proliferation, liability issues etc. To this end, a revised mandate for negotiation of a broad Euratom-Russia cooperation agreement in the peaceful uses of nuclear energy is being prepared.

The Commission adopted a proposal for a Council Decision on the new mandate to recast the Euratom-Canada agreement, with a view to simplify the current agreement (modified in several occasions since its signature 50 years ago) and to include, at Canada's request, new provisions, mainly on technology transfer and on the contamination principle.

Preventive measures were taken for the implementation of Directive 2006/117/Euratom on the supervision and control of shipments of radioactive waste and spent fuel, which was due to be transposed by 25 December. Its correct implementation was prepared and supervised by the way of 26 procedures under Article 33 Euratom. On 5 March 2008, the Commission adopted the standard document foreseen in the Directive, to be used for all shipments within its scope, and on 4 December 2008, the Commission adopted a Recommendation establishing criteria for the export of radioactive waste and spent fuel to third countries. The criteria aim to enable the Member States' competent authorities to evaluate whether a third country to which exports are not prohibited has the ability to manage waste or spent fuel safely.

#### 6.8.2. *Evaluation of the current position*

The current situation for the control of the existing *acquis* is stable. Whereas in 2008 a large number of existing infringements cases could be solved and closed, early 2009 the number of files increased following the expiry of the Member States' deadline for implementation of Council Directive 2006/117/Euratom in December 2008. The resulting workload should be manageable, as Member States are expected to make progress with transposing this Directive in the first months of 2009 (based on the information resulting from Article 33 submissions).

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<sup>118</sup> European Community Urgent Radiological Information Exchange for Nuclear Emergencies

The immediate future situation should be manageable, too, and much effort will be devoted to the control of conformity of the most recently adopted Directives, which might result in an increase in the number of infringement procedures.

In the medium term, a significant intensification of the workload is expected when the two major proposals for new Directives (on nuclear safety and recasting the BSS) will have to be implemented.

### 6.8.3. *Evaluation results*

#### 6.8.3.1. Priorities

A priority objective for 2009 will remain to achieve a high level of safety and security for the European citizens.

The Commission's efforts will focus on the one hand on consolidating the *acquis* in place, through the monitoring of the implementation of most recently adopted directives, and, on the other hand, on further legislative developments.

#### 6.8.3.2. Planned Action

A systematic conformity check will be made concerning Directive 2003/122/Euratom on High-Activity Sealed Sources and Orphan Sources.

The control of transposition and implementation of Directive 2006/117/Euratom on the surveillance and control of shipments of radioactive waste and spent fuel will be started. Concerning this Directive, a Commission Recommendation is planned for the establishment of a secure and effective data transmission system.

The negotiations for the adoption of a Community framework on nuclear safety will be pursued, with a view to a prompt adoption.

### 6.8.4. *Sector summary*

Given the renewed and growing interest in nuclear energy, the Commission is called to accompany the expected development with an advanced legal and binding framework based on the Euratom Treaty that maintains and improves the high standard of regulation achieved in the EU Member States. Primary attention will be given to the consolidation of the existing legislation, to the updating of the radiation protection *acquis* and to the establishment of a legislative framework that allows the Community to fully use its competences in the field of nuclear safety. The key actions in the near future, for which substantial work was already carried out during 2008, will therefore concern the control of implementation of the most recent Directives, on high activity radioactive sources and on shipments of radioactive waste and nuclear fuel; the negotiation and implementation of the proposal for a Council Directive setting up a Community framework for nuclear safety, and the recast of the Basic Safety Standards, for which a proposal is expected during the course of 2010, that will set modern, unified standards for the protection of the health of the citizens in the European Union.

## 6.9. TRANSPORT - Passengers' rights

### 6.9.1. Current position

#### 6.9.1.1. General introduction

Since the 2001 White Paper, where the Commission announced the establishment of passengers' rights in all modes of transport and its intention to place users at the heart of transport policy, three Regulations will have entered into force by the end of 2009, in the sectors of aviation and rail transport:

- Regulation (EC) N° 261/2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights;
- Regulation (EC) N° 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air;
- Regulation (EC) N° 1371/2007 on rail passengers' rights and obligations, applicable as from December 2009.

These pieces of legislation are complemented with Regulation (EC) N° 2027/97 of 9 October 1997 on air carrier liability in the event of accidents, as amended by Regulation (EC) No 889/2002. The overall regulatory background on air passenger rights also includes other legislation, for example: Regulation 1008/2008, on common rules for the operation of air services in the Community; Directive 96/67, which defines the conditions for access to the ground-handling market at European airports, and therefore could be used as leverage to improve the quality of baggage handling in order to prevent baggage damage or mishandling; and Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC.

#### 6.9.1.2. Report on the work done

The Commission's activities continued efforts in order to guarantee a correct implementation of the provisions protecting air passengers' rights in general, and those of passengers with reduced mobility in particular when travelling by air.

- Passengers with reduced mobility (PRM). A stakeholders' conference was organised in January 2008 to ensure a successful full application of Regulation n° 1107/2006 as from July 2008 and to make each category of operators aware of the specific needs and constraints of the stakeholders concerned. A workshop with the PRM organisations was held to ensure that these organisations can fulfil the responsibilities foreseen. A first meeting of National Enforcement Bodies (NEB) appointed under this Regulation was held in December 2008.

On 7 August 2008, the Commission adopted a Communication<sup>119</sup> on the level of compensation that can be deemed appropriate for destroyed, damaged or lost mobility equipment. While the number of incidents with this type of equipment seems to be limited, the fact is that the value of such specialised mobility equipment could exceed the amounts covered by the Montreal Convention. The training requirements under Regulation N°

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<sup>119</sup> Communication on the scope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when travelling by air (COM (2008) 510 final).

1107/2006 should help to avoid this kind of incidents. The report foreseen for 2010 will assess again the scale of the problem after the entry into force of this regulation.

- The APR Regulation. The Commission kept working towards a homogeneous application of Regulation (EC) No 261/2004 in all the Member States; it followed up the use of the standard complaint form and the respect of the common understanding between NEB and between NEB and air companies. A joint meeting with all NEB, airline and consumer associations was held early December 2008, which started an evaluation phase on the implementation of the Regulation.

#### *6.9.2. Evaluation of the current position*

While Regulation 261/2004 ensures a high level of protection for air passengers, the high number of complaints and enquiries received by the Commission from unsatisfied air passengers (about 10,000 during 2008), as well as the outcome of contacts with national authorities and stakeholders show that full implementation and enforcement of their provisions is not sufficiently ensured in all situations and Member States.

As for Regulation 1107/2006, the proactive and preventive approach adopted to prepare its full entry into force in July 2008 has already yielded results insofar as the Commission has helped the NEB to establish the basis for an efficient collaboration and exchange of information. From the information gathered by the Commission in 2008-2009, the main problems for a correct application of the Regulation are currently related to the interpretation of the exception to the "non discrimination principle" based on safety grounds.

#### *6.9.3. Evaluation results*

The priority remains guaranteeing a full application of air passenger rights. The Commission resources will be concentrated first in ensuring that Member States correctly enforce the regulation and sanction infringements. As part of the ongoing evaluation for the APR Regulation, an independent evaluation study will be concluded early in 2010, analyzing the four years of operation of Regulation No 261/2004. Secondly, a public consultation will be launched before the end 2009, in view of a communication to be adopted in 2010 which will review the state of play of application by all the parties concerned, including the national authorities responsible for enforcing passengers' rights. The necessity for possible further legislation will be evaluated.

As for the PRM Regulation, an evaluation study is currently on-going and will be available early 2010. Another meeting with the NEB will be held in November 2009, in view of the report to be adopted early 2010 as requested by Article 17 of the Regulation.

While much attention will be paid to the need for the course to procedures, as appropriate, the management of enquiries from passengers is expected to be rationalised by national authorities and the Commission's resources will be concentrated on the monitoring of the activity of the NEB. A collaboration contract has been thus signed between DG COMM and DG TREN in 2008 to take advantage of the synergies and "know how" from the two services to deal efficiently with the impressive amount of passengers' enquires and complaints.

#### *6.9.4. Sector summary*

While the Community legislative framework offers a high level of protection for air passengers, including those with reduced mobility, the fact is that respect by air companies



and enforcement by national authorities is not always as satisfactory as it should. The Commission's efforts are concentrating on removing outstanding problems and making sure that the Member States assume their part of the responsibility.

Lessons learnt from evaluating the application of air passengers' rights have revealed shortcomings in the drafting of the APR and the PRM Regulations such as an ambiguous definition of the responsibilities of NEB for enforcement and lack of reporting obligations from NEB. This has helped the Commission to improve the texts of the two legislative proposals it has adopted at the end of 2008 on the rights of passengers when travelling by sea and inland waterway and by bus.<sup>120</sup>

The main objectives for 2009-2010 are strengthening the rights of passengers in case of lost luggage and to assess the need for action in the event of airline bankruptcies.

## **6.10. TRANSPORT - Inland Waterway Transport**

### *6.10.1. Current position*

#### 6.10.1.1. General introduction.

Inland waterway transport plays an important role for the transport of goods in Europe. More than 37 000 kilometres of waterways connect hundreds of cities and industrial regions. Some 20 out of 27 Member States have inland waterways, 12 of which have an interconnected waterway networks. The potential for increasing the modal share of inland waterway transport is, however, significant. Compared to other modes of transport which are often confronted with congestion and capacity problems, inland waterway transport is characterized by its reliability, its low environmental impact and its major capacity for increased exploitation.

The main pieces of Community *acquis* in this field are the following:

- Directive 2006/87/EC laying down technical requirements for inland waterway vessels, as amended. It establishes harmonised conditions for issuing technical certificates for inland waterway vessels. It is aimed at increasing the safety of passengers and freight transport by inland waterway in Europe. This Directive repealed and replaced Directive 82/714/EEC as from 30<sup>th</sup> December 2008.
- Directive 2005/44/EC on harmonised river information services (RIS) on inland waterways in the Community. It established a framework for the deployment and use of RIS in the Community and for the establishment and further development of technical requirements and specifications for harmonised and interoperable RIS. It defines further the minimum requirements to be fulfilled by Member States to enable the setting-up of RIS.

#### 6.10.1.2. Report on the work done in 2008

During the year 2008 the Community *acquis* had considerable developments.

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<sup>120</sup> Proposal for a Regulation of the European Parliament and the Council concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004; Proposal for a Regulation of the European Parliament and of the Council on the rights of passengers in bus and coach transport.

A follow-up of the transposition of Directive 2005/44/EC was performed and continuous monitoring of the implementation of the Directive was ensured via frequent meetings with authorities and stakeholders, expert group meetings and conformity checks. Commission regulations defining technical specifications were processed, as well as amendments of existing Commission regulations defining technical specifications were prepared. The process of ensuring the proper implementation of the Directive in 2009 and beyond will continue along the same line.

The technical annexes to Directive 2006/87/EC continued to be further aligned with legislation agreed in the framework of the Central Commission for Navigation on the Rhine. For this purpose 3 meetings of the of experts from EU Member States and the Central Commission for Navigation on the Rhine and 2 meetings of the Inland Waterway Transport Committee as regards Technical requirements for inland waterway vessels were held. Three amending Directives were adopted (Commission's Directives 2008/67/EC, 2008/87/EC and 2008/126/EC) and a fourth amending Directive was prepared for adoption in 2009.

For the proper implementation of the Directive regular communication with the Member States is performed, a Joint Seminar of Inspection Bodies from the Member States of the Danube Commission, the Central Commission for Navigation on the Rhine (CCNR) and the EU was organised in Budapest, workshops have been attended in Member States and an unregistered number of questions from citizens, and inspection bodies were answered. Good cooperation with the International River Commissions and the United Nations Economic Commission for Europe (UN-ECE) on technical requirements for inland waterway vessels was maintained.

#### *6.10.2. Evaluation of the current position*

The situation keeps evolving, and an increased workload is foreseen due to necessary legislative developments, including rectifications needed in published legislation, and work linked to the fact that the transposition deadline for three new directives elapsed at the end of 2008.

#### *6.10.3. Evaluation results*

As in the past, priority will be given to strengthening the competitive position of the inland waterway transport in the transport system, and to facilitate its integration into the intermodal logistics chain.

One amending Directive will be proposed after a positive advice of the Committee. A Corrigendum for several languages has to be prepared and launched. The procedure for the recognition of classification societies has to be completed. The relation with the River Commissions, and especially the chaired secretary of the Joint Working Group, should be reflected. The following projects should be taken up: Harmonisation of additional technical requirements on zone 1 and 2 waterways and Joint Seminar of Inspection Bodies from the Member States of the Danube Commission, the CCNR and the EU.

Infringement procedures will be launched against Member States not having transposed the newest Directives, and in particular Directive 2006/87. Specific follow up will be needed in particular in connection with national additional requirements and derogations allowed by this Directive.

#### 6.10.4. *Sector summary*

With a view to strengthening the competitive position of the inland waterway transport in the transport system, and to facilitate its integration into the intermodal logistic, the Commission will reinforce its administrative capacity in order to keep developing the harmonisation of additional technical requirements on zone 1 and 2, on the one hand, and to monitor that the individual implementation of Directive 2006/87, as amended, does not prejudice the existing harmonisation.

### **6.11. TRANSPORT - Logistics and co-modality**

#### 6.11.1. *Current situation*

Council Directive 96/53 on the maximum authorised weights and dimensions for heavy goods vehicles and buses circulating within the Community has been in place for more than 12 years already. The Directive sought to eliminate the differences between standards in force in the Member States which had an adverse effect on the conditions of competition and constituted an obstacle to traffic between Member States. This is why common standards for the weights and dimensions have been established to permit the improved use of these vehicles by creating a balance between their rational and economical use in traffic between MS.

The Directive has been completely transposed, and no infringement procedures have been started until now. A study has been performed in 2008 to investigate the feasibility for its possible amendment in order to increase the efficiency of heavy goods vehicles. Several workshops have been performed in this respect.

#### 6.11.2. *Evaluation of the current position*

The Community *acquis* in this field is generally stable although some adaptations and improvements might be appropriate.

#### 6.11.3. *Evaluation results*

A report for the economic development of combined transport and the application of Community law in that area is to be drawn up this year in line with Council Directive 92/106 on combined transport of goods, aiming to define, where necessary further measures to promote combined transport operations.

#### 6.11.4. *Sector summary*

With a view to improve the efficiency and sustainability of freight transport in Europe, which is a main goal of the European transport policy, the Commission will continue to study the necessities and possibilities of further development of the existing legislation, as well as the necessities for issuing new acts in order to promote and encourage the performance of multimodal transportation as a drive for a competitive and sustainable freight transport system in Europe.

## 6.12. TRANSPORT - Inland Transport

### 6.12.1. Current position

#### 6.12.1.1. General introduction

In road transport the most important pieces of legislation concern the enforcement of social rules, working time and road charging (Directive 2006/22/EC, Directive 2002/15/EC, Directive 1999/62/EC, respectively).

In the rail sector, the 1st railway package (Directives 91/440/EEC as amended, 95/18/EC as amended and 2001/14/EC)<sup>121</sup> constitutes the basis of the institutional architecture of the sector.

As for road safety, the legislation covers the driving licence (Directive 91/439/EEC), the initial qualification and periodic training of professional drivers (Directive 2003/59/EC), the road worthiness testing (Directive 96/96/EC), the compulsory use of safety belts (Directive 2003/20/EC) and the registration of vehicle documents (Directive 99/37/EC).

The transport of dangerous goods by road and rail is covered by two directives (Directives 94/55/EC and 96/49/EC, respectively). These will be replaced and repealed as from June 2009 by Directive 2008/68/EC, also applicable to inland waterways.

#### 6.12.1.2. Report on the work done in 2008

The Commission brought five Member States before the Court for not having adopted the necessary legislation transposing Commission Directive 2006/22/EC on the implementation of European social legislation relating to road transport activities by 1 April 2007. In three cases Member States subsequently notified transposition and the Court cases could be withdrawn. Two cases were still pending by the end of 2008.

As regards working time in road transport, the Commission continued the control of implementation concerning Directive 2002/15. The national measures of the Member States were assessed and in the case of six Member States the transposition measures had to be considered not to be in conformity leading to infringement proceedings. Infringement proceedings were also initiated against seven Member States that failed to submit the biannual report on the implementation of this Directive.

The Commission adopted a proposal to modify Directive 2002/15/EC. The aim of this proposal is four-fold: to clearly put false self-employed drivers in the category of mobile workers, to exclude genuine self-employed drivers from the directive, to make the enforcement more harmonised and to clarify the night time provisions.

In 2008 the Commission closed 4 infringement proceedings concerning the non-conformity of national measures with Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures; one new case was opened. The Commission pursued one Member State for its road charging system for passenger cars which the Commission considered incompatible with Article 12 TEC.

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<sup>121</sup> Directive 91/440/EEC on the development of the Community's railways; Directive 95/18/EC on the licensing of railway undertakings, and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.

The Commission opened infringement proceedings against 19 Member States which had failed to transpose in time Directive 2006/38/EC, modifying Directive 1999/62. All Member States were required to do so by 10 June 2008 at the latest. The Directive establishes a common European framework for charging hauliers for the costs of the use of infrastructure in order to avoid distortions of competition between transport undertakings of the Member States and to ensure the proper functioning of the internal market. 15 cases were resolved in the reporting period and 4 cases remain pending.

In the rail sector Member States efforts focussed on the transposition of the Directives of the first railway package (91/440/EEC as amended, 95/18/EC as amended and 2001/14/EC), which was due by 15 March 2003 or upon accession in the case of the new Member States. The first railway package defines basic requirements such as the independence of the essential functions of an infrastructure manager from rail operators, the charging scheme for infrastructure charges, the setting up of rail regulatory bodies. On this basis, it provides for the opening of the rail freight market to all eu-licensed operators, from 2003 on the Trans European Rail Freight Network, from 1 January 2006 for all international rail freight transport and from 1 January 2007 for all rail freight transport.

The Commission had adopted on 3 May 2006 a report on the implementation of the 1st railway package (COM(2006) 189 final) which contained important findings on the state of implementation in the Member States and announced the criteria that the Commission would apply for controlling implementation in each individual member state, in particular on the issue of independence of essential functions.

In order to complement the general findings of the report with concrete data from Member States, and to evaluate whether these Directives had been correctly and completely transposed into Member States' law and regulations, the Commission's services sent out questionnaires to the Member States in June and November 2007. After analysing the replies to these questionnaires, the Commission sent letters of formal notice to 24 Member States on 27 June 2008.

In the road safety sector currently 17 infringement proceedings are open, all for non-communication of the transposition of directives. Two proceedings concerning the non-transposition of Directive 2003/59/EC on professional driver education are pending before the European Court of Justice. Four Member States received reasoned opinions for the non-communication of the transposition of the Directive 2007/38/EC on the retrofit of blind spot mirrors, which had to be transposed by 6 August 2008. The remaining proceedings concern the non-transposition of an amendment to directive 91/439/EEC on driving licences introduced by directive 2008/65/EC, which needed to be transposed by 30 September 2008.

#### *6.12.2. Evaluation*

As far as the enforcement of social rules and working time in road transport is concerned, the Commission assessed in detail the application of the working time rules in the Member States, in particular as regards the possible inclusion of self-employed in the scope of Directive 2002/15/EC. The assessment showed that the grounds for the inclusion of genuine self-employed drivers in the working time were not sufficient as the policy objectives (including road safety) pursued by the legislation in respect of this category of drivers were already sufficiently ensured by other applicable rules, namely Regulation (EC) 561/2006 on driving time and rest periods and Regulation (EEC) 3821/85 on the recording equipment (tachograph). In addition, any enforcement of working time rules concerning genuine self-

employed drivers appeared to be ineffective, and out of proportion with the high cost related to it. Therefore, this specific category of drivers should remain excluded from the scope of the Directive.

In the railway sector the letters of formal notice sent to 24 Member States for incorrect transposition of the first railway package targeted three main shortcomings: 1) the lack of independence of the infrastructure manager in relation to railway operators, 2) insufficient implementation of the rules of the Directive on track access charging, such as the absence of a performance regime to improve the performance of the railway network and the lack of incentives of the infrastructure manager to reduce costs and charges and 3) the failure to set up an independent regulatory body with strong powers to monitor competition in the railway sector and rule on complaints.

These are areas which are essential for the opening of the railway markets in the Member States.

The opening of infringement proceedings in the road safety sector is due mainly to the late transposition of the directives. Apart from infringement procedures, the Commission is requested to take a position on the very numerous petitions on this subject which citizens address to the European parliament. These petitions mainly concern the non recognition of driving licences and road traffic laws of the Member States.

#### *6.12.3. Evaluation results*

For the road transport sector, four Directives will require special attention also in 2009:

- Directive 2002/15, on the organisation of working time of persons performing mobile road transport activities, as a consequence of the proposed modification of the night time provisions;
- Directive 2006/22, determining the minimum level of enforcement for the European provisions on driving times and rest periods, and on the use of the tachograph;
- Directive 2006/38 amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures. The control of the correct application of the new rules which had to be transposed by June 2008 will continue;
- Directive 2006/1/EC on hired vehicles, the application of which by Member States will be reviewed with a view to identifying shortcomings of the current regime and possible amendments thereto.

In the rail sector and on the basis of the replies by Member States to the letters of formal notice the Commission will consider how to proceed on the infringement cases in 2009. These proceedings will concentrate on the remaining issues that could not be resolved in the three areas mentioned above.

In the field of road safety sector, the Commission's services will continue informing and reminding the Member States in bilateral and multilateral meetings of their transposition obligations

#### 6.12.4. Summary by sector

##### 6.12.4.1. Road transport Sector

The ongoing revision of the market access rules for the transport of goods and passengers by road will be finished in 2009. By then the regulatory framework of the road transport sector will be modernised and streamlined. The Commission will continue to control the implementation and application of the social rules, in close cooperation with the Member States. In the area of road charging the Commission has proposed an amendment to the "Eurovignette" Directive currently in force allowing for the inclusion of external costs in infrastructure charging. In parallel, the control of the implementation of the rules presently in force will continue.

##### 6.12.4.2. Railway sector

In the rail sector and on the basis of the replies of Member States to the letters of formal notice (1st railway package), and information on legislative changes or commitments, the Commission will consider how to proceed on the infringement cases in 2009. These proceedings will concentrate on the remaining issues that could not be resolved in the three areas mentioned above (independence of essential functions of an infrastructure manager from rail undertakings, infrastructure charging, independence and powers of regulatory bodies).

##### 6.12.4.3. Road Safety sector

As far as the road safety sector is concerned the main problem remains the late notification of the transposition of directives. This is why efforts will continue to be undertaken to inform and remind the Member States in bilateral and multilateral meetings, at an early stage, of their transposition obligations within the agreed deadlines. This will concern the directives which still need to be transposed, namely the directive on road infrastructure safety management and the third driving licence directive.

### **6.13. TRANSPORT - Air Transport**

#### *6.13.1. Current position*

##### 6.13.1.1. General introduction

#### ***Internal market, air transport agreements and multilateral relations sector***

The sector covers areas such as the implementation measures necessary following the so called "Open skies judgments" of 5 November 2002,<sup>122</sup> where the Court identified a number of breaches of Community law in existing bilateral agreements between certain Member States and the United States of America, and which implied assisting Member States to remedy the situation of around 1400 bilateral agreements.

It covers also areas of the internal market such as the monitoring of Public Service Obligations and Computer reservation System.

The sector of the internal market, air transport agreements and multilateral relations is mainly ruled by Treaty, Court judgments and regulations.

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<sup>122</sup> C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98.

The most important legal instruments and related work and reporting in 2008 are:

- Articles 10 and 43 of the EC Treaty
- Case-law on external competences (ERTA)<sup>123</sup>
- Regulation (EC) No 847/2004 on the negotiation and implementation of air service agreement between Member States and third countries (Committee Regulation).
- The new Regulation (EC) No 1008/2008 of 24 September 2008 which replaces (recasts) Regulations No 2407/92, No 2408/92 and No 2409/92 on common rules for the operation of air services in the Community.
- Regulation (EC) No 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems.

### ***Single sky and modernisation of air traffic control***

In this sector, the Commission is responsible for implementing and developing the Community air traffic management (ATM) policy in order to achieve the Single European Sky (SES).

The sector is mainly dealing with the implementation of the following legal instruments:

- The framework Regulation (EC) N° 549/2004;
- The service provision Regulation (EC) N° 550/2004;
- The airspace Regulation (EC) N° 551/2004;
- The interoperability Regulation (EC) N° 552/2004.
- Directive 2006/23/EC on a Community air traffic controller licence

### ***Air safety and environment***

The sector deals with the application and further development of the aviation safety regime within the European Community.

It covers also the areas dealing with air transport environment (such as Emissions Trading Scheme, ETS) and noise-related legislation.

The air safety and environment sector is mainly ruled by Regulations and Directives.

The most important legal instruments and related work and reporting in 2008 are:

- The new Regulation (EC) No 216/2008 which replaces Regulation (EC) No 1592/2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (EASA).

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<sup>123</sup> Case 22/70, Commission v Council - European Agreement on Road Transport



- Regulation (EC) No 2111/2005 on the establishment of a Community list ('blacklist') of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier
- Directive 2004/36/EC on the safety of third-country aircraft using Community airports (SAFA) as amended by the new Directive 2008/49/EC.
- The new Regulation (EC) 351/2008 implementing Directive 2004/36/EC (SAFA) as regards the prioritisation of ramp inspections on aircraft using Community airports.
- The new Regulations (EC) No 8/2008 and 859/2008 amending Council Regulation (EEC) No 3922/91 as regards common technical requirements and administrative procedures applicable to commercial transportation by aeroplane (EU OPS).

### ***Infrastructures and airports***

This sector implements, or supervises the implementation of the "action plan for airport capacity, efficiency and safety" that the Commission adopted in 2007 to increase the output of the existing infrastructures and to optimize the planning of new infrastructures, whilst raising safety standards at highest levels and enhancing the environmental compatibility of airports. Within this context, the sector notably set up and supervises the Community Observatory on airport capacity.

The sector is involves the implementation of the following legal regulatory instruments:

- Council Regulation (EEC) N° 95/93 of 18 January 1993 on common rules for the allocation of slot at Community airports;
- Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports;
- The newly adopted Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges;
- Some of the requirements of Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (now recast in Regulation (EC) No 1008/2008).

### ***Aviation security***

Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002 establishes common rules in the field of civil aviation security. This Regulation is complemented by detailed implementing rules taking the form of several Commission Regulations and a Commission Decision. In particular, the rules require Member States to establish and implement a national civil aviation security programme complemented by a quality control programme in order to ensure the application of the common standards. Member States also have to designate a single appropriate authority responsible for the coordination and the monitoring of the implementation of its national civil aviation security programme and ensure the availability of sufficient resources to monitor compliance. Regulation (EC) No 2320/2002 also requires from the Commission to carry out inspections of national administrations and a suitable sample of airports in all Member States.

For more details on the legislation applicable, please see annex I.

#### 6.13.1.2. Report on the work done in 2008

### ***Internal market, air transport agreements and multilateral relations sector***

#### ***- Internal market***

Regulation (EC) No 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community (recast) entered into force on 1st November 2008. It allows the adoption by Member States of Public Service Obligation (PSO) for reason of economic development and territorial continuity through air services.

According to the Regulation Member States must respect several obligations and Commission has the power to carry on investigations in case of unjustified access restriction.

In 2008, several meetings were held with Member States and stakeholders (airports) to explain the functioning of the new Regulation, which simplifies the procedures. The Commission produced guidelines to improve the implementation of the Regulation and to organise partnership with Member States in order to avoid infringement cases in this area. Practically, a functional mail box has been created for the transmission of Member States requests. Through this channel, Commission has received PSO projects for checking the conformity, in particular of the socio-economic context, before publication. An exhaustive inventory of all public service obligations in force was set up, published on Europa and is being updated on a monthly basis.

In 2008, the Commission carried out audits of Computer Reservation Systems on the ground of complaints from CRS and Airlines, which were unfounded (Article 10 of Regulation (EC) No 2299/89).

The proposal for a Regulation on a Code of Conduct for computerised reservation systems (CRS) suggests the removal of impracticable provisions that were subject to uncertainty. During the legislative process, the Commission's services held numerous meetings with CRS and Travel agents to explain and convince them on the benefit of modernisation and simplification of the existing Regulation such as price transparency and protection of personal data. The new Regulation will enter into force in March 2009.

#### ***- Air transport agreements***

In order to improve the good application of Community law, the Commission has produced a legislative guideline containing all legislation and updated every two years. This legislative guideline explains to the Member States the legislation in force and gives examples on how to implement it. This document is used in different ways: it is a tool to explain Community law to third countries when new agreements to ensure the conformity of third country regulations are being negotiated particularly for neighbouring countries of the Mediterranean Sea and Balkans which have started to implement common air transport policy provision.

In 2008, the Commission services provided new Member States and neighbouring countries assistance with technical experts. For this specific action, Commission services update regularly the expert's data base.

The Commission services are working on an European Civil Aviation Code with a double objective: to give a detailed overview to third countries of the architecture of Community Air policy during the negotiations and to help new Member States and neighbouring countries in the institutional building issues.

For the bilateral agreements, the committee established by Regulation (EC) No 847/2004 met twice in 2008. This committee is assessing the acceptance by third countries of Community clauses on designation, safety, environment, ownership and control and other technical issues. In 2008, the Commission managed to put into conformity 222 additional bilateral agreements through committee decisions and two infringement cases could be closed.

### ***Single sky and modernisation of air traffic control***

On 25 June 2008, the Commission adopted a proposal to amend the basic regulations and a proposal to extend the competence of EASA (European Aviation Safety Agency) to air traffic management.

The adoption by the Council and the European Parliament of these proposals will contribute to the practical implementation of the Single European Sky for instance through the definition of mandatory deadlines for the implementation of key elements like the functional airspace blocks (FABs) or the competence of EASA on the certification of air traffic management systems.

Infringement procedures were initiated against 20 Member States that did not communicate the transposing measures for Directive 2006/23/EC (Community air controller licence) within the deadline (17<sup>th</sup> May 2008), eight of which could be closed by the end of the year.

### ***Air safety and environment***

- European Aviation Safety Agency (EASA)

The competence of EASA has been widened and the amended basic Regulation (EC) No 216/2008 entered into force in April 2008. It applies to the safety certification of third country airlines operating to or from Europe, to pilots' licences and to all safety aspects of the operation of airlines and aircraft. EASA has also been charged with the task of managing the SAFA (Safety of Foreign Aircraft) Programme and the development of enhanced implementing rules.

The Commission presented a new proposal in June 2008 to further extend the Agency's tasks to aerodromes and Air Traffic Management safety. This is an essential pillar of the Single European Sky legislation package and will provide for completion of the safety chain for the EASA system. The Council signalled a partial general approach in December 2008, allowing for its final adoption in first reading in the course of 2009.

Furthermore, the Commission adopted the necessary rules (Regulation EC No 287/2008) providing for the necessary extension of validity of the certificates of airworthiness until 28 September 2009 of certain types of aircraft, for which EASA had received appropriate applications for certification (according to the requirements of Regulation N° 1702/2003 as modified by Regulation EC No 375/2007). Also, the Commission adopted individual decisions (concerning Poland, Hungary and Latvia) affecting the certification of airworthiness of aircraft of these types to allow them to be integrated into the EC certification system in derogation of specific requirements of Regulation (EC) No 375/2007.

In line with the objective of better regulation, the Commission adopted regulations to adapt the existing airworthiness rules to non-commercial air transport without compromising safety: Regulation (EC) No 1056/2008 amending Regulation (EC) No 2042/2003 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks; Regulation (EC) No 1057/2008 amending the Appendix II of Annex to Regulation (EC) No 1702/2003 concerning the Airworthiness Review Certificate (EASA Form 15a).

- The EC list of banned air carriers

The measures to prohibit or to restrict the operation of unsafe airlines in Europe have continued to be applied with the required level of attention.

Three updates (Regulations EC No 331/2008, 715/2008 and 1131/2008) of the list of banned air carriers have been implemented in 2008 with significant decisions affecting additional carriers but also releasing others from the list since they have successfully restructured their safety oversight systems and procedures.

- Safety Assessment of Foreign Aircraft (SAFA)

In order to enhance the efficacy of the EC SAFA programme, the Commission has completed the procedures for adoption of two measures, notably a Commission regulation on the prioritisation of ramp inspections on certain aircraft and a Commission directive harmonising further the methods and the requirements for conducting and reporting such inspections. Both instruments were formally adopted in 2008.

- EU OPS

The harmonised rules on air operations (OPS) have been further upgraded twice, by Regulations (EC) No 8/2008 and 859/2008, and a close monitoring of the way both the industry and the Member States are complying with the new rules applicable from 16 July 2008 has been performed. In particular, 40 notifications of temporary exemptions, 23 requests for derogations (2 positive Commission decisions taken in 2008) and 15 notifications of additional national provisions have been received. The Commission has also analysed several complaints or pieces of information linked to potential infringements to the new rules and established appropriate contacts with the competent authorities to clarify the situations. Two meetings with the competent authorities have served to clarify the meaning of some provisions and disseminate best practices on the topic.

- Occurrence Reporting

The ability of all national safety authorities and of EASA to constantly improve safety rules and to take stock of the negative experience of accidents and incidents has been enhanced by two Commission Regulations (EC No 1330/2007 and 1321/2007) adopted in the autumn of 2007. In particular, these establish the detailed rules to be complied with by Member States and all industry stakeholders for the dissemination of incidents information and also to collect it into a central European repository of information. The principle of protection of the source of information has also been strengthened through a specific position in Regulation 216/2008.

- Sustainable Development:

The main efforts have been invested to ensure that the specificities of aviation have been fully taken into account in the directive including aviation in the European emissions trading scheme (EU ETS) adopted in November 2008, as well as in the general review of the EU ETS completed in December 2008 to ensure that aviation provides a fair contribution to the fight against climate change. In this context, the preparation of the implementing rules applicable to aviation was also launched in October 2008.

In parallel, an intense dialogue with third countries was developed – bilaterally and within ICAO - aimed at convincing the rest of the world that the European initiatives are well-founded and that a global framework to address aviation emissions is needed. The outcome of these important activities should be seen in 2009 when the aviation ETS enters into force and the ICAO/GIACC and Copenhagen negotiations should be completed.

Extensive preparatory work, including a preliminary study and impact assessment, has also been carried out on the options for addressing the climate change impacts of NOx emissions from aviation.

On 15 February 2008 the Commission adopted a Report on the implementation of Directive 2002/30/EC on noise-related operating restrictions at airports and, on this basis, has been examining whether amendments to the Directive would be justified.

### ***Infrastructures and airports***

- As regards the Action Plan for airport capacity, efficiency and safety: The Community Observatory on airport capacity was inaugurated on 4 November 2008. It will advise the Commission on the implementation of the action plan.

Measures aiming at enhancing the consistency between airport slots and flight plans have been enshrined in the draft Air Traffic Flow Management Regulation, to be adopted in 2009. Preliminary work started on the cartography of the European airport network and on the integrated air/rail ticketing.

- As regards the implementation of Community law: Efforts to ensure the proper implementation of Directive 96/67/EC were intensified, and the situation at several airports was assessed in depth. As a result, one reasoned opinion and 2 letters of formal notice were prepared. At the same time, a study on the implementation of the Directive was launched and completed. It focuses notably on the situation in the Newest Member States. In spite of these efforts, new complaints were made to the Commission, which concern 3 Member States.

Concerning the regulation on airport slots, the sector assessed the situation at several airports. Besides, 3 new complaints were made to the Commission in this respect, while 3 cases were closed. Moreover, the Commission adopted in April 2008 a Communication to clarify some provisions of the regulation and make its implementation easier.

Concerning the harmonization of passenger's departure taxes, the sector dealt with cases in 2 Member States, and sent 1 letter of formal notice to one of them. Both cases have in the meantime been closed.

The sector also dealt with discrimination in night bans at one airport. At the end of the year, the position of the competent authorities on the issues raised by the Commission in relation with the night curfew was still pending.

- As regards the enhancement of economic regulation: Discussions continued on the Proposal for a Directive on Airport Charges, to establish a common framework regulating the essential

features of airport charges and the way they are set; the Directive was adopted by the Council and Parliament on 11<sup>th</sup> March 2009.

### ***Aviation security***

During the year 2008, the Commission continued to fulfil its monitoring obligations and conducted inspections (including follow-up inspections) of 9 national administrations and 18 airports.

Five infringement procedures were initiated following inspections of national administrations. Most cases relate to an insufficient frequency and scope of national quality control activities resulting from a lack of resources to monitor compliance nationally. Two infringement cases were closed following full rectification of the identified shortcomings. The remaining infringement cases are being closely followed and informal contacts with the Member States have taken place in order to assist them in a swift rectification of deficiencies.

In order to encourage a reduction in the number and severity of deficiencies identified during Commission inspections the following measures have been taken in 2008:

- Consistent implementation of a peer-review system, namely the active participation of national auditors from all Member States in Commission inspections. In addition, the Commission made available to all Member States an updated and more detailed version of its harmonised inspection methodology in order to assist them in preparing for Commission inspections on their territories.
- The Commission regularly informed the Member States of non-compliances found during inspections in the Regulatory Committee on aviation security, which met 8 times during 2008. These updates on non-compliances identified during inspections help Member States to identify critical areas where deficiencies occur repeatedly.
- Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 was adopted. This new Framework Regulation for aviation security, ultimately replacing Regulation 2320/2002, allows the Commission to review the detailed rules for the implementation of the common aviation security standards. This revision will improve clarity and consistency, thus paving the way for an even higher compliance level. Work on developing these new implementing rules is well underway and will be finalised by April 2010.

#### ***6.13.2. Evaluation of the current position***

##### **6.13.2.1. Internal market, air transport agreements and multilateral relations sector**

Situation in this field is acceptable, evolving according to the priorities and performing very well.

#### ***- Internal market***

Since the opening of the market in 1992 which was a major achievement of the Air transport policy, some progress has been made to improve liberalisation of the sector. The rules governing the liberalisation of services and tariffs have been simplified and reinforced in 2008 through the adoption of Regulation (EC) No 1008/2008 (recast) that entered into force on 1<sup>st</sup> November 2008.

### *- Air service agreements*

Much has been achieved since the "open skies" judgments. On a total of 1400 illegal bilateral agreements 786 are now in conformity with Community law (222 for 2008). A bilateral Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, was signed in 2007, and negotiations have started with Canada. The neighbouring policy is now concrete: agreements have been signed with Switzerland, Western Balkans and Morocco, which are participating at different levels to the common air policy.

Certain bilateral agreements such as those concluded by Austria with China and with Syria and by Finland with Russia present however particular difficulties, despite the efforts made both by Member States and Commission.

#### 6.13.2.2. Single sky and modernisation of air traffic control

Considering the limited number of legal instruments, the monitoring of the practical implementation seems manageable.

The transposition of Directive 2006/23 has not been achieved yet (or not fully) in several Member States.

#### 6.13.2.3. Air Safety and Environment

The appraisal of the present situation of air safety and environment is acceptable and evolving according to the established priorities.

#### 6.13.2.4. Infrastructures and airports

The implementation of the Directive on groundhandling remains of some concern. The situation appears unsatisfactory in this respect, notably in some of the new Member States. It is therefore essential to continue a close surveillance of Member State's transposition instruments and the way they are applied.

#### 6.13.2.5. Aviation security

Since the introduction of Community rules in 2002 and of Commission inspections in 2004, results of aviation security inspections have steadily improved. The compliance with main provisions during aviation security inspections of airports rose from 62% in 2006 and 69% in 2007 to 78% in 2008. However, inspections of national administrations also showed that several Member States do still not make available sufficient resources to fulfil their national quality control obligations.

The fact that the Commission took a strict and coherent approach to the rectification of deficiencies identified during Commission inspections has also contributed to the improved inspection results. It is expected that additional infringement cases will be necessary to further improve compliance levels in the European Union, in particular as regards the availability of a sufficient number of national auditors to monitor the correct implementation of aviation security measures at European airports. However, the continued effort in inspections and advice is still likely to result in a continued positive evolution. The entry into force of the revised aviation security rules in April 2010 will then further improve the overall compliance level within the European Union.

### 6.13.3. Evaluation results

#### 6.13.3.1. Internal market, air transport agreements and multilateral relations sector

##### **Priorities**

The priorities remain the same:

- To remove the illegal provisions of existing bilateral air transport agreements between Member State and third countries, to negotiate a final agreement with US in order to make the Community ratification possible and close the infringements procedures.
- To maintain partnership with Member States, stakeholders and citizen representatives for a harmonised implementation of internal market regulations.
- To update the new CIRCA Interest Group that was set up to comply with the requirements of Regulation (EC) No 1008/2008 concerning the notification of operating licences.

##### **Planned action**

The key actions programme will be oriented toward priorities:

- Meetings with third countries to remove the illegal provisions of existing bilateral agreements.
- The organisation of training for Member States, third countries, stakeholders and EC official on the Community *acquis*, the Air transport policy, the practical challenges and objectives of the stakeholders in the area of Computer reservation system.
- Studies to assess different third country markets.
- To develop activities related to new legislation in the area of Computer Reservation Systems such as guidelines, training, expert committee meetings.

#### 6.13.3.2. Single sky and modernisation of air traffic control

As in the past, the practical implementation of existing legislation by Member States and by relevant stakeholders will be monitored in the framework of the Single Sky Committee (Article 5 of Regulation (EC) No 549/2004) and the Industry Consultation Body (Article 6 of Regulation (EC) No 549/2004).

These instruments are complemented by the use of existing arrangements under the Eurocontrol Convention. For instance the CRCO (Central Route Charging Organisation) is used for the reporting obligations under the charging Regulation (EC) No 1794/2006 and the LCIP (Local Concurrence Implementation Plan) is used for the reporting obligations under Article 12 of the framework Regulation (EC) No 549/2004 and under Article 8 of Regulation (EC) No 2150/2005 on the flexible use of airspace.

#### 6.13.3.3. Air Safety and Environment

##### **Priorities**

Priorities concern the most significant developments in such areas as :



- Accident investigation and incident reporting
- Extension of EASA tasks, fees and charges, supervision of EASA, fines
- List of banned airlines
- Aviation environmental issues
- International cooperation
- Monitoring of compliance

### ***Planned action***

The key actions programme will be oriented towards the above listed priorities:

- Accident investigation and incident reporting

In 2009 the Commission adopt a legislative proposal to enhance accident investigation and incident reporting. The co-decision process for the adoption of this measure should continue in 2010.

- Extension of EASA tasks, fees and charges, supervision of EASA, fines

A high number of proposals prepared by EASA following the entry into force of the "first extension" amended Regulation (216/2008) in April 2008 will be processed from 2010 – –and will result in some 5 to 10 Commission regulations being adopted between 2010 and 2012.

On top of these implementing rules specifically linked to the first extension of tasks, the continuous update of the technical Community legislation (mainly initial airworthiness and maintenance) following Opinions by EASA will continue in 2010 and it will be carried through comitology procedure.

As far as the "second extension" of tasks is concerned, an adoption of the Commission's proposal in first reading is expected in the course of 2009.

A thorough revision of the EASA fees and charges Regulation is also foreseen. This amendment is necessary to introduce the new fees and charges to be paid by the Industry for the new certification activities the Agency will start to execute following the "first extension" of tasks.

In 2010 the Commission intends to adopt a regulation to introduce fines and periodic penalty payments to be imposed on persons or undertakings to which the Agency has issued a certificate. The mechanism envisaged is such that the Commission will impose the fine following a request from the Agency.

Finally, the usual activity as "parent Commission service" of EASA will continue, implying adoption of the Commission's Opinion on the Agency's Work programme, monitoring of the Agency's drafting and implementation of the budget and staff policy plan, follow up to various audits (including the Court of Auditors recommendations), etc.

- List of banned airlines

Recent analysis of ICAO and SAFA reports shows a worrying negative trend in terms of third Countries' safety performance. As a consequence, the effort in auditing third countries' airlines and administrations will have to be strengthened.

The update of the Community list of banned airlines every four months will continue.

A report on the implementation of the Regulation following the first three years of implementation will be proposed by the Commission in 2009.

- Aviation environmental issues

Proposals are planned for measures dealing with aviation noise emissions from airplanes (2009-2010).

The involvement at international level on aviation emissions reductions measures, in particular emissions trading, will require intense activities in ICAO, in the United Nations Framework Convention on climate change (UNFCCC) after COP15, but also during bilateral negotiations with third countries. This is indispensable to ensure a smooth implementation of the EC Directive including aviation in the EU ETS.

- International cooperation

The management of a number of tailored technical cooperation projects with third countries, mainly those affected by the list of banned airlines, aimed at enhancing their aviation safety supervisory capability and their compliance with international air safety standards, will be continued.

The work generated by the negotiation or implementation of bilateral EU/third countries aviation safety agreements should increase significantly, implying the creation and management of some technical Committees (at least four just for the United States of America) to properly follow up the implementation of the agreements but also to prepare new annexes to cover the new tasks entrusted to EASA following the first modification to Regulation 216/2008. Such annexes will have to be negotiated in the Bilateral Oversight Board which the Commission has to co-chair at the level of the Head of Unit with large technical support of the Unit and EASA. For Brazil, a similar path can be envisaged, the entry into force of the bilateral agreement being expected however at the end of 2009 only.

- Monitoring of compliance

Monitoring compliance with the existing EU legislation is an ongoing task. This implies – inter alia – the analysis and appropriate follow-up of the standardisation inspection reports issued by EASA, as well as ensuring a correct functioning of the SAFA Directive. The Agency inspects at present each Member State every two years; as a consequence, the Commission will analyse yearly some 13/14 standardisation reports and follow them up as appropriate - mainly initiating sanction (withdrawal of certificates or of mutual recognition, for example) or infringement procedures where necessary.

As far as the 'SAFA Directive' is concerned, its provisions shall be repealed and replaced by implementing rules enacted under Regulation 216/2008/EC. In this sense, a continuous refinement of the procedural annexes, of the prioritisation of inspections and of the minimum training of Member States' inspectors is envisaged together with the introduction of a minimum quota of ramp inspections to be performed annually by Member States. This

process encompasses a constant dialogue and consultation with the National Administrations and other relevant stakeholders through workshops and technical meetings.

#### 6.13.3.4. Infrastructures and airports

In 2009 the sector will continue focussing on the proper implementation of the existing law as regards groundhandling, slots and airport charges. It will also concentrate on the implementation of the action plan on airport capacity, and notably on the supervision of the works of the Observatory on airport capacity.

#### 6.13.3.5. Aviation Security

##### ***Priorities***

The primary focus for the Commission in the field of aviation security remain unchanged, namely to further develop harmonised rules in aviation security that ensure an adequate level of protection whilst limiting the negative impact on facilitation and to ensure the application by all Member States of the common standards contained in Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002.

##### ***Planned action***

The Commission will continue to apply a strict compliance monitoring and enforcement policy to ensure an adequate protection of its citizens. The Commission therefore intends to continue its inspections at a similar frequency as compared to 2008. Particular emphasis will be given to ensuring that Member States have an adequate number of resources to fulfil their obligations.

In order to ensure the timely entry into force of the new implementing rules in the field of civil aviation security, the Commission will intensify work in this field and plans several working group meetings involving stakeholders and Member States. In addition, the Commission plans to develop detailed guidance material to facilitate the smooth entry into force of the revised common standards.

#### 6.13.4. *Summary by sector*

##### 6.13.4.1. Internal market, air transport agreements and multilateral relations

##### ***- Internal market***

Concerning common rules for the operation of air services, the new Regulation (N° 1008/2008) contributes helps to the restructuring of the sector and maintains competitive conditions both on international routes and European domestic routes. It also clarifies several aspects in the areas of aircraft leasing, public service obligations and traffic distribution rules at airports, ensuring that these rules are applied with maximum transparency and without discrimination.

The Regulation aims in particular at simplifying publicity obligations, extending the maximum period for the exclusive concessions which will be 4 years (5 years for the most remote regions). It introduces an emergency procedure to cope with the sudden interruption of the services of the operator serving a route covered by public service obligations (OSP). It gives the Commission the possibility of requesting from the Member State more information and explanations on the OSP socio-economic context that they intend to create.

The Commission's proposal to simplify and modernise the Code of Conduct relating to computer reservation systems (CRS) will partially liberalise the market and will allow CRS providers and the travel agents who are subscribed to widen their offer, thereby improving competition in the air tickets distribution market. Competition is further strengthened by new safeguard measures designed to protect consumers and to prevent competitive abuses.

#### *- Air services agreements*

The objective to bring existing bilateral agreements into line with Community law, following the “open sky” case law, is vitally important not only for the European Community and its Member States but also for the third countries concerned and for the aviation sector, airlines and the users.

Since 2002, much effort has been made in order to remove the illegalities identified in bilateral agreements between twenty Member States and the United States. In 2008, the Commission organised several joint committee meetings for the provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, which was signed in 2007 and which needs to be ratified by all Member States before the ratification by the European Community. This legal constraint does not permit closure of Member States' infringements that have already ratified the agreement.

In the framework of Regulation (EC) No 847/2004 and its committee, the Commission assists member States to bring other existing bilateral agreements with third countries into conformity with EU requirements.

#### 6.13.4.2. Air Safety and Environment

The impact of added safety resulting from the Commission's initiatives has been assessed so far on the basis of the number of unsafe companies which have been prevented to operate to or from Europe and by the number of tourist agents (about 40.000) in Europe which have to inform travellers of the list of banned airlines companies operating outside Europe.

An additional criterion remains the increased level of safety oversight that foreign European Civil Aviation Authorities carry out for fear of seeing their operators banned from Europe.

Furthermore, the role of EASA is to control compliance by Member States and to assist them to enhance their safety level to the legally required level. The standardisation activities of EASA have continued to produce significant results as an ever increasing number of Member States is being inspected on a yearly basis. In 2008, EASA inspected 21 Member States in the area of initial airworthiness and 4 visits to third countries (including Switzerland); 26 Member States and 3 non EU JAA States (including Serbia and Norway) as well as 4 inspections in the United States of America in the area of continuing airworthiness. At the request of the Commission, EASA has also carried out 4 supplementary inspections of Member States (2 ad-hoc inspections and 2 follow-up inspections). Furthermore, the Agency increased considerably the number of visits to Member States in the area of operations, flight crew licensing and synthetic training devices (simulators): 10 Member States and 5 JAA States (including Switzerland) in the area of operations; 8 Member States and 3 JAA States (including Switzerland) in the area of flight crew licensing and 6 Member States in the area of synthetic training devices (simulators). This aspect, enforcement of compliance, is revealing itself more and more the key to successful impact of EU aviation safety rules.

#### 6.13.4.3. Infrastructures and airports

In 2009, the focus of attention will remain unchanged, namely to ensure the proper implementation of the economic regulatory framework, and to guard against any possible lack of airport capacity by implementing the action plan.

#### 6.13.4.4. Air Security

The priorities for the Commission in the field of aviation security remain unchanged, namely to further develop harmonised rules in aviation security that ensure an adequate level of protection and to ensure the application by all Member States of the common standards contained in Regulation (EC) No 2320/2002 of the European Parliament and of the Council of 16 December 2002.

The planned key actions are the continuation of the well established inspection regime at current frequencies, the strict enforcement of Community rules following the identification of deficiencies and the development of revised implementing rules for aviation security which will ensure more consistency, clarity and harmonisation while safeguarding the level of protection for European citizens.

Whilst the inspection and enforcement activities are put in place on a continuous basis, the development of the new implementing rules will take place during the course of 2009 and be finalised by April 2010 at the latest. However, further reviews and adjustments following changes in the threat situation or technological developments are also possible thereafter.

### **6.14. TRANSPORT - Maritime Safety**

#### *6.14.1. Current position*

##### 6.14.1.1. General introduction

The maritime safety EU *acquis* aims at enhancing the safety of ships in European waters, protecting the marine environment and ensuring appropriate living and working conditions on board. The main relevant pieces of legislation in this area are:

- Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (OJ L 319 of 12.12.1994, p. 20). This directive addresses the responsibility of Member States as flag States by establishing measures to be followed by the Member States and organisations concerned with the inspection, survey and certification of ships for compliance with the international conventions on safety at sea and prevention of marine pollution;
- Council Directive 95/21/EC of 19 June 1995 on port State control of shipping (OJ L 157 of 7.7.1995, p.1). This directive sets out rules applicable to Member States in their capacity of port States. It provides for increased compliance with international and relevant Community legislation on maritime safety, protection of the marine environment and living and working conditions on board ships of all flags and for the establishment of common criteria for control of ships by the port State and harmonised procedures on inspection and detention;
- Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system (OJ L 208 of 5.8.2002, p. 10). The system established in accordance with this directive aims at improving the response of the authorities to incidents, accidents and potentially dangerous situations at

sea, including search and rescue operations, and at better preventing and detecting pollution by ships.

Other relevant legislation includes directives on marine equipment (Directive 96/98/EC), harmonised safety rules and standards for passenger ships (Directive 98/18/EC), fishing vessels (Directive 97/70/EC) and the safe loading and unloading of bulk carriers (Directive 2001/96/EC), registration of persons on board passenger ships (Directive 98/41/EC), mandatory surveys for the safe operation of regular ro-ro ferry and high speed passenger craft services (Directive 99/35/EC), seafarers hours of work (Directive 1999/95/EC), stability requirements for ro-ro passenger ships (Directive 2003/25/EC) and Regulations on the accelerated phasing-in of double hull or equivalent design oil tankers (Regulation (EC) n° 417/2002), the prohibition of organotin compounds on ships (Regulation (EC) n° 782/2003) and on the transfer of cargo and passenger ships between registers within the Community (Regulation (EC) n° 789/2004). Finally, environment-related directives on port reception facilities for ship-generated waste (Directive 2000/59/EC) and on ship-source pollution and on the introduction of penalties for infringements (Directive 2005/35/EC) should also be listed.

#### 6.14.1.2. Report of the work done in 2008

The Committee on Safe Seas (COSS) set up under Regulation (EC) no. 2099/2002 met in November. The meeting provided the opportunity for Commission services to discuss with representatives of Member States issues such as the update of Community *acquis* on passenger ships in order to reflect IMO instruments, the stability regulations for ro-ro passenger ships, the recognition and the performance criteria of classification societies as well as a possible amendment to Regulation (EC) n° 417/2002 on double hull oil tankers.

Regular meetings on maritime policy took place in 2008 between the Director responsible for maritime safety and policy and his counterparts in the Member States. These meetings provided also an opportunity to foster clarification and better implementation of the *acquis*.

Preparation of the report assessing the implementation of Directive 2000/59/EC on port reception facilities for ship-generated waste continued in 2008 with the aim of submitting it to the European Parliament in the 1st semester 2009.

The European Maritime Safety Agency continued its broad program of inspection visits in the Member States. This program was initiated in 2004 at the request and in co-operation of the Commission and it currently covers the following areas: classification societies, training of seafarers, port State control and port reception facilities. The methodology for extending the program to vessel traffic monitoring and information systems was established in 2008 allowing for the actual launching of the exercise in March 2009. The reports produced by the EMSA teams serve as basis for further Commission contact with the Member States either through requests for clarification or the launching of infringement procedures. In an area where there is a reduced number of complaints received from citizens or enterprises, these inspections are of great value to the Commission as they allow it to understand how the EU maritime safety *acquis* is implemented in the Member States.

The number of infringement procedures declined sharply in 2008. This was essentially due to the corrective measures introduced by Member States in order to improve the quality of the transposition of the *acquis* and its implementation, following pre-judicial initiatives by the Commission. Still at the end of the year over 40 procedures remained open. They concentrate

essentially on port State control and port reception facilities issues. Noteworthy are also the decisions of the Court of Justice in several cases condemning Member States for their failure to establish, adopt and implement plans for ship-generated waste.

#### 6.14.2. *Evaluation of the current position*

Maritime safety Community law is relatively young. It is however based in international conventions and other instruments, for some of which there is considerable implementation experience in the Member States. Current implementation situation thus ranges from relatively stable, whilst not yet entirely acceptable (for instance, for Directive 95/21/EC on port State control of shipping which is closely related to the rules of the Paris MOU to which most Member States have been party to for several years) to more difficult as in the case of Directive 2000/59/EC on port reception facilities, where key provisions such as those on the coverage of costs by all ships, the monitoring of deliveries and the performance of inspections are still implemented unevenly throughout the Union.

The situation tends to become more complex as 2008 saw the finalisation of a very significant package of new Community maritime safety *acquis*. This package, whose texts are due for publication in the first semester 2009, cover a broad range of issues, some of which consist of improvements of current *acquis* (port State control, vessel traffic monitoring and information system, classification societies), while others are essentially new (accident investigation, Flag State obligations, liability of carriers of passengers by sea, insurance of shipowners). Preparation of adequate transposition of the new texts into national law and of their implementation will be necessary.

#### 6.14.3. *Evaluation results*

##### 6.14.3.1. Priorities

There is a clear continuity in the efforts to ensure an appropriate transposition and implementation of the maritime safety *acquis*. In terms of thematic areas, emphasis will be put on the traditional areas of the monitoring of classification societies and of the implementation of directives on the training of seafarers, port State control, vessel traffic monitoring and information system and port reception facilities. Transposition of Directive 2005/35/EC (ship-source pollution and penalties) will also be closely monitored.

We shall continue to rely on the systematic assessment of implementation in the Member States based on the inspections by EMSA to be followed by contacts with Member States and, when appropriate direct pre-judicial initiatives. We shall also devote considerable resources to trying to prevent transposition problems, in particular in the context of the new package of legislation.

A pre-emptive approach is also taken in relation to the alignment to and implementation of the *acquis* by accession countries, in particular Croatia, through dialogue and assessment of administrative capacity (in co-operation with EMSA).

##### 6.14.3.2. Planned action

Contact with national administrations will be ensured through COSS meetings. As far as the newest legislation is concerned, a general meeting at Director level with representatives of the Member States is scheduled for Fall 2009 with the objective of discussing and clarifying the content of the recent legislative package in preparation of transposition by Member States.

This meeting will be complemented by dedicated workshops with MS experts on the implementation of each of the new legislative texts.

Follow-up of EMSA inspection reports will be ensured leading to clarification actions and/or infringement procedures in the key areas mentioned under point 1.

#### 6.14.4. Sector summary

The monitoring and promotion of the implementation of the maritime safety *acquis* concentrates on the traditional key areas (classification societies, training of seafarers, port State control, vessel traffic monitoring and information system and port reception facilities). Dialogue with Member States continues in different fora (COSS, meetings with the Directors-Generals of national administration, technical co-operation through EMSA). Clarification initiatives by the services and, when appropriate, infringement procedures are also undertaken. Given the imminent publication of a significant new package of maritime safety legislation, considerable effort is to be devoted to detailing and explaining the new *acquis*, e.g. by dedicated implementation workshops, with a view to facilitate its transposition by Member States.

### 6.15. TRANSPORT - Maritime Security

#### 6.15.1. Current position

##### 6.15.1.1. General introduction.

The main objective of the EU legislation on Maritime Security is to implement measures aimed at enhancing ship, port facility and port security in the face of the threats posed by intentional unlawful acts. The EU legislation intends to provide a basis for harmonised interpretation and implementation of international measures to enhance maritime security adopted by the Diplomatic Conference of the International Maritime Organization (IMO), in 2002, with the establishment of the International Ship and Port Facility Security Code (ISPS Code) and the ILO /IMO Code of Practice on Security in Ports.

The main pieces of Community *acquis* in this field are the following:

- Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security: The Regulation takes into account amendments to the 1974 International Convention for the Safety of Life at Sea (the SOLAS Convention) and the maritime security measures imposed by the Regulation are only some of the measures necessary in order to achieve an adequate level of security across all of the various transport chains linked to maritime transport. The Regulation is limited in scope to security measures onboard vessels and the immediate ship/port interface.

- Directive 2005/65/EC of the European Parliament and of the Council of 26 October 2005 on enhancing port security: The Directive is mainly based on the recommendations contained in the ILO/IMO Code of Practice on Security in Ports. The Directive completes the mechanism provided for under the Regulation by establishing a security system for all port areas, in order to ensure a high and comparable level of security for all European ports. The aim of the Directive is to improve security in port areas not covered under the Regulation and to ensure that the enhancement of port security will support the security measures taken under the Regulation, without creating additional obligations in areas already governed by the Regulation.



- Regulation (EC) No 324/2008 of 9 April 2008 laying down revised procedures for conducting Commission inspections in the field of maritime security: In 2005, in order to monitor the application by Member States of the Regulation and to verify the effectiveness of national maritime security measures, procedures and structures, the Commission adopted Regulation (EC) No 884/2005, laying down procedures for conducting Commission inspections in the field of maritime security. On 9 April 2008, the Commission adopted Regulation (EC) No 324/2008 laying down revised procedures for conducting Commission inspections in the field of maritime security, which also laid down “procedures for the monitoring by the Commission of the implementation of Directive 2005/65/EC jointly with the inspections at the level of Member States and port facilities in respect of ports...”. This Regulation, repealing Regulation (EC) No 884/2005, came into force on 1 May 2008.

#### 6.15.1.2. Report on the work done in 2008

During the year 2008 the work done on monitoring the application of Community law in the field of maritime security had considerable developments.

- The Maritime Security Committee (MARSEC) met 5 times which were as much occasions to discuss with the Member States of the issues involved in the common interpretation of the security standards defined at the international level. Furthermore, these issues are also addressed with the stakeholders from the advisory group (SAGMaS).

- Follow-up of the infringement procedures launched for the absence of national transposition for measures concerning Directive 2005/65/EC within the required deadline: The majority of the 22 Member States required to transpose the provisions of the Directive into national law only did so after the deadline for implementation (15 June 2007) had passed. Only six of them provided notification of national measures before this transposition deadline, quickly followed by six other Member States. The average delay in transposition was six months. On 1 January 2008, seven Member States had still not adopted or transmitted to the Commission their national measures transposing the Directive. Finally, on 18 September 2008, the Commission decided to take action before the European Court of Justice, in the absence of notification of national transposition measures within the required deadline, against the last two Member States which had not yet met the deadline. The Commission also began procedures for monitoring the application of this Directive during the inspections carried out in the field of port security.

- Preparation of the report assessing the implementation of the Directive on enhancing port security: This report fulfils the Commission's obligation under Article 19 of the Directive to report on its application by 15 December 2008 at the latest, and then subsequently every five years, and to provide an overview of the transposition of the Directive by Member States and to identify possible problems found. However, in view of the delay in transposing the Directive and in the practical implementation of its provisions by several Member States, the report focuses on implementation-related matters and short-term results.

- The inspection team carried out 120 inspections (22 national administrations, 46 port facilities, 36 ships, 6 recognized security organizations, 2 companies; 8 ports). The inspections permitted to check the implementation of the security legislation on the ground by the operators concerned, as well as the supervision of it by the Member States.

### *6.15.2. Evaluation of the current position*

Considering the implementation of the Directive, it should be noted that the delays in preparing and adopting national transposition measures in a variety of Member States have had a knock-on effect, in that the relevant port authorities were not able to implement the Directive until the national measures had been finally approved and adopted.

Given, on the one hand, the short life so far of Regulation (EC) No 324/2008 laying down revised procedures for conducting Commission inspections in the field of port security and, on the other, the delay with which several Member States both transposed the Directive and implemented its provisions in practical terms, it would be premature to draw any final conclusions and this work will be kept among the priorities for 2009.

The inspection team reported on several occasions a lack of control exerted by the Member States to check the correct application of Community legislation in the port facilities and ships under their competence. This point will also be a priority in 2009. The first inspections concerning the monitoring of Directive 2005/65/EC carried out into 2008 were very disappointing because the first eight visited ports did not lay out an assessment, nor a plan for security.

### *6.15.3. Evaluation results*

As in the past, priority will be given to the achievement of an adequate level of security across all of the various transport chains linked to maritime transport.

Concerning Directive 2005/65/EC, once all national texts have been sent to the Commission the Commission will conduct a more detailed examination of national transposition measures and subsequent provisions made by Member States in order to make a global assessment (i.e. covering all relevant Member States) of whether the national measures comply with the relevant provisions of the Directive (conformity checks). Infringement procedures will be launched against Member States not having fully or correctly transposed the Directive.

Furthermore, the working programme for the performance of maritime security inspections carried out by the Commission will systematically include a section for verifying that the procedures for monitoring the application of the Directive have been correctly applied.

### *6.15.4. Sector summary*

While the situation in maritime security sector is demonstrating the benefits of harmonised rules, enhancing ship, port facility and port security in the face of the threats posed by intentional unlawful acts, there are still a number of areas where some obstacles to efficient maritime security persist.

The efforts are concentrating in ensuring an efficient implementation of the existing maritime security legislation, by combining action in two fields:

- permanent contact with national administrations through the work of the Maritime Security Committee and in the context of preparation and follow up of inspections;
- based on the results of the inspections carried out by the Commission and on the on-going conformity checks, an action plan identifying the main areas where there is failure to comply

with the Directive and Regulation will be the basis for initiating different actions, including infringement proceedings as necessary.

## **7. ENVIRONMENT**

### **7.1. Nature Conservation**

#### *7.1.1. Current position*

##### 7.1.1.1. General introduction

The most important pieces of nature conservation legislation are the Birds Directive, 79/409/EEC<sup>124</sup> and Habitats Directive, 92/43/EEC<sup>125</sup>. The former sets out measures for the protection, management and control of all species of naturally occurring European wild birds, as well as introducing rules to protect their habitats. The latter protects natural habitats and wild flora and fauna throughout the European Union and establishes a European ecological network known as “Natura 2000”.

Nature conservation legislation constitutes a fairly stable part of the EC environmental *acquis*. Developments in this sector mainly concern the annexes to the Birds and Habitats Directives that have been adapted on a number of occasions in response to scientific and technical progress and to the successive enlargements of the European Union. The most recent adaptation is in response to the Accession of Bulgaria and Romania to the European Union on 1 January 2007. The Community is at present very close to the completion of the Natura 2000 network and regulatory stability is required.

##### 7.1.1.2. Report of work done in 2008

#### ***Designation of Special Protection Areas and Special Areas of Conservation***

Further substantial progress was made in 2008 in the establishment of the Natura 2000 network, consisting of Special Protection Areas under the Birds Directive and Special Areas of Conservation under the Habitats Directive. In December 2008, the Commission adopted eight Decisions updating existing or establishing new Biogeographic Lists of Sites of Community Importance (SCIs). The additions include 769 new sites and a total area of 95,522 km<sup>2</sup>. Most of the sites are in the newer Member States. Romania and Bulgaria have now added areas to the network for the first time, including areas along the Black Sea that are home to numerous varieties of rare and threatened plants and animals. Natura 2000 now includes around 25,000 sites, covering 17% of the EU’s landmass, making it the largest interconnected network of protected areas in the world.

Several Member States have increased the number of designated areas following infringement procedures launched by the European Commission and it is expected that several of these procedures will be closed in 2009.

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<sup>124</sup> Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds OJ L 103, 25.4.1979, p. 1-18.

<sup>125</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206, 22.7.1992, p. 7–50.

Most Member States are now in a process of designating their Sites of Community Importance as Special Areas of Conservation according to Article 4(4) of the Habitats Directive. This exercise includes the establishment of detailed conservation objectives for the individual sites and the design of appropriate management instruments according to Article 6(1) of the directive. Member States have to designate their SCI as SACs not later than six years after the inclusion of the sites in a Community list. As that deadline was 28 December 2007 for most sites of the Macaronesian biogeographical region, an infringement procedure was launched in 2008 against Portugal and Spain for not having designated sites in that region as SACs. For most sites of the Alpine biogeographical region the deadline for SAC designation is 22 December 2009 and for most sites of the Atlantic and Continental regions it will be 7 December 2010.

Little progress has however been made as regards the designation of off-shore marine areas. Member States were expected to communicate substantial designations to the Commission by end 2008. A series of Marine Biogeographic Seminars will start taking place in 2009 to evaluate these proposals. The Commission will consider launching new infringement procedures against those Member States which have not provided sufficient designations.

### ***Non-conformity with the Birds and Habitats Directive***

In 2008, the Commission pursued infringements dealing with non-conformity of national transposing legislation with the Birds and Habitats Directive.

In 2008, as regards the Birds Directive, a first warning letter was sent to Slovakia and Romania and second warning letters were sent to Czech Republic, Hungary, Latvia and Lithuania. The Commission also decided to refer Italy to the European Court of Justice. Austria received a first warning concerning the implementation of the judgment in case C-507/04.

As regards the Habitats Directive, a first warning letter was sent to Latvia, Lithuania, Poland, Slovakia, Hungary and Romania and a second warning letter was sent to Estonia and Czech Republic. The Commission also decided to refer France to the European Court of Justice. Ireland received a first warning concerning the implementation of the judgment in case C-183/05.

### ***Insufficient designation of Special Protection Areas***

Under the Birds Directive, Member States are obliged to designate all of the most suitable sites as Special Protection Areas to conserve wild bird species. The designation must be based on objective, verifiable scientific criteria. To assess whether Member States have complied with their obligation, the Commission uses the best available ornithological information. Where the necessary scientific information provided by Member States is lacking, national inventories of Important Bird Areas (IBA) compiled by the non-governmental organisation Birdlife International, are used. While not legally binding, the IBA inventory is based on internationally-recognised scientific criteria. The Court of Justice has already acknowledged its scientific value, and in cases where no equivalent scientific evidence is available, the IBA inventory is a valid basis of reference in assessing whether Member States have classified a sufficient number and size of territories as Special Protection Areas.

In 2008, the Commission sent a first written warning letter to Bulgaria and a second warning letter to Romania for failing to designate enough Special Protection Areas on its territory. Following the judgments of the European Court of Justice, the Commission pursued the

infringement procedure against Spain and Greece with a first written warning under Article 228 of the EC Treaty (Cases C-235/04 and C-334/04).

### ***Illegal Bird Hunting***

Hunting is regulated in the European Union by the Birds Directive. Although the Directive contains a general prohibition on the killing of wild birds, it does allow certain species to be hunted provided this does not take place during the breeding season or migration periods. Hunting periods are set at national levels, and vary according to species and geographical location. Exceptionally, Member States may allow the capture or killing of birds covered by the Directive outside of the normal hunting season for a limited number of reasons, although such derogations are only available when there is no alternative solution.

As regards huntable species, the Commission is preparing further management plans on such species with an unfavourable conservation status. They are not legally binding but give guidelines to Member States to fulfil their obligations on species' conservation.

In 2008, the Commission decided to take Malta to the Court of Justice for its spring hunting practices (case C-76/08). The Court ordered, as an interim measure, that spring hunting was not to be allowed in 2008.

In the judgment in case C-503/06, Commission/Italy, the Court condemned Italy for allowing hunting of starling (*Sturnus vulgaris*) under conditions which were contrary to the Birds Directive.

An update of the guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds was published.

### ***Species protection***

The Habitats Directive comprises an important pillar which is related to the protection of species. In particular, Articles 12 and 16 are aimed at the establishment and implementation of a strict protection regime for animal species listed in Annex IV(a) of the Habitats Directive within the whole territory of Member States. Focus is mainly on developing guidance documents such as the Guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC that was finalized in February 2007. Specific guidance documents have also been developed for the protection and management of large carnivores. An initiative for preparing species protection plans for a number of priority species has been launched.

Furthermore, the Commission is preparing further action plans for globally threatened bird species.

In order to reduce the conflicts between Cormorants and fisheries, the Commission will take action, namely through the preparation of guidance on appropriate use of derogations under Article 9 of the Birds Directive.

In 2008, the Commission took Spain to the Court of justice for failure to provide for strict protection of the Iberian Lynx (*Lynx pardinus*) (Case C-308/08).

### ***Further judgments of the Court of Justice in 2008***

In relation to the protection of SPAs to be designated under the Birds Directive (1979/409/EEC), the Court ruled in case C-293/07, *Commission/Greece*, that Greece had failed to put into place a coherent, specific and complete legal protection regime for SPAs. In fact, the protection regime laid down in the Greek legislation did not include all SPAs and it provided varying protection of the sites in such a way that the objectives for the protection of SPAs, laid down in Article 4(1) and (2) of the Birds Directive and in Article 6(2) of the Habitats Directive, were not fulfilled.

In cases T-322/06, T-323/06, T-345/06, T-366/06, the Court of First Instance ruled that a Commission decision to include several Spanish sites in the Natura 2000-network does not directly affect the businesses located within them. The actions for annulment of the decision therefore were considered inadmissible.

### 7.1.2. *Evaluation based on the current situation*

Despite the small number of legal instruments in this field, nature conservation legislation accounts for between a fifth and a quarter of environmental infringements. The nature sector accounts for the highest number of open environmental cases. The high number of cases in the nature sector is due mainly to the extent of the network, which now includes around 25,000 sites: there are Natura 2000 sites in the vicinity of nearly every EU citizen. This is positive in as much as it brings the EU close to its citizens but it also means that the Commission receives a lot of complaints about threats to these sites. Although the demand from citizens, specialised and active NGOs and the European Parliament is high, the complaint and legal enforcement mechanisms for nature conservation in the Member States are often weak or inappropriate.

In order to rationalise the handling of this high number of cases and ensure the effective implementation of the nature directives, the Commission has taken several measures, which can be divided into three categories:

- *Focus on the main implementation priorities*: the core obligations of the directives were effectively addressed (i.e. correct and complete transposition and establishment of the Natura2000 network), while systemic problems of bad implementation were tackled (e.g. hunting derogations).
- *Proactive cooperation with Member States*: this includes the drafting of interpretative guidance documents for the main provisions of the nature directives; the development of targeted guidance for economic sectors such as the port sector, wind energy, the non-energy extractive industry, and inland waterways, which have particular challenges in relation to the legislation; training of the competent authorities; regular contacts with the national, regional and local authorities, establishment of the “*GreenEnforce Network*”.
- *Improvements in the handling of complaints*: specific methods have been developed with the purpose of helping the complainants (i.e. ad hoc nature supplementary information form, which guides the complainants as regards the information needed to evaluate a complaint) and making more effective use of complaints (i.e. grouping of complaints in order to focus on systemic breaches).

Those measures have had a significant effect, as they resulted in the reduction of the implementation deficit. This is also confirmed by the number of open cases, which has been

significantly reduced, despite the accession of 12 new Member States. At the end of 2003, 589 open cases were related to the nature conservation directives while, at the end of 2008, 168 nature cases were open.

### 7.1.3. Evaluation results

#### 7.1.3.1. Priorities

Priorities will be the following:

- *Completing the establishment stage of the Natura 2000 network.* The terrestrial part of the Natura 2000 network is either established or close to establishment in accordance with the Habitats and Birds Directives. Habitats and species coverage still needs to be extended in places, mainly in the EU-12 Member States, and legal action will be pursued against Member States when necessary. The process has been launched to finalise the establishment of marine sites. Since the scientific knowledge and information available on the existence and distribution of marine habitat and species remains incomplete, the Member States were expected to submit their proposals by end 2008, based on existing knowledge, while pursuing further necessary surveys. In order to facilitate the process, a guidance document has already been prepared by the Commission services. First Biogeographic Seminars will take place in 2009. A guidance document on introducing fisheries measures for marine Natura 2000 sites in the context of the Common Fisheries Policy has also been prepared.
- *Ensuring a systematically correct approach to Natura 2000 site protection.* To enable the Natura 2000 network to achieve its goal of conserving key elements of Europe's biodiversity, there needs to be proper scrutiny and minimisation of, the impacts of potentially damaging plans and projects in line with ECJ case-law. Ensuring application of best scientific knowledge, examination of alternatives and, where appropriate, provision of compensatory habitats are all major challenges. In this regard, the Commission services issued a guidance document on Article 6(4) of the Habitats Directive, a key provision for the implementation of the nature directives. In addition, the Commission intends to promote best practice within specific economic sectors, such as European ports, wind energy, non-extractive industries and inland waterway transport.
- *Ensuring overall positive management of Natura 2000 network.* Apart from vetting potentially damaging plans and projects, Member States need to set up effective management systems for Natura 2000, supporting human activities such as conservation-sensitive farming that are beneficial to conservation objectives while also meeting socio-economic needs.
- *Prioritisation of Commission's legal enforcement work.* In the coming years, the Commission will continue to pursue its legal enforcement action to help meet the main objectives of the nature conservation legislation. To this effect, high priority will continue to be given to pursuing infringement cases concerning significant non-conformity of national implementing legislation with the Birds and Habitats Directives, insufficient site designations (mainly in the EU-12 Member States and for marine sites) and the lack of adequate legal protection and management regimes for the Natura 2000 sites. Focus will also be on addressing breaches concerning big infrastructure projects or interventions involving EU funding that have significant adverse impacts on Natura 2000 sites. In this context, the Commission will take into account considerations such as irreversible

ecological damage and, where appropriate, seek interim measures from the European Court of Justice<sup>126</sup>. Infringements concerning unsustainable hunting practices in some Member States will also be followed up closely. In order to better handle individual complaints pointing to widespread problems of bad implementation, the established practice of launching horizontal infringement cases will continue to be followed. The approach in implementing EC legislation in general is set out in the Commission Communication "A Europe of results – Applying Community law" (COM(2007)502 final)<sup>127</sup>. The approach to be taken in the implementation of EC environmental law in particular is laid down in the Commission Communication on implementing European Community Environmental Law (COM(2008)773 final)<sup>128</sup>.

#### 7.1.3.2. Planned action (2009 and beyond)

In addition to planned actions described under the previous point, the Commission will publish in 2009 a Communication on the conservation status of Species and Habitats protected under the Habitats Directive following reports submitted by the Member States under Article 17 of the Habitats Directive. This assessment together with the final report on the implementation of the Biodiversity Action Plan due in 2010 will provide the basis upon which the Commission will consider the need to review the existing nature legislation.

#### 7.1.4. Summary by sector

As regards the designation of Special Protection Areas and Sites of Community Importance as part of the Natura 2000 network, further substantial progress was made in 2008. In December 2008, the Commission adopted eight decisions updating existing or establishing new Biogeographic Lists of Sites of Community Importance (SCIs). The additions include 769 new sites and a total area of 95,522 km<sup>2</sup>.

Most Member States are now in a process of designating their Sites of Community Importance as Special Areas of Conservation (SAC) according to Article 4(4) of the Habitats Directive. Member States have to designate their SCI as SACs not later than six years after the inclusion of the sites in a Community list. The deadline for designation as SAC most sites on the list of the Macaronesian biogeographical region was on 28 December 2007. For most sites of the Alpine biogeographical region the deadline for SAC designation is 22 December 2009 and for most sites of the Atlantic and Continental regions it will be 7 December 2010. Infringement procedures have been launched for the non-designation of SACs in the Macaronesian region. One of the future main challenges will be to launch and manage corresponding infringements for the sites in the remaining regions in case they have not been designated as SACs before the respective deadlines.

Species protection continues to constitute a challenge when implementing the Nature Directives. The species listed in the Directives shall be strictly protected but they can also be hunted provided the conditions in the Directives are fulfilled. The proper functioning of the

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<sup>126</sup> In the last two years the Commission has three times sought for interim measures in nature protection cases. In cases C-503/06, *Commission v. Italy* and C-76/08, *Commission v. Malta*, the Court ordered the Member States to halt illegal hunting activities on 19 December 2007 and 24 April 2008 respectively. In case C-193/07, *Commission v. Poland*, the Commission sought interim measures from the ECJ to prevent a Polish motorway project causing serious habitat damage: the request was dropped when Poland agreed to halt the relevant works pending an ECJ judgment.

<sup>127</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0502:FIN:EN:PDF>

<sup>128</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0773:FIN:EN:PDF>



Natura 2000-network is ensured by hunting derogations granted on correct grounds and by appropriate protection regimes and management of protected sites, including of the species present there.

The priorities in the Nature sector have largely remained the same from previous years. Legal enforcement work in this sector, as in other environment sectors, must be prioritised in the interest of the efficient pursuit of the objectives of environment legislation. The approach to be taken in the implementation of EC environmental law in particular is laid down in the Commission Communication COM(2008)773 final on implementing European Community Environmental Law.

Therefore, in the coming years, the Commission will continue to pursue its legal enforcement action to help meet the main objectives of the nature conservation legislation. To this effect, high priority will continue to be given to pursuing infringement cases concerning significant non-conformity of national implementing legislation with the Birds and Habitats Directives, insufficient site designations (mainly in the EU-12 Member States) and the lack of adequate legal protection and management regimes for the Natura 2000 sites. Focus will also be on addressing breaches concerning big infrastructure projects or interventions involving EU funding that have significant adverse impacts on Natura 2000 sites. In this context, the Commission will take into account considerations such as irreversible ecological damage and, where appropriate, seek interim measures from the European Court of Justice<sup>129</sup>. Infringements concerning unsustainable hunting practices in some Member States will also be followed up closely. In order to better handle individual complaints pointing to widespread problems of bad implementation, the established practice of launching horizontal infringement cases will continue to be followed.

## **7.2. Waste Management**

### *7.2.1. Current position*

#### 7.2.1.1. General introduction

Waste legislation covers a large share of the entire EU environmental acquis and includes thirteen main legislative acts adopted by the European Parliament and the Council and a large number of related decisions adopted through comitology procedures. The overall scope of this legislation is the prevention or reduction of waste production, the re-use, the recycling, other types of recovery than recycling and the disposal of different categories of waste; permitting and control of disposal operations, mainly landfills; and shipments of waste within the EU as well as to and from third countries.

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<sup>129</sup> In the last two years the Commission has three times sought for interim measures in nature protection cases. In cases C-503/06, *Commission v. Italy* and C-76/08, *Commission v. Malta*, the Court ordered the Member States to halt illegal hunting activities on 19 December 2007 and 24 April 2008 respectively. In case C-193/07, *Commission v. Poland*, the Commission sought interim measures from the ECJ to prevent a Polish motorway project causing serious habitat damage: the request was dropped when Poland agreed to halt the relevant works pending an ECJ judgment.

The basic requirements are laid down by the Waste Framework Directive<sup>130</sup> which is complemented by specific legislation addressing particular environmental threats associated with waste. This specific legislation includes harmonised rules on waste management practices, including strict emission limits and operating requirements for the incineration and landfill of waste; harmonised rules on shipments of waste; and product specific recycling legislation setting targets for collection and recycling and introducing producer responsibility principles for specific waste streams derived from consumer goods, in particular packaging waste, end of life vehicles, waste electrical and electronic equipment, mining waste and batteries.<sup>131</sup>

#### 7.2.1.2. Report of work done in 2008

During 2008, EU waste legislation was subject to a major exercise of streamlining, simplifying and improving existing provisions. This included adoption by the European Parliament and the Council of a new Waste Framework Directive in November 2008 and the Commission's proposals to recast directives on respectively the prevention, re-use and recovery of waste electrical and electronic equipment and the restriction of the use of hazardous substances in such equipment, submitted in December 2008.<sup>132</sup>

The new Waste Framework Directive replaces the previous framework directive (2006/12/EC) and the directives on hazardous waste (91/689/EEC) and waste oils (75/439/EEC) with effect from 12 December 2010. The Waste Framework Directive establishes a clear waste hierarchy, i.e. firstly prevention; then preparing for re-use; recycling; other recovery, e.g. energy recovery; and finally disposal as a last option. The directive aims to ensure, together with the Landfill Directive (1999/31/EC) and the Waste Incineration Directive (2000/76/EC), that waste management operations are environmentally sound and adequately permitted.

The Waste Framework Directive forms a basis for all other EU waste legislation by laying down core definitions. The new directive has been modernised and introduces a new approach to waste management that encourages the prevention of waste. Member States are required to establish waste prevention programmes (Article 29). Other key requirements introduced by the new directive concern the obligation to set up separate collection for paper, metal, plastics and glass and the fulfilment of a number of targets on preparing for re-use, recycling and other material recovery. By 2020, Member States must recycle 50% of their household waste, at least paper, metal, plastics and glass, and possibly similar waste and 70% of their construction and demolition waste. Several provisions remain in the new directive, such as the key requirements for Member States to adopt waste management plans (Article 16) and establish integrated and adequate networks for disposal installations (Article 28).

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<sup>130</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives (OJ L, 312, 22.11.2008 p. 3). This Directive replaces Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ L 114, 27.4.2006, p. 9) and has to be transposed by the Member States by 12 December 2010.

<sup>131</sup> For an entire list of all EU waste legislation, please consult the Commission's Europa web-site <http://ec.europa.eu/environment/waste/index.htm>.

<sup>132</sup> Proposal for a Directive of the European Parliament and of the Council, on waste electrical and electronic equipment (WEEE) SEC(2008) 2933, SEC(2008) 2934. Proposal for a Directive of the European Parliament and of the Council, on the restriction of the use of certain hazardous substances in electrical and electronic equipment SEC(2008) 2930, SEC(2008) 2931.

The Commission adopted in December 2008 proposals to recast the directives on waste electrical and electronic equipment ('WEEE') and restrictions on hazardous substances in such equipment ('RoHS'). These directives aim, inter alia, at diverting WEEE from landfills and incinerators to environmentally sound re-use and recycling and at restricting the use of hazardous substances in WEEE. The proposals aim to develop a better regulatory environment, one that is simple, understandable, effective and enforceable. The scope and definitions of both directives would thus be clarified. The proposed directives would also improve their coherence with other EU legislation such as the Waste Framework Directive and REACH and the recent "Marketing of Products" package<sup>133</sup>.

The proposals would enhance the implementation and enforcement of current provisions and lessen the administrative burden on businesses. It is proposed to harmonise registration and reporting obligations for producers and to make national registers interoperable. It is estimated that savings under the proposed revised directives would amount to some €66 million. The directives seek to better control the illegal trade of electrical and electronic equipment. In this respect the proposed changes of the WEEE Directive includes minimum monitoring requirements intended to strengthen Member States' inspection and monitoring with an emphasis on controlling waste treatment and waste shipments. In addition, the proposed revised WEEE directive sets new binding targets for the collection, reuse and recycling of electrical and electronic equipment.

A number of new key legislative measures concerning waste were also voted favourably by the technical adaptation committees and adopted by the Commission through comitology procedures. Such measures included hazardous waste, end of life vehicles and batteries.

The delays for Member States to transpose two major pieces of waste legislation expired in May 2008 for the Directive 2006/21/EC on mining waste<sup>134</sup>; and in September 2008 for Directive 2006/66/EC on batteries and accumulators<sup>135</sup>. Concerning the Directive on mining waste full transposition has been achieved for 13 Member States and for 15 Member States concerning Batteries Directive. In 2008 the Commission initiated legal enforcement actions in several cases concerning Member States' failure to communicate their transposition measures of those directives.

The Commission also carried out a number of studies and taken legal action as regards the conformity of national transposition measures with several key waste directives, in particular, the end of life vehicles directive (ELV), RoHs and the WEEE directive:

- With regard to ELV Directive, conformity has been achieved for seven Member States. In 2008 the Commission has continued enforcement actions concerning non-conform national legislation. As of December 2008, six infringement procedures were ongoing against Belgium, Denmark, Finland, France, Italy and Sweden. In 2009, as a horizontal exercise for remaining 14 Member States, the Commission will assess the national legislation in cooperation with the relevant Member States and take legal enforcement action where necessary.

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<sup>133</sup> COM(2007)35 final, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, The Internal Market for Goods: a cornerstone of Europe's competitiveness Brussels, 14.2.2007.

<sup>134</sup> OJ L 102, 11.4.2006, p. 15.

<sup>135</sup> OJ L 266, 26.9.2006, p. 1.

- With regard to WEEE Directive, conformity is achieved for seven Member States. In 2008 the Commission continued legal enforcement actions opened in 2007 horizontally against a number of Member States. As of end of 2008, infringement cases were open for 15 Member States (Czech Republic, Denmark, Estonia, Spain, Finland, France, Ireland, Hungary, Italy, Luxembourg, Lithuania, Latvia, Portugal, Sweden and Slovakia). In 2009, the Commission in cooperation with the remaining Member States (Malta, UK, Belgium, Bulgaria and Romania) will assess their national legislation and take legal enforcement action where necessary.
- With regard to RoHS Directive, legal assessments finalised in 2008 show that correct transposition is achieved by 15 Member States, for 8 of them after legal enforcement actions were launched. As of end of 2008, infringement cases were open for 9 Member States (Czech Republic, Denmark, Spain, Finland, France, Hungary, Italy, Sweden and Slovakia). In 2009 the Commission in cooperation with Romania and Bulgaria will finalise the assessment of their national legislation and will take legal enforcement action where necessary.

In 2008, Member States reported on the achievement of the collection and recycling targets of the ELV directive, the WEEE directive and the Packaging waste directive and shipment of waste regulation. After the Commission sent reminders to Member States about their reporting obligations in 2007, in 2008 legal enforcement action was launched against 11 Member States concerning failure to fulfil reporting obligations under the Council Regulation 259/93/EEC and Regulation 1013/2006/EC on waste shipments. In 2009, legal enforcement actions will be launched against 9 Member States for not fulfilling their reporting obligations under one or more of those Directives.

With regard to transposition of the Landfill Directive 1999/31/EC, legal action was taken against 15 Member States for inadequate transposition. To date most of these cases have been closed. Second warning letters were sent to 4 Member States (Denmark, Czech Republic, Estonia and France) and 3 Member States (Belgium, France and Spain) were referred to the European Court of Justice. The assessment of Bulgaria's and Romania's legislation is ongoing.

In 2008, there has been one judgment related to illegal landfills (C-442/06 against Italy). The two horizontal cases against France (C-423/05) and Italy (C-135/05) are followed up in the Article 228 EC procedure. A first written warning was sent to Italy and to France in 2008. In a horizontal case against Spain concerning a significant number of illegal and uncontrolled landfills, a final written warning was sent in 2008. After a final written warning for Spain's failure to comply with the Court ruling C-157/04 (La Gomera) Spain has complied with the judgment and the case was closed in 2009.

With regard to the serious situations in Italy, Campania region and Bulgaria, Sofia concerning deficient implementation, in 2008 the Commission has worked very closely with both Member States. A final warning to Bulgaria was sent in November 2008 for its failure to provide an adequate system for the disposal of household waste in Sofia. Concerning Italy in June 2007 the Commission launched legal action against Italy over the chronic waste crisis affecting Naples and the rest of the Campania region. The Commission considers that Italy failed to set up an adequate and integrated waste management system in the Campania region and to guarantee that waste is collected, treated and disposed of without endangering human health and the environment. In view of the continuation of the infringement, the Commission referred the case to Court of Justice in July 2008. The case is currently pending before the ECJ.

During 2008 a number of specific actions were carried out in order to address two particularly serious and wide-spread implementation deficits: illegal waste disposal and illegal waste shipments.

- A series of thirty awareness events and information exchanges with Member States and stakeholders were completed. The events aimed to promote better enforcement and inspections on the ground, focusing on illegal waste shipments and illegal landfills. Following the events a number of conclusions were drawn and a set of recommendations were published in a report available on the Commission's Europa web-site.<sup>136</sup>
- The Commission supported via service contracts the carrying out of a number of joint enforcement actions and exchange programs concerning the EU waste shipment regulation, organised by IMPEL's cluster for transfrontier shipments (IMPEL-TFS); and inspections and monitoring of landfills in co-operation with IMPEL.
- A help-desk for the implementation of EU waste legislation was established in order to investigate and analyse inquiries received from citizens, stakeholders and national authorities on the implementation and interpretation of the Waste Shipment Regulation and the Waste Framework Directive.
- Bilateral and multilateral meetings with Member States and stakeholders, including regular meetings of a 'Waste Directors' Informal Group', were organised with a view to assist and discuss with Member States and stakeholders on issues concerning the implementation of EU waste legislation.
- Studies were initiated and are being carried out in order to examine how to best address implementation problems in the future, for example a feasibility study on the establishment of a waste implementation agency and the need for clear and specific criteria relating to waste shipment inspections and controls.

#### *Judgments of the Court of Justice in 2008*

A number of important ECJ judgments were delivered in 2008. Italy was condemned for incorrect transposition of some provisions of Directive 1999/31/EC on landfill of waste (C-442/06, 10 April 2008, Commission/Italy) and was condemned for maintaining in its law provisions excluding from waste definition some substances (C-283/07, 22 December 2008, Commission/Italy). The waste legislation remains one of the main sources for preliminary ruling references by national Courts, in particular as regard the definition of waste and the qualification of by-product (C-188/07, 24 June 2008, Commune de Mesquer; C-387/07, 11 December 2008, MI.VER Srl). It is expected that the new legislation adopted in 2008 (Directive 2008/98/EC to be transposed by 12 December 2010) will reduce the uncertainty in these domains. In addition, the Court clarified definitions and as regard Directive 2000/76/EC on incineration of waste (C-251/07, 11 September 2008, Gävle Krafvärme AB and C-317/07, 4 December 2008, Lahti Energia Oy). The Court annulled point 2 of Commission Decision 2005/717/EC as regards tolerances for decaBDE in electric and electronic products (C-14/06, 1 April 2008, Parliament/Commission). As a consequence, from 1 July 2008, decaBDE is banned from these products.

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<sup>136</sup> The Commission's Europa web-site: <http://ec.europa.eu/environment/waste/index.htm>.

### 7.2.2. *Evaluation based on the current situation*

The overall situation of implementation of EU waste legislation is critical. The existing implementation deficits result in significant, negative impacts for citizens' health and environment and are widespread throughout the EU. A constantly high number of complaints and petitions<sup>137</sup> are received concerning illegal landfills in several Member States, illegal waste shipments are frequently occurring, notably electronic waste and end-of-life vehicles, and there is a lack of adequate waste management infrastructure in several Member States.

The implementation gaps as regards illegal landfills and illegal waste shipments and the lack of adequate waste management infrastructure remain persistent in large parts of the EU, although the Commission has initiated several actions during 2007 in order to bridge the gaps.

Further considerable pressure emanates from the fact that by 16 July 2009 all landfills in the EU either had to be fully compliant with the technical requirements of the landfill Directive or had to be closed. It is not excluded that a number of Member States will not be in a position to fulfil this requirement.

### 7.2.3. *Evaluation results*

#### 7.2.3.1. *Priorities*

In view of the seriousness of many existing infringements, in particular relating to illegal waste disposal and gaps in waste infrastructure, and due to the long time duration they have persisted, a high priority should be given to effectively pursuing legal enforcement actions and proceedings before the Court of Justice. Specific focus should be given to address structural and systemic failures by Member States to take effective actions in order to address these problems.

The wide-spread nature of these implementation deficits in large parts of the EU justify that they also remain a priority for the Commission's preventive measures next year. The current actions should continue with a focused approach addressing specific problems identified in each of the Member States concerned through bilateral events and meetings. These preventive actions should be extended beyond illegal landfills and illegal waste shipments. The serious situations of deficient implementation of European waste legislation in the Campania region in Italy and Sofia in Bulgaria demonstrate also that improvements are needed beyond the development of adequate waste management infrastructure such as waste prevention programmes and public awareness raising, the development of recycling capacities and a system of separate waste collection.

Certain key requirements to be implemented by Member States during 2009 should be given a high priority. These include the achievement of EU waste reduction and management goals, such as the diversion of biodegradable waste from landfills; and the obligation that all landfills comply with the requirements of the Landfill Directive by 16 July 2009.

As regards illegal waste shipments, the lack of proper enforcement and effective controls and inspections appear to be a fundamental problem in large parts of the EU. The studies and service contracts initiated by the Commission should be completed with a view to identify

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<sup>137</sup> At the end of 2008, the complaints and infringements concerning EU waste legislation represented nearly 25% of all environmental complaints and infringements.

how precise and clear criteria for waste shipment inspections and controls could be established.

Another important priority is to achieve better implementation of EU waste legislation as a support to EU's industry and trade in the waste sector. If properly implemented, EU waste legislation may provide opportunities for enterprises to innovate. EU's waste management and recycling industries are already making substantial contributions to the EU economy and are constantly developing. The legislation and its implementation should also serve to take the interests of these stakeholders into consideration. This may provide important gains for both environmental and enterprise policies, for example by providing better access to secondary raw materials or converting one of the most important greenhouse gases - methane gas - from landfills into electricity.

#### 7.2.3.2. Planned action (2009 and beyond)

The Commission should aim to fulfil the objectives and priorities set out above through the following specific actions:

- Pursue effectively and consistently legal enforcement and proceedings before the Court of Justice concerning illegal landfills and gaps in waste infrastructure, with a particular focus on structural and systemic failures by Member States to address these problems. On the basis of conformity studies and in cooperation with Member States assess and where necessary launch legal enforcement actions concerning the conformity of national transposition measures with the Directive on packaging and packaging waste, Directive on landfill of waste, RoHs Directive, WEEE Directive and ELV Directive.
- Organise awareness events, information exchanges and other bilateral and multilateral meetings with Member States and stakeholders, with a targeted approach addressing specific problems identified in each Member States and covering the most serious and wide-spread implementation deficits, including illegal landfills, illegal waste shipments and the lack of adequate waste management infrastructure existing in several Member States.
- Develop clear and effective criteria for waste shipment inspections and controls with a view to strengthen the enforcement of the Waste Shipment Regulation and prevent illegal waste shipments.
- Closely monitor (a) Member States' compliance with the targets set in the Landfill Directive for diverting biodegradable waste from landfills; (b) the obligations to ensure that all landfills comply with this directive's requirements, in particular concerning obligations to close all non-conform landfills by 16 July 2009; and (c) the waste management capacity and landfill capacity in each Member State.
- Improve the development of waste management plans and waste prevention programmes in order to avoid cases such as in Campania region in Italy and in Sofia, Bulgaria.
- Promote the establishment of best practices on implementation of EU waste legislation, with a particular focus on supporting EU's industry and trade in the waste sector.
- Publish implementation reports for several pieces of EU waste legislation.<sup>138</sup>

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<sup>138</sup> The directives on waste oils (75/439/EEC); sewage sludge (86/278/EEC); hazardous waste (91/689/EEC); packaging and packaging waste (94/62/EC); landfills (1999/31/EC); WEEE (2002/96/EC); the Waste Framework Directive (2006/12/EC); end of life vehicles (2000/53/EC); and the Waste Shipment Regulation (259/93/EEC).

#### 7.2.4. Sector summary

The overall situation in implementation of EU waste legislation remains critical, in particular with a view to heavily impacting landfill and waste shipment deficiencies. 2008 was characterized through a major breakthrough on the legislative side with the adoption of the new Waste Framework Directive which is seen as the major step towards transforming the EU into a recycling society to be fit for the next decade. The recast of the WEEE and RoHS Directives adopted by the Commission in late 2008 will streamline environmentally friendly disposal of e-waste and lessen the administrative burden on businesses.

Legal enforcement to ensure transposition of various Directives, such as the Mining Waste and Batteries Directive, with focus on WEEE and RoHS, ELV, Landfill Directives as well as reporting obligations under the Waste Shipment Regulation remains as a priority in 2009. However, it will be equally important to complement down stream enforcement action by stepping up up-stream measures with a view to enhanced waste prevention, recycling and separate waste collection.

Efforts in combating illegal landfill have considerably been stepped up in 2009. As from 16 July 2009 all non-compliant landfills in Europe had to be closed. Therefore, 2009 is the year in which monitoring of compliance with targets set in different pieces of legislation as well as legal enforcement through infringement action will continue on a high pace. Such action will be supplemented by awareness raising events with Member States and stakeholders on landfill and waste shipment. Furthermore, criteria will be developed with a view to strengthening implementation through inspection, notably for the Waste Shipment Regulation and the Landfill Directive. It will also be necessary to develop a strategy in order to avoid cases of total failure waste management such as in Campania and Sofia.

### 7.3. Environmental Impact Assessment and Strategic Environmental Assessment

#### 7.3.1. Current position

##### 7.3.1.1. General introduction

There are two important pieces of legislation in this sector: Council Directive 85/337/EEC<sup>139</sup> on the assessment of the effects of certain public and private projects on the environment, as amended by Directives 97/11/EC<sup>140</sup> and 2003/35/EC<sup>141</sup> (the EIA Directive) and Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive<sup>142</sup>)

The EIA Directive obliges Member States to carry out environmental impact assessments before certain types of public and private projects which are likely to have a significant impact on the environment are authorised.

The application and effectiveness of environmental impact assessment legislation, in particular the EIA Directive, has been subject to regular reviews in the past. On the basis of such reviews, the EIA Directive was subsequently amended twice, in 1997 and 2003:

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<sup>139</sup> OJ L 175, 05.07.1985

<sup>140</sup> OJ L 073, 14.03.1997

<sup>141</sup> OJ L 156, 25.06.2003

<sup>142</sup> OJ L 197, 21.7.2001, p. 30.



- Directive 97/11/EC widened the scope of the EIA Directive by increasing the types of project covered, and the number of projects requiring mandatory environmental impact assessment (Annex I). It also strengthened the procedural basis of the EIA Directive by providing for new screening arrangements, including new screening criteria (at Annex III) for Annex II projects, and providing minimum information requirements.
- Directive 2003/35/EC was seeking to align the provisions on public participation with the Aarhus Convention on public participation in decision-making and access to justice in environmental matters.

The SEA Directive seeks to ensure that the environmental consequences of certain public plans and programmes that are likely to have significant environmental effects are identified and assessed while they are being prepared and before they are approved.

#### 7.3.1.2. Report of work done in 2008

##### *The EIA Directive*

The Commission is assessing the conformity of the national transposition measures communicated and initiates, when necessary, infringement procedures. The EIA Directive generates a relatively high number of complaints, due to its large scope of application. However, given the essentially procedural character of the obligations laid down, only a small number of complaints lead to infringement cases. The majority of the infringement cases concern bad (incomplete or incorrect) transposition of the Directive's provisions or failure of the Member States to apply the screening mechanism (article 4(2) and Annex III of the Directive).

In 2008, the Commission opened in total 16 new infringement procedures on the basis of the EIA Directive. Twelve cases were opened against Austria, Belgium, Bulgaria, Czech, Germany, Italy, Poland and United Kingdom concerning bad application of the EIA Directive, 10 of which were based on a complaint. Four cases were launched against Italy, Poland, Romania and Slovenia for non-conform transposition of the EIA Directive. Five cases out of those opened in 2008 have already been closed.

##### *The SEA Directive*

The deadline for transposing the SEA directive expired on 21 July 2004, but significant delays in transposition have occurred in many Member States. For this reason, the Commission launched non-communication infringement proceedings against many Member States. All these cases have already been closed since all the Member States have already communicated their national transposing measures.

Thus, in 2008 infringement proceedings for non-conform transposition of the SEA Directive were opened against the following eleven Member States: Bulgaria, Czech Republic, Denmark, Estonia, Ireland, Latvia, Lithuania, Malta, Poland, Slovenia and United Kingdom. For some Member States the cases have been already closed following clarification of national authorities and/ or adoption of necessary amendments ensuring compliance with the Directive's requirements (Bulgaria, Latvia, Malta and Poland).

##### *Judgments of the Court of Justice in 2008*

The EIA Directive has been the subject of several cases brought before the European Court of

Justice. The case-law of the Court of Justice has contributed to a better understanding of certain provisions of the Directive. In 2008, the ECJ delivered, inter alia, the following rulings:

In Case C-2/07 (Judgment of 28/02/2008), in relation to works at Liège-Bierset Airport, which were alleged to have promoted its use for air freight services and to have caused an increase in night flights, the Court confirms that the scope of Directive 85/337 is wide and its purpose very broad. The ruling mainly relates to the definition of development consent.

In Case C-215/06 (Judgment of 03/07/2008), the Court dealt with the issues of retention, permissions and "after-the-event regularisations" of unlawful operations. The Court concluded that "[...] by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive."

In Case C-142/07 (Judgment of 25/07/2008), the question of application of the EIA Directive to the Madrid M-30 urban ring-road was raised in a preliminary ruling from a Court of Madrid (Spain). The Court has underlined that Directive 85/337/EEC (as amended) "...must be interpreted as meaning that it provides for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by point 7(b) or (c) of Annex I to the directive, or where they are projects covered by point 10(e) of Annex II or the first indent of point 13 thereof, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment".

In Case C-66/06 (Judgment of 20/11/2008 Commission / Ireland), the Court declares that, by not adopting, in conformity with Articles 2(1) and 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment that belong to the categories of projects covered by point 1(a) to (c) and (f) of Annex II to that directive are made subject to a requirement for development consent and to an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of the directive, Ireland has failed to fulfil its obligations under the directive;

It is interesting to note that the Court considered (paragraph 85) that "It follows that, by setting thresholds which take account only of the size of projects – to the exclusion of the other criteria laid down in Annex III to Directive 85/337 – for project categories covered by point 1(a) to (c) of Annex II to the directive and by not providing for a case-by-case examination for those project categories ensuring that projects likely to have significant effects on the environment do not escape an assessment of their environmental effects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the directive and has consequently not adopted all necessary measures to ensure that projects likely to have significant effects on the environment are made subject to a requirement for development consent and to an assessment of their environmental effects in accordance with Articles 5 to 10 of the directive."

### 7.3.2. *Evaluation based on the current situation*

#### 7.3.2.1. Implementation of the EIA-SEA Directives

In the interests of better implementation of the EIA and the SEA Directive, the Commission services have developed in recent years a number of guidance documents on particularly important aspects of both directives<sup>143</sup>.

In addition, the Commission is currently preparing reports on the application of both the EIA and the SEA Directives (expected in mid-2009). Regarding the EIA Directive, pursuant to its Article 11(3), the Commission services are preparing the report on the application and effectiveness of the Directive. The report will address and evaluate the status of the application and effectiveness of the Directive and its implementation by the Member States.

Regarding the SEA Directive, the Commission services are preparing an implementation report pursuant to Article 12(2) of the Directive. The report will address and evaluate the status of the application and effectiveness of the Directive and its implementation by the Member States. It must be remembered however that the Directive was in fact implemented very recently in the Member States (deadline for transposition was 21 July 2004) and consequently the experience in its actual implementation is rather limited. In conclusion, the conformity of Member States' legislation cannot yet be considered to have been fully secured.

#### 7.3.2.2. Enforcement of the EIA/SEA Directives

Although the Environmental Impact Assessment sector continues to generate a high number of complaints, its contribution to the overall number of open cases has decreased. Most open cases in the sector still relate to the EIA Directive, but cases relating to the SEA Directive are on the increase. The current situation is satisfactory.

The majority of the infringement cases related to the EIA Directive concern bad (incomplete or incorrect) transposition of the Directive's provisions or failure of the Member States to apply the screening mechanism (Article 4(2) and Annex III of the EIA Directive).

With regard to the SEA Directive, it is relatively recent and there is not sufficient experience on its implementation. Given the similar nature of the obligations between the EIA and SEA Directives, it is to be expected that problems in the correct application of the SEA Directive will be similar to those encountered in applying the EIA Directive. In terms of enforcement, early signs are that decisions as to whether smaller plans and programmes or modifications require an SEA (so-called "screening" decisions) could pose problems of bad application.

### 7.3.3. *Evaluation results*

#### 7.3.3.1. Priorities

In 2008, the Commission services continued applying the priorities identified in the previous report aiming at rationalising the handling of this high number of cases and ensure the effective implementation of the EIA and SEA directives. Those priorities were also highlighted by the Commission in its communication COM/2008/773 and the Commission

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<sup>143</sup> <http://ec.europa.eu/environment/eia/home.htm>

staff working document accompanying the communication. The priority areas regarding the enforcement of the EIA and SEA Directives include the following:

- Non-conformity of transposing measures for the EIA/SEA Directives likely to affect the attainment of the legislative objectives. These cases now mainly concern the EU-12 Member States.
- Breaches concerning big infrastructure projects or interventions involving EU funding.
- Breaches linked to bad transposition of certain provisions of the environmental impact assessment legislation likely to affect overall the attainment of the legislative objectives.
- Breaches that reveal interpretation problems concerning certain provisions of the environmental impact assessment legislation which could have a significant influence on the impact of the legislation that would justify seeking clarification from the Court of Justice.

Apart from the above cases where the Commission legal enforcement action might be indispensable, individual breaches of certain provisions of the environmental impact assessment legislation should primarily be addressed through the existing review mechanisms at Member State level.

The Commission services will continue implementing the priorities recently identified in the sectoral communication COM/2008/773 and the Commission staff working document accompanying the communication.

Depending on the results of future reports and on their application of the EIA and the SEA Directives, further amendments to those priorities cannot be excluded.

#### 7.3.3.2. Planned action (2009 and beyond)

The forthcoming reports on the application of both the EIA and the SEA Directives (expected in mid-2009) will form the basis for future Commission's action in the sector, including a simplification exercise, in terms of clarification of certain provisions of the EIA Directive.

With regard to EIA Directive, based on the findings of the report the Commission services will consider appropriate amendments that may lead to a simplification exercise, in terms of clarification of certain provisions of the EIA Directive, following the accession of the new Member States, probably through a recast initiative. This will aim to ensure better regulation, clearer provisions and strengthened compliance by the Member States, inter alia with the relevant rulings of the ECJ.

With regard to SEA Directive, in light of short experience on its implementation, it is considered that amendments would be premature at this stage.

#### 7.3.4. Sector summary

The EIA Directive has achieved its major objectives. At present, all Member States have established relevant comprehensive regulatory frameworks. The EIA Directive is seen as one of the EU principal pieces of environmental legislation. However, since the development of EIA is an evolving process, the challenge of ensuring that the Directive is implemented in an effective and consistent manner across all Member States is continuous. The forthcoming review on the application and effectiveness of the Directive will use the twenty-year implementation experience gained in order to address this challenge. This forthcoming report

will form the basis for future Commission's action in the sector, including a simplification exercise.

The SEA Directive is recent and there is not sufficient experience on its implementation. Amendments are premature at this stage. The Commission services are currently preparing an implementation report, pursuant to Article 12(2) of the Directive. The report will address and evaluate the status of the application and effectiveness of the Directive and its implementation by the Member States.

The Commission services will continue the implementation of both Directives on the basis of the priorities recently identified in the sectoral communication COM/2008/773 and the Commission staff working document accompanying the communication.

## 7.4. Protecting Water Resources

### 7.4.1. Current position

#### 7.4.1.1. General introduction

Water legislation in the European Union entered a new era following the adoption of the **Water Framework Directive**<sup>144</sup> which establishes a strategic framework for the protection of all water bodies, i.e. rivers, lakes, coastal waters and groundwater in a highly integrated manner. As the cornerstone of EU water policy, the Water Framework Directive provides that all water bodies must meet the standard of “good status” as a rule by the end of 2015. To do so, Member States must draw up a river basin management plan (RBMP) and a programme of measures for each river basin district. The draft plans and programmes must have been submitted to the public for consultation by December 2008 at the latest. It is then foreseen that they will be adopted by December 2009.

The Water Framework Directive will repeal all existing EU water acts by December 2013, except the Urban Waste Water,<sup>145</sup> Drinking Water,<sup>146</sup> Bathing Water<sup>147</sup> and Nitrates Directives.<sup>148</sup> The implementation of the Water Framework Directive must not jeopardise the achievement of the objectives of these remaining EU water acts and vice-versa.

The *Urban Waste Water Directive*, in particular, is a key element of EU water policy for achieving the Water Framework Directive environmental objective of good status. The Urban Waste Water Treatment Directive requires that wastewater generated by agglomerations is collected and made subject to secondary treatment before being discharged into the natural environment. More stringent treatment must be applied when wastewater is discharged into so called sensitive areas. The original EU15 Member States should have achieved the objectives of the Directive in 1998 for sensitive areas, in 2000 for large towns and cities discharging in

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<sup>144</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1–73).

<sup>145</sup> Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment (OJ L 135, 30.5.1991).

<sup>146</sup> Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption (OJ L 330, 5.12.1998).

<sup>147</sup> Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ L 031, 5.2.1976). This Directive is in the process of being replaced by Directive 2006/7/EC of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC (OJ L of 4.2.2006).

<sup>148</sup> Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 375, 31.12.1991, p. 1–8).

normal areas and by 2005 for smaller towns discharging in normal areas. Regarding newer EU12 Member States, which joined the EU in 2004 and 2007, their Accession Treaties provide for extended time periods to meet the objectives of the Directive.

The *Drinking and Bathing Water Directives* require Member States to meet binding quality standards to ensure safe drinkable water from the tap and clean water for bathing, to monitor whether the standards are complied with and to inform consumers and the public accordingly.

The *Nitrates Directive* is also an important instrument which deals with the relationship between agriculture and water quality. In order to reduce and prevent water pollution caused by nitrate pollution originating from agricultural sources, Member States must designate so called nitrate vulnerable zones and then adopt and implement action programs in these zones with the aim of diminishing nitrate and fertilizer inputs to land. Monitoring programs are required to be set up to assess the efficiency of these action programs.

As a complementary requirement to the Water Framework Directive, water directives have also been adopted in recent years in the field of floods,<sup>149</sup> marine waters<sup>150</sup> and groundwater.<sup>151</sup>

#### 7.4.1.2. Report of the work done in 2008

##### *Management of the acquis, new legislation and preventive measures*

The implementation of the *Water Framework Directive* in 2008 was characterised by three main developments. Firstly, 15 Member States published their draft RBMPs for public consultation, with the remaining Member States planning to publish theirs by June 2009. The Commission also developed a preliminary outline for compliance-checking in consultation with Member States to form the basis on which the Commission will assess the content of the final RBMPs in 2010. Secondly, the Commission adopted Decision 2008/915/EC on the results of the intercalibration exercise to ensure that the values used by national authorities to monitor and assess the ecological status of surface water bodies are comparable among Member States.<sup>152</sup> Thirdly, Directive 2008/105/EC was adopted setting environmental quality standards (EQS) for the pollutants identified under the Water Framework Directive as “priority substances” and certain other pollutants.<sup>153</sup> Member States must use these EQS to determine whether the chemical status of surface water bodies is “good”.

The Commission continued the stakeholder consultation process on the future eventual revision of the *Drinking Water Directive* in 2008 and also drew up two guidance documents to support the implementation of the new *Bathing Water Directive*: Decision 2009/64/EC on

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<sup>149</sup> Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks (OJ L 288, 6.11.2007, p. 27–34).

<sup>150</sup> Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ L 164, 25.6.2008, p. 19–40).

<sup>151</sup> Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration (OJ L 372, 27.12.2006, p. 19–31).

<sup>152</sup> Commission Decision 2008/915/EC of 30 October 2008 establishing, pursuant to Directive 2000/60/EC of the European Parliament and of the Council, the values of the Member State monitoring system classifications as a result of the intercalibration exercise (OJ L 332, 10.12.2008, p. 20–44).

<sup>153</sup> Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council (OJ L 348, 24.12.2008, p. 84–97).

the equivalence on microbiological monitoring data allowing the use of alternative monitoring methods<sup>154</sup> and a guidance document that provides advice to Member States for the establishment of the bathing water profiles by the 2011 deadline.

With a view to improving the implementation and enforcement of the *Drinking and Bathing Water Directives*, Member States have used, for the first time, the Water Information System for Europe electronic platform (WISE) to meet their obligations to report on drinking and bathing water quality in 2008.<sup>155</sup> In the field of reporting, an important implementation step regarding the *Urban Waste Water Directive* was the creation of the first ever EU-wide electronic data collection on waste water infrastructure and performance of treatment plants, adapted to the requirements and principles of WISE.

As to the implementation of the *Nitrates Directive*, the Nitrates committee made up of Commission and Member State representatives was convened three times in 2008 mainly to discuss derogations requested by Denmark, The Netherlands and the United Kingdom. These meetings resulted in the adoption of Decision 2008/664/EC allowing Denmark to apply higher amounts of livestock manure to land<sup>156</sup> and discussions over the Dutch and British derogation requests prepared the ground for further derogation Decisions in 2009. In addition, the Commission continued to assess the implementation of the Nitrates Directive in the various Member States, in particular focusing on implementation in France, Greece, Poland, Latvia, Lithuania and the Netherlands.

### ***Management of complaints and of infringements***

The 2008 enforcement work of the Commission in respect of the *Water Framework Directive* mainly concerned its transposition into the law of the Member States:

- *Non-communication of transposing national measures:* Italy and Luxembourg were the two remaining Member States, which had still to notify national transposing measures. Once a new water Italian law had been adopted, the Commission was able to close the Case it had initiated against Italy which had led to a Court ruling (C-85/05). Luxembourg adopted and published the missing domestic implementing legislation in December 2008 paving the way for the Commission to close this infringement case. The Court of Justice had ruled against Luxembourg on this matter in Case C-32/05.
- *Non-conformity of national legislation:* The Commission started in 2008 to examine the replies of Denmark, Ireland, Sweden, Germany and the United Kingdom to the letters of formal notice that had been addressed to them in 2007 for failure to transpose correctly and completely the Water Framework Directive. The Commission opened new cases and sent letters of formal notice to Slovenia and Hungary in January 2008, Finland in February 2008, France in April 2008, Greece, Malta, Poland in June 2008, Estonia in September 2008, the Czech Republic, Latvia, Slovakia in October 2008 and to Lithuania in November 2008 for their incomplete and incorrect transposition of the Directive.

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<sup>154</sup> Commission Decision 2009/64/EC of 21 January 2009 specifying, pursuant to Directive 2006/7/EC of the European Parliament and of the Council, ISO 17994:2004(E) as the standard on the equivalence of microbiological methods (OJ L23 of 27.1.2009).

<sup>155</sup> <http://water.europa.eu/>

<sup>156</sup> Commission Decision 2008/664/EC of 8 August 2008 amending Decision 2005/294/EC concerning a request for derogation under point 2(b) of Annex III to and Article 9 of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 217, 13.8.2008, p. 16–17).

Regarding the *Urban Waste Water Directive*, the Commission's enforcement work has focused on ensuring full compliance with the Directive's obligation to designate all sensitive areas and ensure that more stringent treatment is provided to discharges from agglomerations into these areas by 1998. In 2008 the Commission sent France a Reasoned Opinion under Article 228 of the EC Treaty for its failure to ensure compliance with the judgment of the Court of Justice in case C-280/02. As a result of this judgment a number of additional sensitive areas were required to be designated by France and over 100 agglomerations discharging into these areas need to be provided with more stringent treatment. In the same year, the Commission decided to refer Ireland to the European Court of Justice for its failure to ensure compliance with these obligations, in particular in ensuring that more stringent treatment was applied for numerous agglomerations discharging into designated sensitive areas.<sup>157</sup> The Commission also sent a Reasoned Opinion to Spain under Article 226 of the EC Treaty for its failure designate additional sensitive areas and to ensure more stringent treatment was in place for a large number of agglomerations discharging into designated sensitive areas. For Italy, the infringement action launched to address its failure to designate a number of water bodies as sensitive was closed in 2008 when the Commission received confirmation of their designation. Assessments were then launched to investigate the compliance with the more stringent treatment requirements for those agglomerations discharging into the sensitive areas which Italy has now designated. Furthermore, on 8 May 2008 the Court of Justice condemned Portugal in Case C-233/07 for its failure to ensure compliance with Article 3 of the Directive and the conditions set out in Commission Decision 2001/720/EC granting Portugal a derogation regarding urban waste water treatment for the agglomeration of the Estoril coast.

In 2008 the Commission continued its enforcement work to ensure compliance with the end of year 2000 deadline for the collecting and secondary treatment obligations in the Directive for urban waste water discharges from large towns and cities. The Court of Justice gave judgment against Ireland for its failure to comply fully with these obligations on 11 September 2008 in Case C-316/06. In 2008 the Commission followed up the judgment of the Court of Justice against Greece in Case C-440/06 for its failure to ensure full compliance with the collecting and treatment obligations for certain large towns and cities with a letter of formal notice under Article 228 of the EC Treaty. The Commission also decided to send a Reasoned Opinion to Spain and France under Article 226 of the EC Treaty for their failure to fully comply with these obligations.

Further enforcement action was taken in 2008 under this Directive with a letter of formal notice being issued to Spain under Article 228 of the EC Treaty for its failure to ensure full compliance with the judgment of the Court of Justice in Case C-219/05. The Commission also addressed an additional Reasoned Opinion to the United Kingdom under Article 226 of the EC Treaty for its failure to control excessive spills of untreated urban waste waters from its storm water overflows.

For the *Drinking Water Directive* letters of formal notice were sent, in 2008, to Belgium, Latvia, Hungary and Slovenia on the ground that their national law did not fully and correctly transpose the Directive. The Commission was able to close the cases that had been launched against Spain and Portugal in the light of both Member States' replies and initiatives. Furthermore, in 2008 the Commission sent under Article 228 of the EC Treaty a letter of formal notice to France and a Reasoned Opinion to Portugal on the ground that both Member

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<sup>157</sup> Now lodged in the Court as case C-95/09



States had failed to take all the measures necessary to fully implement Court rulings C-147/2007 and C-251/03 respectively of the violation of the "old" Drinking Water Directive (80/778/EEC).<sup>158</sup>

Concerning the new ***Bathing Water Directive***, the Commission's enforcement work focused on the notification by Member States of the national measures adopted to transpose the Directive and on the communication of the first national lists of bathing waters, which were due before the start of the 2008 bathing season:

- *Non-communication of transposing national measures:* Whereas Member States had to transpose the new Bathing Water Directive and notify these transposing measures to the Commission by 24 March 2008 at the latest, letters of formal notice were addressed in July 2008 to 21 Member States, namely Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Sweden and the United Kingdom for their failure to do so. This proved successful as many of these Member States transposed and notified their domestic implementing legislation by the end of 2008.
- *Bad implementation:* After reminding Member States of their obligation to publish and communicate, before the start of the bathing season, national lists of bathing waters, the Commission followed this up by issuing letters of formal notice to Italy, Luxembourg, the Netherlands and the United Kingdom in September 2008. The Commission is now expected to close these cases as the five non-compliant Member States subsequently communicated their domestic lists by the end of 2008.

As to the ***Nitrates Directive***, following the designation of additional “vulnerable zones”, the Commission decided in 2008 to close both cases which had been initiated against Portugal and Italy. In December 2008 the Commission decided to refer Luxembourg to the Court, now Case C-526/08 for having in place a non-compliant nitrate action programme. In 2008 the Commission services held several meetings with the Spanish and United Kingdom authorities to ensure the adequate amendment of their nitrate action programmes and enabling the Commission to prepare these cases for possible closure in 2009.

#### 7.4.2. *Evaluation based on the current situation*

Emission-oriented legislation, such as the Urban Waste Water and Nitrates Directives, has achieved great progress in protecting water quality. However, considerable challenges remain. These include addressing issues of water scarcity, droughts and floods, ensuring that waste water originating from small towns is properly collected and treated and bringing about the reduction of priority substances in surface waters. These challenges are now being addressed by a new EU legal water framework whose scope has both expanded in recent years, for example, with the adoption of the new Directive on flood risks and has at the same time resulted in the streamlining of EU water law with the repeal of Directives adopted in the 1970s and 1980s. The improvement of water quality in Europe will depend largely on the state of transposition into the law of the Member States of this new EU water legal framework and on its full and timely implementation.

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<sup>158</sup> Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ L 229, 30.8.1980, p.11). Directive 80/778/EEC was repealed and replaced by Directive 98/83/EC on 25 December 2003.

The Common Implementation Strategy, an informal process set up in 2001 by Member States, accession countries and the Commission under the Water Framework Directive, has delivered extensive guidance to promote the implementation of this Directive. Most Member States have met the first implementation deadlines, including, the duty to designate and identify competent authorities by June 2004, the requirement to carry out the environmental and economic analysis of water uses in river basin districts by March 2005 and the establishment of monitoring programmes by March 2007. On the other hand, the proper implementation of the Directive may well be affected, *inter alia*, by its incomplete and incorrect transposition by a number of Member States into their national legal systems and by the absence of exhaustive national methods for assessing the ecological status of surface water bodies.

Water quality has improved following EU15 Member States' encouraging progress in implementing the **Urban Waste Water Directive**. Yet, there are still many agglomerations, for instance, in Belgium, France, Italy and Spain that lack complete waste water collecting systems and treatment facilities. As to the EU12 Member States, the implementation of the Directive is characterized by transitional periods foreseen in the Accession Treaties regarding the building of the necessary waste water infrastructure and by the fact that the EU has made financial support available.

Concerning both the **Drinking** and the **Bathing Water Directives**, assessment surveys show a real improvement in terms of meeting environmental quality standards even if further progress still needs to be made. The preservation, enhancement and restoration of drinking and bathing water quality will depend upon the correct and full transposition and implementation of both Directives, but also on the delivery of the objectives in the Water Framework Directive, Urban Waste Water Directive and Nitrates Directive.

As to the **Nitrates Directive**, significant progress has been made in the recent years, including in 2008, regarding the designation of "vulnerable zones" and the elaboration and implementation of monitoring programmes. However, further improvements are clearly needed, in particular, with regard to the quality of action programmes as nitrate concentrations where there are still major concerns in some intensively farmed areas.

#### 7.4.3. Evaluation results

##### 7.4.3.1. Priorities

As regards reporting, the Commission will continue to develop together with the European Environmental Agency the Water Information System for Europe (WISE) in 2009, as a single platform for water information and reporting which should reduce the overall administrative burden involved in reporting.

The Commission will in 2009, verify whether Member States would have notified by 16 January 2009 at the latest national measures transposing the new Groundwater Directive and launch legal actions where Member States fail to meet this deadline.

As to the implementation of EU water law, the Commission will closely monitor the publication by Member States of their final RBMP and programmes of measures due under the Water Framework Directive in December 2009. In this respect, the Commission will continue to make use of the Common Implementation Strategy as an informal platform to foster better implementation and to exchange good practice. Regarding the Drinking Water Directive, the Commission will consider drafting, in 2009, a legislative proposal aimed at

revising the Directive. The Commission will also assess Member States' data on drinking water quality for 2005-2007 and compile an EU-wide synthesis report.

#### 7.4.3.2. Planned action (2009 and beyond)

Given that the preservation, improvement and restoration of water quality is so closely linked to the *Water Framework Directive*, apart from dealing with existing transposition-related cases, the Commission will focus on ensuring Member States fully meet their obligations, including in particular the adoption of appropriate RBMP and programmes of measures for each river basin district and the development of national methods for assessing the ecological status of surface water bodies.

The Commission's work regarding the implementation of the *Urban Waste Water, the Drinking and the Bathing Directives* will be based on a twin-track approach. On the one hand, it will continue to promote the exchange of information, experience and cooperation at an informal level with Member States and stakeholders. On the other hand, the Commission will draw up and publish implementation reports, including a report on bathing water quality in 2009, the 5<sup>th</sup> Commission report on the implementation of the Urban Waste Water Directive and an EU-wide synthesis report on drinking water quality. In addition, the Commission will launch, if necessary, appropriate legal enforcement action against Member States that fail to comply with the obligations set out in these Directives.

**The Nitrates Directive:** The Commission's work to ensure compliant implementation will continue in 2009 on the basis of detailed assessments of the information provided by Member States in their 4-year implementation reports and via bilateral contacts. In particular, the Commission will finalise in 2009 the examination of the national reports on the 2004-2007 period with the aim of publishing a summary report in 2010. The assessment will focus on the main obligations of the Nitrates Directive, namely on water monitoring, the designation of "vulnerable zones" and the drawing up and updating of nitrates action programmes. It will then need to be decided whether these assessments need to be followed up with infringement action. The Commission has also planned to hold four Nitrates Committee meetings in 2009 to proceed with its regulatory work on Member States' derogation requests and to give Member States the opportunity to exchange information on implementation.

The Commission will also focus on the transposition and implementation of the following new EU water Directives:

- The *Flood Directive*, which requires Member States to assess the flood risks of watercourses and coastlines, to map the flood extent as well as assets and humans being at risk and to take adequate and coordinated measures to reduce flood risk. The transposition deadline for this Directive is November 2009 and the Commission will need to assess whether Member States have notified national transposing measures on time and if those measures correctly and fully transpose the Directive.
- The *Marine Strategy Framework Directive* establishes a strategic framework for the protection of marine waters in the EU and requires Member States to achieve "good environmental status" for all marine waters by 2020 on the basis of an initial assessment of marine water quality by 2012 and the implementation by 2015 of programs of measures. The Commission's enforcement priorities will focus on these deadlines with the first step being to assess whether Member States have notified national transposing measures and designated competent authorities by the 15 July 2010 deadline. The Commission will then need to assess whether those measures will ensure correct and full transposition of the Directive. The Commission will also need to adopt a Decision by mid-

2010 fixing criteria and methodological standards for determining "good environmental status".

- The new ***Bathing Waters Directive*** was required to be transposed into national law by 24 March 2008. The Commission will need to verify whether the transposition is both correct and complete and whether the Directive is appropriately implemented, including the Member States' duty to annually designate and notify bathing waters.
- In view of the implementation and achievement by 2015 of the groundwater pollution-related environmental objective set in the Water Framework Directive, the new ***Groundwater Directive*** establishes criteria for the assessment of "good groundwater chemical status" and for the identification and reversal of significant and sustained upward trends in pollutant concentrations. The new Groundwater Directive is required to be transposed into national law by 16 January 2009 at the latest. Therefore, the Commission shall need to check whether Member States have met this deadline and whether the measures adopted ensure the correct and complete transposition of the Directive.
- In order to allow Member States to meet the 2015 surface water pollution-related environmental objective set in the Water Framework Directive, ***Directive 2008/105/EC*** was adopted on 16 December 2008 setting EQS for "priority substances" and certain other pollutants to be met to achieve "good ecological status" for surface water bodies. Member States are required to transpose Directive 2008/105/EC by 13 July 2010 at the latest. The Commission will need to verify whether Member States would have indeed adopted and notified all national transposing measures by this deadline and whether those domestic measures correctly and fully transpose Directive 2008/105/EC. Any non compliance may lead to the opening of infringement action.

#### 7.4.4. Sector summary

Substantial progress regarding the implementation of EU water law has been observed in the past decade as a result of increased awareness among decision-makers of the critical importance of meeting water quality standards to preserve water resource and the associated natural environment and to protect human health. Better implementation has often been driven by informal and formal cooperation between Member States, industries, non-governmental organisations, consumers and the Commission as well as by infringement procedures. However, more efforts need to be made to ensure full compliance with EU water Directives. In respect of the Nitrates Directive, the Commission has noted that several regions within the EU show worrying water quality trends for which reinforced action programmes will need to be developed. With regard to the Urban Waste Water Directive, Member States must ensure that it is fully applied, including in smaller towns. The implementation of EU water legislation and the enhancement, preservation and restoration of water quality will greatly depend on Member States meeting their obligation to take all required measures to guarantee the achievement by 2015 of the environmental objectives of "good chemical and ecological status" for surface water bodies and of "good chemical and quantitative status" for groundwaters set in the Water Framework Directive. The Commission will continue to focus on the proper transposition of EU water law, including of the new Floods, Marine Strategy and Bathing Water Directives and their implementation. The Commission will continue its efforts to ensure that Member States fulfil their obligation under these Directives and will assist them, when necessary, via formal and informal cooperation channels.

## 7.5. Air quality

### 7.5.1. Current position

#### 7.5.1.1. General introduction

##### *Ambient air quality*

The new Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe is the key legal instrument in this sector<sup>159</sup>. The Directive entered into force on 11 June 2008 and merges four Directives<sup>160</sup> and one Council Decision<sup>161</sup> into a single air quality instrument. It introduces new objectives for fine particles (PM<sub>2.5</sub>) but does not change existing air quality standards. Available evidence points to serious problems in complying with the air quality limit values in many European air quality zones but the new Directive does, however, give under certain conditions Member States greater flexibility in meeting some of these standards in areas where they have difficulty complying.

Under the new Directive 2008/50/EC Member States have the possibility to notify an exemption from the application of the limit values for PM<sub>10</sub> (and to postpone the limit values for nitrogen dioxide (NO<sub>2</sub>) which enter into effect in 2010) provided that certain conditions are satisfied. The Commission has nine months from the submission of a notification to assess it and to decide whether to raise objections or not. If no objections are raised, the notification will be tacitly approved at the expiry of the nine months assessment period.

##### *Air emissions*

There are several legal instruments which affect the emissions of certain air pollutants at source. These include Directive 98/70/EC relating to the quality of petrol and diesel fuels<sup>162</sup>, Directive 1999/32/EC relating to a reduction in the sulphur content of certain liquid fuels<sup>163</sup> and the Paints Directive 2004/42/EC on the level of solvents (volatile organic compounds) in paints, varnishes and refinishing products.

##### *Environmental noise*

The Noise Directive<sup>164</sup> lays down a common approach to avoiding, preventing or reducing on a prioritised basis the harmful effects of exposure to environmental noise. It requires the

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<sup>159</sup> . *OJ L 152, 11.6.2008, p. 1–44.*

<sup>160</sup> The four directives merged into the new directive are: Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management; Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air; Directive 2000/69/EC of the European Parliament and of the Council relating to limit values for benzene and carbon monoxide in ambient air; and Directive 2002/3/EC of the European Parliament and of the Council relating to ozone in ambient air

<sup>161</sup> Council Decision 97/101/EC establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States.

<sup>162</sup> Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC (*OJ L 350, 28.12.1998, p. 58–68*).

<sup>163</sup> Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC (*OJ L 121, 11.5.1999, p. 13–18*).

<sup>164</sup> Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise (*OJ L 189, 18.7.2002, p. 12–25*).

assessment and mapping of ambient noise in large agglomerations and in the vicinity of major roads, railways and airports.

#### 7.5.1.2. Report of work done in 2008

##### *Ambient air quality*

For 2006, around 400 zones in 23 Member States were reported being in non-compliance with the PM<sub>10</sub> limit values. The dilemma has been how to treat these breaches of existing Community law whilst recognising the explicit possibility for Member States to seek a time extension for compliance. The Commission's policy has been to launch infringement proceedings in respect of those excesses which have not been the subject of a notification from the Member States.

In 2008, the Commission asked 23 Member States that had reported excesses of the daily and annual PM<sub>10</sub> air quality limit values for 2005 and 2006 to provide information whether they intended to notify an exemption from the obligation to apply the limit values for PM<sub>10</sub> pursuant to Article 22 of Directive 2008/50/EC. Member States were warned that if a notification was not submitted prior to 31 October 2008 or compliance with the limit values not achieved, infringement proceedings would be launched. By the end of the 2008, 11 Member States had submitted notifications. Bulgaria and Romania reported exceedances in 2007 of the PM<sub>10</sub> limit values in their first air quality reports submitted in September 2008. They were subsequently warned that if a notification of an exemption from the limit values is not submitted prior to 31 March 2009 then infringements proceedings may follow unless compliance has been achieved. So far the Commission has received notifications 16 Member States and launched infringement proceedings against Cyprus, Estonia, Germany, Italy, Poland, Portugal, Slovenia, Spain, Sweden and UK up until March 2009.

In 2008, the Commission also continued to pursue infringement procedures it had launched in previous years against several Member States (Spain, France, Italy and Slovenia) that have shown widespread exceedances of sulphur-dioxide (SO<sub>2</sub>) limit values that have been in force since 1 January 2005. New exceedances were discovered in 2007 and reported to the Commission in 2008 as part of the formal reporting requirements. These excesses may also be the subject of further infringement proceedings in due course.

##### *Judgments of the Court of Justice in 2008*

The Court delivered a preliminary ruling on 25 July 2008 (Case C-237/07) in relation to Directive 96/62/EC on ambient air quality assessment and management whereby it has clarified that where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution.

##### *Air emissions*

In 2008, the Member States reported the first results of the implementation of the Paints Directive and the results of their monitoring programmes regarding the permitted levels of solvents in various paint products.

##### *Environmental noise*

Under the Noise Directive Member States had to send to the Commission by 30 December 2007 summary information about their strategic noise maps that had to be drawn up by 30 June 2007. Strategic noise maps are required to be drawn up in order to monitor the extent of noise pollution, to inform and consult the public about noise exposure, its effects, and the measures considered necessary to address noise.

In 2008, most of the Member States reported the Commission the information required. The Commission started last year and is currently finalizing its assessment of the quality of these noise maps in relation to the requirements of the Directive (with the assistance of the European Environment Agency) and will instigate horizontal infringement proceedings, if appropriate, in respect of non-compliant maps or where no map has been reported.

#### *7.5.2. Evaluation based on the current situation*

##### ***Ambient air quality***

There remain widespread non-compliance with air quality limit values and particularly those for PM<sub>10</sub> which is probably the pollutant of most concern given its adverse impacts on health. This is due in part to a lack of preparedness by the Member States to undertake the necessary assessments of air quality and to put into place the necessary plans and actions to improve air quality in good time. The ongoing "time extension" exercise should improve the capacity of the Member State authorities to prepare plans and programmes as well as the introduction of new measures to tackle air pollutant emissions at source. Community measures such as those recently adopted on light and heavy duty vehicles will also help. In addition, the recent referral to the ECJ in the *Janecek* case (Case C-237/07) should also lead to improvements as it clarifies that individuals have the right to request the preparation of air quality plans before national courts.

##### ***Air emissions***

There are no serious issues associated with the implementation of the fuel quality directive except for the occasional failure to report on fuel quality in a timely fashion. The Sulphur in liquid fuels directive establishes maximum permitted levels of sulphur in a range of fuels including heating oil, heavy fuel oil and marine fuels. There is sufficient information in the public domain that there are regular non-compliances in relation to marine fuels. A perceived problem of the directive is that the obligation falls to the end user rather than on those placing the relevant fuel on the market. The problem is exacerbated by the fact that there is an inconsistency in approach to fuel monitoring amongst the Member States (often with very limited information) which derives from the fact that the Directive's provisions are unclear.

The reports submitted by the Member States last year on the implementation of the Paints Directive and the results of their monitoring programmes regarding the permitted levels of solvents in various paint products have shown that there are varying approaches in the Member States with widely varying efforts regarding the number of samples tested. In addition, there have been numerous requests for clarification of the Directive's provisions particularly regarding the scope of the products it covers and the relationship with the Solvents Directive 1999/13/EC governing the use of solvents at industrial installation. These uncertainties persist despite guidance having been prepared by the Commission services.

##### ***Environmental noise***

The problems thus far encountered in relation to the implementation of the Noise Directive are three-fold. First, Member States have been late in preparing the necessary maps although this is probably due to the fact that this is the first attempt at undertaking a technically challenging task. The second problem is that there are no harmonised assessment methods and so Member States have used national methods thus making a wider geographical assessment or comparison more difficult. Third, the reporting requirements are unclear such that non-standardised reporting of maps has occurred which in some cases makes the use of the reported information very difficult.

### 7.5.3. Evaluation results

#### 7.5.3.1. Priorities

##### ***Ambient air quality***

In the coming years, the Commission will continue to monitor closely the situation with regard to compliance with air quality limit values in all Member States. It will continue to follow its "horizontal approach", which allows air pollution problems to be addressed in a far higher number of places than would have been possible if it had only focused on individual cities or regions.

##### ***Air emissions***

The first priority is to improve the compliance with the permitted sulphur levels for those liquid fuels covered by Directive 1999/32/EC. Secondly, a priority will be to improve the monitoring and reporting under the both the paints Directive and the sulphur content of liquid fuels Directive. Finally, the definitions and scope of the Paints Directive could usefully be clarified.

##### ***Environmental noise***

The first priority is to improve the consistency in the Member States' assessments of environmental noise and the usefulness of the reported information. A second priority is to improve the implementation of the Directive by the Member States by providing greater clarity and guidance.

#### 7.5.3.2. Planned action (2009 and beyond)

##### ***Ambient air quality***

As regards excessive SO<sub>2</sub>, the Commission will continue to pursue the legal enforcement action it has already launched against several Member States.

As for PM<sub>10</sub>, the Commission will assess closely whether time extension requests expected to be submitted by most of the Member States meet the relevant criteria. Infringement procedures are to be envisaged against Member States in breach of the limit values which do not apply for a time extension or do not meet the conditions for obtaining such extension.

In addition, legal enforcement procedures will be pursued to ensure that Member States fulfil their reporting obligations under the air quality legislation.

##### ***Air emissions***



There are reviews of both directives underway with the intention to bring forward amending legislation, if appropriate, in 2010 and 2011 respectively.

### ***Environmental noise***

The priorities for further action will be to complete the ongoing review of the legislation including its implementation. In addition, the Commission will consider, in the context of the review and the need for harmonised assessment methods and streamlined electronic reporting procedures. Finally, where maps or action plans have not been prepared or reported or are deficient in relation to the requirements of the Directive the Commission may pursue infringement proceedings.

#### *7.5.4. Sector summary*

In 2005 a set of legally binding EU air quality limit values became applicable, including limit values for particulate matter PM<sub>10</sub>, pollutant with very important adverse impacts on health. A widespread non-compliance with PM<sub>10</sub> limit values remains, partly due to challenging and complex nature of this pollutant and the lower and delayed impact of certain community measures. But the main reasons are serious delays in the implementation of the directives in a large number of Member States, mainly as regards the drawing up and implementation of the necessary plans to ensure that air quality is improved in good time. The capacity and awareness of the Member State authorities of the need to tackle air pollution at the source and to prepare plans and programmes should be increased through the procedure and conditions laid down in the new Directive 2008/50/EC on ambient air quality and cleaner air for Europe for extending the time required for achieving compliance with the limit values for PM<sub>10</sub>, NO<sub>2</sub> and benzene, joined with coherent and timely enforcement where appropriate.

In the coming years, the Commission will continue to monitor closely the air quality situation in order to ensure long term and sustainable compliance with the limit values in all Member States. In particular, it will be a priority task to assess further time extension notifications as well as to follow-up on the decisions adopted by the Commission. In case objections are raised to the application of a time extension, it will be necessary to pursue the Member States concerned through infringement proceedings. A further priority will be to ensure a timely and effective implementation of Directive 2008/50/EC. Dissemination of information to the public and cooperation between the Member States and the Commission in order to develop appropriate policies should continue.

## **7.6. Climate change**

### *7.6.1. Current position*

#### *7.6.1.1. General introduction*

The most important cross-cutting measures in this domain are the Emissions Trading Directive, 2003/87/EC<sup>165</sup>, and Decisions 280/2004/EC<sup>166</sup> and 2005/166/EC<sup>167</sup>. With the

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<sup>165</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (*OJ L 275, 25.10.2003, p. 32–46*).

<sup>166</sup> Decision 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (*OJ L 49, 19.2.2004, p. 1–8*).

adoption of the Emissions Trading Directive, the EU has established a scheme for greenhouse gas emission allowance trading within the Community (EU ETS). This is a market-based instrument aimed at gradually reducing emissions in selected sectors. It should help the Community and the Member States to meet their Kyoto Protocol commitments to reduce greenhouse gas emissions in a cost-efficient way. With the adoption of Decisions 280/2004/EC and 2005/166/EC the EU established a mechanism for monitoring and reporting greenhouse gas emissions. This makes it possible to evaluate more accurately and more regularly the progress made in reducing emissions under the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol.

#### 7.6.1.2. Report of work done in 2008

### Policy

#### EU ETS Review/Implementation

On 23 January 2008, the Commission adopted its proposal for an improved and extended EU emissions trading scheme (EU ETS). This proposal was the result of extensive stakeholder consultations during the first trading period (2005-2007) of the EU ETS. The review showed positive elements, such as the fact that a real market for trading in carbon allowances had evolved, which due to its size – the EU ETS is the largest emissions trading scheme in the world - offered new opportunities to implement CO<sub>2</sub> abatement measures in a cost-effective manner across the EU.

However, the review also identified a number of specific problems:

- Emissions trading can only exploit its environmental strength and justification, if there is scarcity on the allowance market. However, the lack of verified emissions data when setting up the National Allocation Plans (NAPs) for the first trading period (2005-2007) enabled Member States to support their own industry by relying on over-optimistic projections justifying the issuance of more allowances than was justified to ensure the necessary scarcity on the market.
- Member States had different levels of ambition for the emission reductions to be asked of the sectors participating in the EU ETS, and consequently different Member States set different levels of allocation for the same sector. They also applied widely differing allocation methods.
- The Commission's approval of NAPs turned out to be a long-lasting, cumbersome and complex process.
- Some sectors were able to pass through the market value of the allowances in their product prices to their customers even though they got them for free.

With a view to addressing these issues, the Commission proposed a fully harmonised approach including an EU-wide and annually shrinking cap on allowances - to replace the

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<sup>167</sup> Commission Decision 2005/166/EC of 10 February 2005 laying down rules implementing Decision No 280/2004/EC of the European Parliament and of the Council concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (*OJ L 55, 1.3.2005, p. 57-91*).

prevailing bottom-up approach based on NAPs - leading to an emission reduction of 21% by 2020 as compared to 2005 levels. The Commission also proposed to phase-in auctioning over a period of time as the principal allocation method for all operators, and provided for harmonised rules for the transitional free allocation. These elements do not only guarantee that the required emission reductions are achieved, they also increase the certainty and predictability in the system, thereby fostering investments to reduce emissions.

#### EU ETS/Hydroelectric power production projects

According to the ETS Directive as amended by the Directive 2004/101/EC, "... Member States may allow operators to use CERs and ERUs from project activities in the Community scheme" (Article 11a (1)), with the exception of credits from land use, land use change and forestry activities as well as nuclear projects (Article 11a (3)).

"In the case of hydroelectric power production project activities with a generating capacity exceeding 20 MW, Member States shall, when approving such project activities, ensure that relevant international criteria and guidelines, including those contained in the World Commission on Dams November 2000 Report "Dams and Development – A New Framework for Decision-Making", will be respected during the development of such project activities."(Article 11b (6))

The interpretation of this requirement varied among Member States and so has led to the fragmentation of the carbon market and uncertainty for its participants.

In the course of 2008, Member States have agreed to accept in principle common guidelines for the approval of large hydropower project activities, which may also constitute guidance for Member States on which carbon credits to accept for compliance.

The document establishes a common understanding of the meaning of Article 11b (6) regarding its scope and the means whereby project proponents can establish that their projects meet the relevant requirements. It is accompanied by a template enabling project proponents to prepare Article 11b (6) compliance reports, which are then verified by a designated operational entity (DOE) or another verifier appointed by a Member State.

The Member States' agreement to abide by these guidelines is voluntary. The final decision regarding the acceptance of a project as meeting the aforementioned requirements remains the responsibility of the Member State approving the project activity.

By 29 January 2009, most Member States in principle confirmed that they will publish the guidelines and accompanying template by 1 April 2009 and implement these by 1 July 2009.

Member States will also continue cooperation on voluntary harmonisation of the implementation of Article 11b (6), exchanging experience and views on the practical aspects of the use of the guidelines and template.

#### EU ETS NAP Implementation

During the year 2008, all Member States notified the revision of their NAPs on the basis of the Commission's decisions setting out revision requirements as a condition for NAP approval. In addition, Member States also notified their installation-level allocation decisions.

#### EU ETS Registry

The two main tasks for the EU ETS Registries in 2008 were the following:

- The linking of the Community Independent Transaction Log (CITL) and all Member State registries to the UNFCCC International Transaction Log (ITL). This was a complex IT operation that required extensive planning and co-ordination, and was eventually carried out successfully and smoothly and was fully operational in October 2008.
- The amendment of the Registries Regulation to allow transactions with aviation allowances through an IT process that does not require the use of the UNFCCC ITL. This amendment was successfully adopted on 11 October 2008.

In addition, the revised EU ETS Directive agreed in December of 2008 decided that from 2012, all allowances will be held in the Community Registry. This decision will transfer the bulk of Member State-level ETS-related IT-operations to the Commission, a process which will require a significant expansion of the Registry related IT-capacities of the Commission.

### EU ETS/Monitoring, Reporting and Verification

Monitoring and reporting of emissions is currently implemented by the Monitoring and Reporting Guidelines (MRG)<sup>168</sup> established in accordance with Article 14 of the current EU ETS Directive. Consistent implementation of the MRG is required in order to ensure that “a ton of carbon emissions is a ton”, no matter where and by whom it has been emitted within the EU. The MRG makes it possible to provide for a co-ordinated EU approach to compliance.

Thus, in 2008, compliance with the entire Monitoring, Reporting and Verification (MR&V) cycle became more important. With this in mind, the Commission chaired and co-organised with some Member States a two-day conference on EU ETS compliance on 10-11 September 2008. The Conference laid down the foundations of the EU ETS Compliance Forum that should start its activities in 2009. Moreover, in 2008, a comprehensive evaluation project was carried out in the 27 Member States with respect to their implementation of the MR&V compliance cycle.

An amendment and a new annex to the MRG was also adopted to take account of the addition of a new gas (N<sub>2</sub>O) to the system, following a request for opt-in from The Netherlands. A similar process was launched for a new sector, namely aviation and a new activity, namely carbon capture and storage (CCS).

The revised EU ETS Directive agreed in December of 2008, provided for a renewed legal basis for Monitoring and Reporting in Article 14 as well as an extension of the scope of Article 15 regarding Verification to include the Accreditation of verifiers. Moreover, both Articles provide a legal basis for moving from the present MRG to an MR&V system based on two different Regulations, one for Monitoring and Reporting and the other for Accreditation and Verification. This development would allow for the implementation of a more harmonised approach across the EU in the third trading period(2013-2020).

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<sup>168</sup> EU ETS Monitoring and Reporting Guidelines 2007/589/EC. Commission Decision of 18 July 2007 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council

Finally in 2008, a policy initiative was established on ETS Accreditation and Verification laying down the basis for developing a possible guidance note for the second trading period (2008-2012). This initiative will prepare the main elements of the Regulation for the third trading period. The project was finalised in November 2008.

### **Implementation and legal enforcement**

#### **Cases related to the ETS Directive: National Allocation Plans**

The individual NAPs adopted by Member States fix the total number of emission allowances and set out the methodologies to allocate them to individual installations covered by the EU ETS. NAPs for period 2008-2012 are thus an important element in the Member States' strategies for achieving their relevant emission reduction targets under the Kyoto Protocol.

It should be noted that the Commission closed in 2007 all the cases it had launched in 2006 against those Member States, which had failed, to submit by 30 June 2006 their national allocation plans ("NAPs") for the second trading period (2008-2012) of the EU ETS as required by the Emissions Trading Directive.

In 2007 several MS opposed the Commission decision on their national allocation plan. In essence they claim that the upper limit set by the Commission on the total quantity of allowances that they may allocate was too low and that the Commission has exceeded the limits of its discretion when assessing the proposed NAPs by using its own methodology.

Consequently, 9 Member States have brought annulment actions on the basis of Article 230 EC before the European Court of Justice (pending cases). Early 2009 the following cases were pending before the Court of First Instance (CFI): T-183/07 Poland, T-221/07 Hungary, T-194/07 Czech Republic, T-369/07 Latvia, T-368/07 Lithuania, T-263/07 Estonia, T-499-500/07 Bulgaria, T-483-484/07 Romania. The written part of these procedures is over. The Polish and Estonian hearings took place in February 2009. One case (T-32/07 Slovakia) was withdrawn at the beginning of 2008.

Not only the Member States brought actions, also companies allegedly affected by the allocation of emission allowances did. The following cases initiated by companies against various Commission NAP decisions were found to be inadmissible by the CFI (T-130/06 Drax, T-489/04 U.S. Steel Kosice, T-27/07 U.S. Steel Kosice, T-13/07 Cemex, T-28/07 Fels-Werke, T-193/07 Gorazdze Cement, T-195-199/07 Lafarge Cement, T-203/07 Cemex, T-208/07 BOT, T-241/07 Buzzi, T-28/07 Saint Gobain, T-27/07 US Steel Kosice).

Moreover, the European Court of Justice (ECJ) upheld the judgments of the CFI in T-28/07 Saint Gobain as well as in T-27/07 US Steel Kosice in Cases C-503/07P – judgment delivered on 08 April 2008 - and C-6/08P – judgment delivered on 19 June 2008 - respectively.

Two cases were initiated by Arcelor not against a Commission NAP decision like the previous cases but against the EU ETS Directive itself. One was a direct action (T-16/04 Arcelor) brought before the CFI and the other was a preliminary ruling referred to the ECJ (Case C-127/07). In essence, both cases alleged that the EU ETS Directive breached the principle of equal treatment. In its judgment of 16 December 2008 in Case C-127/07, the ECJ found that the EU ETS Directive did not infringe the principle of equal treatment. In Case T-16/04 Arcelor before the CFI, the Court was waiting for judgment of the ECJ in the preliminary ruling Case C-127/07 before delivering its own judgment on the direct action. Proceedings are therefore still pending before the CFI in 2009.

### Cases related to the ETS Directive: implementing measures

As far as the Emissions Trading Directive is concerned, following Commission enforcement action, all Member States have communicated their national implementing legislation. A 2008 study on the implementation of the ETS Directive (as amended by Directive 2004/101/EC, the so-called Linking Directive) however revealed shortcomings in most Member States.

### Reporting cases under Article 3 (1) and (2) of Decision 280/2004/EC

Under Decisions 280/2004/EC and 2005/166/EC, Member States must provide the Commission with annual reports on their actual emissions of greenhouse gases and twice-yearly reports on domestic climate change policies and measures and emission projections. Given that the Commission needs the information provided by the Member States for its own annual report to the UN Framework Convention on Climate Change and the Kyoto Protocol, it has constantly reminded the Member States of their reporting obligations. As a result reporting continues to improve in terms of timing and content.

In 2008, the Commission closed numerous infringement proceedings against Member States that had failed to submit 2007 annual and 2005 bi-annual reports as they provided the Commission the missing information. However, in the case of some Member States the Commission also had to send a second Reasoned opinion under Article 226 or refer the matter before the Court of Justice for the failure to completely fulfil the relevant reporting requirements.

New cases were opened early 2009 against all the MS (except Austria, Sweden and Romania) as their 2008 annual reports on GHG emissions were provided in time but did not cover all the information needed for the Commission to draft its own annual report to the UN Framework Convention on Climate Change.

#### *7.6.2. Evaluation based on the current situation*

### EU ETS Review/Implementation

The problems identified during the review of the EU ETS showed that improvements were needed to ensure that the EU ETS would do what it was set up to do, namely contribute significantly - and cost effectively - to the necessary greenhouse gas emission reductions. Since almost all Member States were over-optimistic when determining their total quantity of allowances, the environmental effectiveness of the system was put in question – to the detriment of the overall efficiency of the scheme and thus to the detriment of the overall economy of the EU by not reducing emissions at least-cost. As, in addition, comparable sectors in different Member States benefited from different levels of free allocation and were allocated based on different allocation rules, there were distortions of competition in the internal market.

The delays associated with the process of approving the NAPs drawn up by Member States led to an extended period of uncertainty in the market with respect to the overall cap of the EU ETS which was built bottom-up. Such uncertainty hampered the proper functioning of the allowance market and the ability of companies to decide on investments in clean technologies.

Companies in some sectors were able to pass on the market value of allowances in their product prices, although they had received the allowances for free. This increased the operating profits for these companies. Although the pass-through of opportunity costs is

rational from a business point of view, the windfall profits it created led to negative perceptions for the EU ETS.

Further information on the evaluation of options to address the problems identified during the review of the EU ETS can be found in the impact assessment that accompanied the Commission's proposal<sup>169</sup>.

On the basis of the issues identified in the conformity studies on the implementation of the ETS Directive, the Commission decided end of 2008 to address these alleged shortcomings through an administrative letter to the Member States concerned, asking for clarification of the issues identified in the studies. These letters were issued early 2009.

#### EU ETS/Hydroelectric power production projects

The requirements set out in Article 11b (6) of the amended ETS Directive do not apply to credits purchased by Member State governments. This creates discrepancy in how project developers are treated, even though some Member States apply the same approval criteria to projects for government purchase programmes as for projects destined for the EU ETS.

Given these discrepancies in treatment, which will continue until the Article 11b (6) guidelines become operational; there remain possibilities for some projects to be evaluated more stringently than others depending on the Member State concerned. This means that existing forum shopping by project developers may continue some time into the future.

This is currently exacerbated by the fact that whereas Member States are applying the requirements of Article 11b (6) to the approval of project activities, a majority of Member States are reluctant to check subsequently certified emission reductions (otherwise known as CERs) surrendered for compliance against the approved project criteria.

#### EU ETS NAP Implementation

The Commission duly assessed the NAP revisions for consistency with the requirements in the Commission's decisions and the national installation-level allocation decisions for consistency with the revised NAPs. On the basis of these assessments, the Commission allowed the Member State to issue carbon allowances to installations.

The appeal by the Member States on the ground that the approach by sectors of the ETS Directive breached the principle of equal treatment was not granted. The cases brought before the CFI on the NAP's do illustrate however that whilst drafting community legislation sufficient attention should be paid to the precise role of the Commission, in particular its powers of assessment of the Member States input.

#### EU ETS Registry

Linking with the UNFCCC ITL was necessary because credits under the UNFCCC flexibility mechanisms, such as CERs and emission reduction units (otherwise know as ERUs) could only be imported into the ETS through the link with the ITL.

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<sup>169</sup> [http://ec.europa.eu/environment/climat/emission/pdf/com\\_2008\\_16\\_ia\\_en.pdf](http://ec.europa.eu/environment/climat/emission/pdf/com_2008_16_ia_en.pdf)

The amendment of the Registries Regulation was necessary as international aviation is not covered by the Kyoto Protocol and thus, trading in aviation allowances does not belong under the supervision of the ITL.

The decision to hold all allowances in a Community Registry was necessary in order to simplify the Registry related IT-infrastructure, thereby making it safer and cheaper for the EU as a whole, although costs will be concentrated in the Commission.

#### EU ETS/Monitoring, Reporting and Verification

Current practices of Member States and Competent Authorities shows a wide range of different implementation and application of the MRG's requirements, for Monitoring and Reporting, with different approaches persisting at national level. Varying Monitoring and Reporting requirements mean that some operators put more effort into Monitoring and Reporting than others, potentially leading to concerns over 'fairness' within the current system. Moreover, some Competent Authorities' monitoring and reporting systems are more efficient than others. For these reasons, there is scope for improvement of the level playing field across the EU in terms of Monitoring and Reporting so as to ensure the environmental integrity and the credibility of the current EU ETS.

The EU ETS Directive and the MRG only regulate some fundamental requirements and aspects of the Verification process. Details are left to Member States. Most, but not all Member States developed specific national verification guidance often based on internationally acknowledged criteria. Quality checks of verification reports are also carried out in many Member States, but not in all. A level playing field concerning the quality of Verification needs to be built up.

The same goes with respect to Community-wide Accreditation of verifiers, where Member States show a very diverse picture with a wide range of standards. As a result of the described lack of binding guidance on Verification and Accreditation in the current EU ETS Directive a plurality of 27 national systems has evolved.

Evaluation projects on behalf of the Commission and several Member States have identified a lack of transparency, as well as a lack of information on quality and consistency of MR&V, as the main challenges for the further development of compliance within the EU ETS.

#### Reporting under Article 3 (1) and (2) of Decision 280/2004/EC

Reminding the Member States of their reporting obligations at meetings (working group level) and, where needed, through a letter of formal notice does seem to work as the 2009 annual reports have improved in timeliness and completeness compared to those of 2007 and 2008. This may be due to the increasing familiarity of the MS with their reporting requirements.

#### 7.6.3. Evaluation results

##### 7.6.3.1. Priorities

#### EU ETS Review/Implementation

The Commission's proposal on an improved and extended EU ETS was agreed by the Council and the European Parliament in a first reading agreement in December 2008. It was a key



measure in the climate and energy package. There were several reasons why this complex package could be adopted in such a short time. First of all, the European Parliament and the Council agreed with the overall architecture of the Commission's proposal. Secondly, the elections to the European Parliament in June 2009 meant that the adoption of the package would have been significantly delayed if not adopted in first reading. Thirdly, and perhaps most importantly, the ongoing negotiations on a new international agreement on climate change are to conclude in Copenhagen in December 2009. By adopting the climate and energy package, the EU gave new impetus to the negotiations by showing that it is possible for 27 very different countries to agree ambitious and legally binding climate policies. As for the ETS specifically, the fact that the scheme has been much improved and extended means that it now has a prominent position as a potential nucleus of the emerging global carbon market.

The European Parliament and the Council did not question the proposed overall architecture of the EU ETS, the level of environmental ambition or the level of harmonisation. Thus, the problems identified during the review of the EU ETS have been largely addressed.

The revised Directive still needs to be formally adopted by the Council of Ministers and is therefore expected to enter into force in the spring of 2009. The changes to the EU ETS will take effect as from the beginning of the third trading period (2013-2020) on 1 January 2013, except for the inclusion of the aviation sector which will take effect as from 1 January 2012.

The Commission will continue its work preparing the numerous implementing measures that the revised Directive provides for (15 comitology measures, 7 legislative proposals, reporting requirements). The work has become even more urgent as the co-legislators advanced several deadlines for the Commission's deliverables. For example, the deadline for determining the sub-sectors deemed to be exposed to a significant risk of carbon leakage was advanced by 6 months to 31 December 2009, the deadline for adopting a Regulation on timing, administration and other aspects of auctioning was advanced by 6 months to 30 June 2010, and the deadline for adopting harmonised rules for the transitional free allocation of allowances was advanced by 6 months to 31 December 2010.

Due to the importance of providing regulatory certainty and predictability to the market, the bulk of the necessary implementing measures should be ready well in advance of the beginning of the third trading period in 2013.

#### *EU ETS/Hydroelectric power production projects*

The Commission will monitor the application of the co-ordinated approach by Member States. Should voluntary co-ordination not yield the anticipated results, Article 11a (9) of the revised EU ETS Directive stipulates that from 1 January 2013 the Community may take up measures restricting the use of specific credits from project types.

#### *EU ETS NAP Implementation*

By the end of 2008, only the NAPs of Bulgaria, Hungary, Poland and Cyprus still awaited approval (all of which except for Poland were notified after November 2008).

The Commission is committed to defending its position in all cases currently pending before the CFI.

#### *EU ETS Registry*

The main priority now is to prepare the Regulation establishing the Community Registry for adoption through comitology.

#### EU ETS/Monitoring, Reporting and Verification

In 2009, the Commission's priority remains focused on co-ordinating the national implementation of current MR&V procedures. Moreover, the Commission will develop MR&V rules for aviation and CCS.

##### 7.6.3.2. Planned action (2009 and beyond)

#### EU ETS Review/Implementation

During 2009 and 2010 the Commission plans to hold a number of separate stakeholder and expert meetings regarding the list of (sub-)sectors deemed to be exposed to a significant risk of carbon leakage, the auctioning regulation, the harmonised rules for transitional free allocation (benchmarks), the need for measures to prevent market abuse and the regulations on monitoring and reporting of emissions and on verification of emission reports and accreditation of verifiers. All of these measures are to be adopted through comitology.

The first measure to be adopted, by the end of 2009, will be the list of (sub-)sectors deemed to be exposed to a significant risk of carbon leakage.

During 2010, the auctioning regulation and the harmonised rules for transitional free allocation and the amended registries regulation are to be adopted. The registries regulation needs to be amended to take account of both the revised EU ETS and the effort sharing decision. The Commission also plans to adopt guidance on free allocation to the power sector in 2010. If further examination would show that there is a need to adopt measures to ensure that the carbon market is sufficiently protected from insider dealing and market manipulation, then these would also be due by the end of 2010.

In addition, the Commission is to determine and publish the total quantity of allowances for the year 2013 and the estimated quantity of allowances to be auctioned in September and December 2010, respectively.

The exact access for each operator to the use of JI/CDM credits within the 2008 to 2020 period should be determined by early 2011, and by the end of 2011, the regulation on monitoring and reporting of emissions and the regulation on verification of emission reports and accreditation of verifiers are due for adoption.

On the basis of the explanations given by the Member States to the request for clarification on the implementation of the ETS Directive into their national legislation, the Commission will decide on further action in 2009.

#### EU ETS/Hydroelectric power production projects

The Commission will set up a website devoted to the co-ordinated approach to Article 11b (6) of the amended ETS directive by 1 April 2009 and will monitor the implementation of voluntary guidelines by Member States.

#### EU ETS NAP Implementation

The outstanding NAPs should be finalised during the first half of 2009. This work stream is to close afterwards, as the legislation applicable after 2013 does not envisage NAPs. Some follow-up work does remain in relation to the processing of any changes proposed by Member States concerning the installation level allocation decisions.

The Commission will deliver its defence at the oral stage of the proceedings currently pending before the CFI, throughout 2009 and 2010, including replying to any questions raised by the CFI.

#### EU ETS Registry

The Regulation establishing the Community Registry should be published in the OJ by the 1<sup>st</sup> quarter of 2010.

#### EU ETS/Monitoring, Reporting and Verification

For the period 2009 to 2011, the Commission will prepare a Monitoring and Reporting Regulation in accordance with the revised Article 14 of the EU ETS and its Annex IV instead of the present MRG.

The Commission will also prepare an Accreditation and Verification Regulation in accordance with the revised Article 15 of the EU ETS and its Annex V. In this way a clear legal basis for verification and accreditation will be established.

Both Regulations will have to be in place by 31 December 2011.

#### Reporting cases under Article 3 (1) and (2) of Decision 280/2004/EC

The Commission will continue to remind the Member States of their (annual and bi-annual) reporting obligations. A next round of reminders to the Member States probably concerns the bi-annual reports which were due for 15 March 2009.

#### 7.6.4. Sector summary

In 2008 the Member States and the Commission further strengthened their commitment on combating climate change. In December 2008 they agreed on the climate change package which sets even more ambitious targets whilst providing the necessary framework *inter alia* by amending the ETS Directive<sup>170</sup>. This is a market-based instrument aimed at gradually reducing emissions in selected sectors. It should help the Community and the Member States to meet their Kyoto Protocol commitments to reduce greenhouse gas emissions in a cost-efficient way. This renewed and extended commitment will enable both the Member States and the Community to achieve their ambitious targets for 2013 and 2020. Apart from the adoption of the package, a whole range of legal and practical implementation actions were decided and carried out in 2008 and will continue in 2009 and on. This included *inter alia* the adoption of National Allocation Plans (NAP) under the ETS Directive, the preparation of Guidelines (on Hydroelectric power production projects) and linking the EU allowances registered in the Community Independent Transaction Log (CITL) to the registration held under the Kyoto Protocol as well as the extension of the CITL so that it can register

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<sup>170</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (*OJ L 275, 25.10.2003, p. 32–46*).

allowances issued to aviation. Ongoing legal actions, initiated by the Member States, private enterprises and the Commission, aimed at clarifying existing obligations of the Member States and the Commission in the adoption of NAPs as well as ensuring that the national legal systems will be able deliver according to the ETS Directive. It also included action on the reporting by Member States on their greenhouse gas emissions required under Decisions 280/2004/EC<sup>171</sup> and 2005/166/EC<sup>172</sup>. Monitoring and reporting allows for an accurate and regular evaluation of the progress made in reducing emissions under the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol. Although much work was done in 2008, the high level of ambition of both the Member States and the Commission for cutting down greenhouse gas emissions implies that a lot of work is still lying ahead.

## **7.7. Industrial installations**

### *7.7.1. Current position*

#### *7.7.1.1. General introduction*

The most important piece of legislation relating to industrial emissions is Directive 2008/1/EC concerning integrated pollution prevention and control (IPPC Directive, codified version of Directive 96/61/EC)<sup>173</sup>. This Directive sets out common permit rules for industrial installations in order to prevent and control emissions into air, water or soil. Installations covered by the IPPC Directive are required to operate under an integrated permit granted by the competent authorities of the Member States. The provisions of the directive were due to enter into effect either in 1999 (for new installations) or before the end of October 2007 (for existing installations).

The Large Combustion Plants (or LCP) Directive, 2001/80/EC<sup>174</sup>, aims to reduce emissions of sulphur dioxide, nitrogen oxides and dust from combustion plants whose rated thermal input is equal to or greater than 50 MW. The control of emissions from such plants plays an important role in the Community's efforts to combat acidification, eutrophication and ground-level ozone as part of the overall strategy to reduce air pollution.

Further important legislation relating to industrial emissions includes the Waste Incineration Directive, 2000/76/EC<sup>175</sup>, and the VOC Solvent Emissions Directive, 1999/13/EC<sup>176</sup>.

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<sup>171</sup> Decision 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (*OJ L 49, 19.2.2004, p. 1–8*).

<sup>172</sup> Commission Decision 2005/166/EC of 10 February 2005 laying down rules implementing Decision No 280/2004/EC of the European Parliament and of the Council concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (*OJ L 55, 1.3.2005, p. 57–91*).

<sup>173</sup> *OJ L 24, 29.01.2008, p. 8–29*.

<sup>174</sup> Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants *OJ L 309, 27.11.2001, p. 1–21*

<sup>175</sup> Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste (*OJ L 332, 28.12.2000, p. 91–111*).

<sup>176</sup> Council Directive 1999/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations (*OJ L 85, 29.3.1999, p. 1*).

The National Emission Ceilings (NEC) Directive, 2001/81/EC<sup>177</sup>, limits the total national emissions of certain air pollutants with the aim to reduce negative effects on human health and the environment, such as acidification, eutrophication and ground-level ozone. The NEC Directive covers air emissions of all economic sectors within the national territories.

The Ozone Regulation<sup>178</sup> sets out controls on production, importation, exportation, supply, use leakage, recovery and lays down the phasing-out in line with the definitions of the Montreal Protocol.

The Seveso II or Major Accident Hazard Directive<sup>179</sup> applies to establishments in which certain dangerous substances are present in sufficiently large quantities to create a major accident hazard. It contains obligations on both operators and Member State authorities to take measures aimed at preventing major accidents and limiting their consequences. One of the key requirements is that emergency plans must be drawn up for areas surrounding so-called “upper tier“ establishments in order to properly protect the public should an emergency arise.

#### 7.7.1.2. Report of work done in 2008

##### Revision of the existing legal framework

In December 2007 the Commission adopted a proposal for a directive on industrial emissions (IPPC Recast) which was subsequently submitted to the legislative procedure in 2008 and is currently being negotiated in co-decision. Some of the main proposed amendments to the legislation are the following:

- Recasting the existing pieces of legislation (seven in number) into a single Directive on industrial emissions.
- Improving and clarifying the concept of BAT to create a more coherent application of the current IPPC directive
- Introducing minimum provisions with regard to inspection, review of permit conditions and reporting of compliance.
- Extending the scope of the IPPC Directive to cover certain activities (e.g. combustion plants between 20 and 50 MW)
- Commission action to amend non-essential elements of the Directive supported by a Comitology Committee

Work in relation to the revision of the NEC Directive also continued in 2008 and is still ongoing. Although the revision was scheduled as part of the Commission legislative work programme for 2006 a proposal had to await the adoption of the Community energy and climate package. Finalisation of the proposal of the NEC Directive is presently underway.

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<sup>177</sup> Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, OJ L 309, 27.11.2001, p. 22–30

<sup>178</sup> Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer, OJ L 244, 29.9.2000, p. 1–24

<sup>179</sup> Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances OJ L 10, 14.1.1997, p. 13–33.

In 2008 the Commission made a proposal for a recast of the Ozone Regulation which is expected to enter into force as of 2010, subject to the agreement of the corresponding European Institutions. The recast aims at simplification, clarification and streamlining. Under the new regulatory text the production and consumption of ozone depleting substances would be reduced. This would not only protect the ozone layer but also reduce greenhouse gas emissions.

A review of the Seveso II Directive, the provisions of which have remained essentially unchanged for over 10 years, also continued in 2008 and remains ongoing with Commission proposals for possible amendments to the Directive expected in early 2010.

#### Compliance promotion and legal enforcement work

The Commission has developed an action plan for implementation of the existing legislation on industrial emissions that forms part of the 2007 Commission Communication "*Towards an improved policy on industrial emissions*"<sup>180</sup>. It sets out key actions over the timeframe 2008-2010, the details of which are set out within the Communication itself. During 2008 the Commission continued to carry out implementation work in line with the actions specified in the action plan.

#### *Non-conform transposition of the IPPC Directive*

During 2008 the status of transposition of the IPPC Directive by EU-10 MS has been analysed, and as a result three non-conformity infringement procedures were launched against the Czech Republic, Estonia and Lithuania. In addition, following a judgment of the Court in May 2008 which condemned Belgium for the non-conform transposition of several provisions of the directive (Case C-271/07), the Commission sent Belgium in December 2008 a first warning letter under Article 228 of the EC Treaty.

#### *IPPC permits for existing installations under Article 5(1) of the Directive*

After the expiry of the deadline of 30 October 2007 by when all existing IPPC installations had to obtain a permit issued in accordance with the requirements of the Directive, the Commission requested an update from all Member States on the state of play of their permitting processes. The answers showed that, despite warnings sent by the Commission to all the MS on several occasions, the deadline for issuing the permits was missed for about 10,000 installations. To address these systematic breaches, the Commission started infringement procedures against several Member States who were significantly lagging behind in issuing permits compliant to the IPPC Directive. As of December 2008, eleven infringement procedures were ongoing on this ground against Belgium, Bulgaria, Denmark, Estonia, Greece, Spain, Ireland, The Netherlands, Portugal and Slovenia.

#### *Implementation of the LCP Directive*

Under the LCP Directive, Member States had to submit the summary of their emission inventories for years 2004, 2005 and 2006 to the Commission by 31 December 2007. In October 2007, the Commission reminded all MS to this obligation and requested that MS also submit plant-by-plant emission data. These are essential pieces of information for the Commission in order to assess the actual implementation of the Directive. In 2008, the

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<sup>180</sup> COM(2007) 843 final

Commission initiated infringement procedures against three Member States (Italy, Sweden and Malta) who had not submitted all the information required. Following the submission of the missing information, these infringement procedures were subsequently closed.

#### *Implementation of the Ozone Regulation*

During 2008 no new infringement cases relating to the Ozone Regulation were launched. A number of cases against Latvia, Lithuania, Estonia, Cyprus, Denmark, UK, Greece, Malta and Italy however remained open from previous years regarding the failure to fulfil the obligations in relation to the decommissioning of halons used in fire extinguishers of ships. Nevertheless, it should also be noted that the Commission has observed an important progress in fulfilling this decommissioning requirement in all the above-mentioned Member States except Malta.

#### *Non-conform transposition of the Seveso II Directive*

In 2008 the Commission pursued the infringement procedures it had opened against all EU-10 Member States except Slovakia for non-conform transposition of Directive 96/82/EC and the amending Directive 2003/105/EC (the Seveso II Directive). At the end of 2008, 5 of those cases against Czech Republic, Estonia, Latvia, Lithuania and Poland remained open. The Commission also opened infringement procedures against 5 EU-15 Member States (Denmark, Finland, France, Sweden and UK) for non-conform transposition of amending Directive 2003/105/EC.

#### *External Emergency Plans under the Seveso II Directive*

The Commission also continued the "horizontal" legal action launched in 2007 against those Member States where emergency plans for so-called upper-tier establishments were lacking in breach of the Seveso II Directive. In total, second warning letters were issued against 14 Member States (Austria, Belgium, Cyprus, Czech Republic, France, Germany, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal, Spain and Sweden). During 2008 most Member States made significant progress towards getting the necessary plans in place and several cases were closed. However in a few cases, the Commission was obliged to refer the matter to the Court. By the end of the year 6 such cases against Austria, Belgium, Germany, Italy, Luxembourg and Spain remained ongoing.

#### *Judgments of the Court of Justice in 2008*

In a judgment of 20 May 2008 (Case C-271/07), the Court of Justice declared that that by transposing in part or incorrectly several provisions of the IPPC Directive, Belgium had failed to fulfil its obligations under that directive.

#### *7.7.2. Evaluation based on the current situation*

##### *IPPC directive*

The Commission has carefully monitored the transposition of the IPPC directive and the related legislation on industrial emissions as well as their implementation. An overall evaluation of the position and proposed actions are set out in the Commission Communication '*Towards an improved policy on industrial emissions*'<sup>181</sup>. This evaluation recognises that the

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<sup>181</sup> COM(2007) 843 final.

IPPC Directive still falls substantially short of being fully applied and respected. This is partly due to very significant delays in the correct transposition and implementation of the obligations of the directive in an important number of Member States. The impact assessment undertaken as part of the review of the IPPC Directive has indicated that the problems identified cannot be addressed without some changes in the legislation. The main problems relate to the important delays in issuing the IPPC permits, shortcomings in the implementation of the IPPC Directive (in particular BAT), a need for increased clarity in the legislation, restrictions in its scope and insufficient enforcement of its application. This has led to the adoption by the Commission in December 2007 of a proposal for a directive on industrial emissions (IPPC Recast), which is currently being negotiated in co-decision.

During the monitoring of the application of the IPPC Directive, the main focus has been on how effectively Member States have implemented the directive by reference to installation-specific case studies. In particular, the Commission has carried out a detailed analysis of the quality of the permits issued and of the permitting, compliance and enforcement regimes adopted by Member States. Based on a two-year process of data collection through an extensive programme of ten studies and continuous consultation of stakeholders, the Commission came to the conclusion that the key principles of the current IPPC directive, in particular the integrated approach based on 'Best Available Techniques', remain a sound basis for the future development of EU legislation on industrial emissions.

#### *LCP directive*

The above-mentioned installation level assessments also included several large combustion plants, which are subject to the minimum requirements set under the LCP Directive. Furthermore, the Commission has evaluated the emission inventories submitted by Member States under this Directive. This showed that, two years ahead of the implementation deadline of 1 January 2008 for existing plants, many Member States were still far away from achieving the levels required by the LCP Directive, let alone from achieving the emission levels associated with application of BAT. The strong lack of BAT implementation in this particular sector was one of the main drivers for the Commission to incorporate the LCP Directive into the IPPC Recast Proposal and to strengthen the minimum emission limit values applicable for these installations.

#### *Waste incineration directive*

In connection with the review of the IPPC Directive and related legislation on industrial emissions, a study<sup>182</sup> has also been carried out on the implementation of Directive 2000/76/EC on the incineration of waste (WID). The main results were reported by the Commission as an annex to the Communication '*Towards an improved policy on industrial emissions*'<sup>183</sup>. It was found that the overall compliance with the Directive in terms of issued permits can be considered as good. Also the assessment of compliance with environmental requirements has found that, in general, incineration plants meet the air emission limit values set in the WID. A couple of issues were however identified that require further action. Therefore the Commission's IPPC Recast Proposal includes a few changes to the WID concerning possibilities for the competent authorities to grant exemptions for emission

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<sup>182</sup> Assessment of the application and possible development of Community legislation for the control of waste incineration and co-incineration (Ökopol, 2007) -

<sup>183</sup> [http://circa.europa.eu/Public/irc/env/ippc\\_rev/library?l=/waste\\_incineration/final\\_report/](http://circa.europa.eu/Public/irc/env/ippc_rev/library?l=/waste_incineration/final_report/) COM(2007) 843 final.



monitoring requirements and the alignment of an emission limit value for cement kilns co-incinerating waste with the BAT levels.

#### *NEC directive*

The implementation of the NEC Directive has been monitored through the annual reporting of emissions and projections by Member States as well as through in-depth analyses of the national programmes<sup>184</sup> developed by the Member States. These evaluations and other stakeholder consultations have provided valuable input for the future revisions of the NEC Directive. Two Member States (Greece and Luxemburg) failed to report such national programmes in 2006 and infringement procedures are ongoing against them. One Member State (LU) still has not reported. The annual reporting of emissions and projections has improved over the years as a consequence of Commission guidance at annual Comitology meetings. In 2008, still a few Member States (Luxemburg, Greece, France, Spain) have failed to provide the full annual reports and may face infringement procedures. The latest annual reports indicate that most Member States will be able to meet the ceilings of the NEC Directive by 2010, but a number of Member States project themselves to be above the limits. This fact has led the Commission to further enquiries to the Member States on what additional action they plan to respect the ceilings by 2010.

#### *Ozone Regulation*

Regarding the implementation of the Ozone Regulation, it can be said that while a number of infringement cases have remained open from previous years and individual issues may persist, in general Member States are in compliance with the Regulation.

#### *Seveso directive*

The basic provisions of the Seveso Directive have remained essentially unchanged since 1996. Overall, the Directive appears to be being satisfactorily applied and respected. The level of transposition and implementation of the Directive has continued to improve, and the number of outstanding legal proceedings has steadily reduced. However there remain concerns as regards performance in relation to external emergency plans for so-called upper-tier establishments. A review of the Directive is ongoing. To inform the review process, which is expected to lead to Commission proposals in early 2010, a number of studies are being undertaken to assess the directive's effectiveness. At this stage, the main change that is foreseen is the adaptation of Annex to the Directive to the Globally Harmonised System of classification of dangerous substances.

### *7.7.3. Evaluation results*

#### *7.7.3.1. Priorities*

#### *IPPC directive and related legislation on industrial emissions*

The negative consequences for the environment of the problems identified are clear and serious. Attention therefore needs to be paid to improved respect for the existing directive and to a strong follow-up on full implementation of the existing provisions.

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<sup>184</sup> Consultancy reports available on Commission web page  
[http://ec.europa.eu/environment/air/pollutants/rev\\_nec\\_dir.htm](http://ec.europa.eu/environment/air/pollutants/rev_nec_dir.htm)

Priority is therefore attached to:

- Ensuring full transposition of the relevant Community legislation by Member States
- Increased assistance to Member States on implementation
- Ensuring that Member States fulfil their reporting obligations.
- A more systematic approach concerning the breaches of the IPPC Directive and launching of infringement procedures
- Annual reporting on progress in implementation of the Action Plan and its revision in 2010 (see further information below).
- Development of the legal framework through the revision of the current legislation and adoption of a new directive

On the basis of these priorities and the work programming set out below, it is hoped to achieve substantially correct compliance with the existing provisions at the latest by 2012, by which time the focus of attention will move to the implementation of the planned legislative developments.

#### *Seveso directive*

Regarding the Seveso II Directive, priority is being attached to ensuring the full transposition and implementation of the Directive in all the Member States. Another priority is the ongoing review of the Directive.

#### 7.7.3.2. Planned action (2009 and beyond)

##### *2008-2010 Action Plan on implementation of the existing IPPC directive*

The Commission will continue to prioritise work on its current collective infringement proceedings, covering a large number of deficiencies in several Member States. In the absence of clear signs of significant progress by other Member States having fewer, but nevertheless important, deficiencies in the application of the directive, the Commission will consider opening additional proceedings. Infringement proceedings could also be opened against those Member States showing a significant delay in fulfilling their reporting obligations.

The Commission will strengthen its monitoring and supporting mechanisms by revising and refocusing the current IPPC Action Plan on Implementation for the time period 2008-2010 as set out below.

- Ensure full transposition of the legislation on industrial emissions

The success of the existing legislation relies first of all on effective transposition by Member States in their national legal systems. At the end of 2008, Belgium, Czech Republic, Estonia and Lithuania had still not fully transposed the IPPC Directive. The Commission will continue to pursue infringement proceedings to ensure full and correct transposition of the industrial emissions legislation.

- Support Member States in their implementation of the legislation

This will include enhanced information exchange, the development of guidance, visits to authorities and training. This support will continue throughout the introduction and implementation of the revised legislation.

- Enhanced monitoring and compliance checks

The Commission will continue to monitor the number of IPPC permits issued and updated and, where required, investigate the system of monitoring and inspection at IPPC installations. Such investigation will cover specific industrial installations and sectors, the use of general binding rules, and the analysis of complaints.

- Improve data collection for review of BREFs and create stronger links with the Research Framework Programme

The permit conditions, including emission limit values (ELVs), used in IPPC permits must be based on BAT as defined in the IPPC Directive. To continue to help the licensing authorities and companies to determine BAT, the Commission will continue to organise the exchange of information between experts from Member States, industry and environmental organisations resulting in the adoption and publication by the Commission of BAT Reference Documents (BREFs).

### *Seveso directive*

The Commission will continue to monitor implementation of the Seveso directive and take action as appropriate. In particular, the Commission will continue to ensure that Member States fulfil their obligations in relation to external emergency plans. The ongoing work in relation to the review of the Directive will also continue in 2009 with Commission proposals for possible amendments to the Directive expected in early 2010.

#### *7.7.4. Sector summary*

The IPPC directive is a complex legislative instrument, therefore its transposition by Member States into the national legislation was suffering significant delays or was done incorrectly and incompletely. This resulted in late and insufficient implementation of its provisions. In particular, its effectiveness has been weakened by implementation shortcomings relating to a low uptake of BAT, the misuse of flexibility provided for by the Directive, non-transparent way of permitting etc. In consequence, several IPPC installations do not comply with the Directive and give rise to infringement procedures, petitions, citizen complaints.

The ongoing legislative (review) process does not only address the existing deficiencies, but provides for more clarity and stringency with regard to permit conditions based on BAT, enforcement regimes and the scope of the legislation.

However, legislative work of approximately 1,5 years and then implementation of further two years remain to be done before the new directive can become effective. During this period, both Member States and the Commission have to focus on the current provisions, and strengthen their efforts to ensure full compliance with them in order to achieve a high level of environment protection and human health.

## **7.8. Chemicals, Pesticides, Biocides and Biotechnology**

### *7.8.1. Current position*

#### *7.8.1.1. General introduction*

#### *Chemicals*

The REACH Regulation (1907/2006)<sup>185</sup>, which entered into force on 1 June 2007, is the cornerstone of the EU's new chemicals legislation. REACH, which is considerably more far-reaching than previous legislation, deals with the registration, evaluation, authorisation and restriction of chemicals. Registration means the process by which information on the safety of chemicals will need to be submitted for registration in a central database, managed by ECHA. Evaluation includes a quality check of the registration dossiers and examination of testing proposals and is done by ECHA; it also includes a more thorough examination of specific substances, where Member States play an important role. Substances of very high concern will require authorisation for use and before being placed on the market. There is a procedure for restriction of manufacturing, placing on the market or using of certain substances where there is an unacceptable risk to health or the environment, which needs to be addressed on community wide basis.

The newly adopted Regulation (EC) No 1272/2008<sup>186</sup> on the Classification, Labelling and Packaging of Substances and Mixtures incorporates the UN GHS (United Nations Globally Harmonised System) into Community law and will replace after a transitional period certain provisions of the current directives related to the classification, packaging and labelling of dangerous substances (Directive 67/548/EEC<sup>187</sup>) and preparations (Directive 1999/45/EC<sup>188</sup>). Provisions of these Directives shall be repealed with effect from 1 June 2015.

Directive 76/769/EEC, which concerns restrictions on the marketing and use of certain dangerous substances, will remain in force until 1 June 2009, when it will be repealed by the REACH Regulation.

Two other pieces of legislation should be mentioned here. First, persistent organic pollutants ("POPs") are governed by Regulation (EC) No 850/2004<sup>189</sup>. This legislation implements the commitments to which the Community has signed up to under the 1998 UN-ECE Protocol on POPs and the UNEP Stockholm Convention on POPs. The Regulation contains requirements to eliminate and/or restrict POP substances to a level equal or even stricter than foreseen under the international agreements. The obligations from the two international agreements have thus been completely transported into Community Law and are as such enforceable according to these rules.

Second, basic provisions concerning the protection of laboratory animals used in experiments are contained in Directive 86/609/EEC<sup>190</sup>. On 5 November 2008 the Commission adopted a proposal to revise Directive 86/609/EEC. One of the key reasons for the proposed revision was uneven implementation of the directive in the Member States.

### *Pesticides, Biocides and Biotechnology*

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<sup>185</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

<sup>186</sup> OJ L 353, 31.12.2008, p. 1

<sup>187</sup> OJ L 196, 16.08.1967, p. 1.

<sup>188</sup> OJ L 200, 30.07.1999, p. 1.

<sup>189</sup> OJ L 158, 30.4.2004, p. 7.

<sup>190</sup> OJ L 358, 18.12.1986 p. 1.

Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms ("GMO") and repealing Council Directive 90/220/EEC<sup>191</sup> establishes a common methodology for risk assessment and a safety mechanism. It also introduces mandatory public consultation and GMO labelling. Directive 90/219/EEC on the contained use of genetically modified micro-organisms<sup>192</sup>, amended by Council Directive 98/81/EC<sup>193</sup> of 26 October 1998, lays down common measures for the contained use of genetically modified microorganisms with a view to protecting human health and the environment.

The regulatory framework on plant protection products is governed by Directive 91/414/EEC defining strict rules for the authorisation of plant protection products (PPPs)<sup>194</sup>. The Directive requires very extensive risk assessments for effects on health and environment to be carried out, before a PPP can be placed on the market and used. As the current legislative framework mainly concentrates on the beginning and the end of life stages of pesticides, the Commission adopted in June 2006 the Thematic Strategy on the Sustainable Use of Pesticides together with a proposal for a Framework Directive on the sustainable use of pesticides and a proposal for a Regulation on the placing of plant protection products on the market revising Directive 91/414/EEC. It is expected that the new Framework Directive on the sustainable use of pesticides will be adopted in the first half of 2009.

Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market<sup>195</sup> (the Biocides Directive) concerns the authorisation and placing on the market of biocidal products in the Member States, the mutual recognition of authorisations within the Community and the establishment at Community level of a list of active substances which may be used in biocidal products.

It should be noted that the product authorisation stage of the Biocide Directive has not yet been implemented. By 1 March 2009, 27 active substances were included in Annex I and 1 active substance in Annex IA. The applications for authorisations of products containing these active substances are expected to be submitted to the competent authorities in the near future. In accordance with Article 16(1) of the Directive, Member States are allowed to apply national rules and practices during the implementation of the review programme.

#### 7.8.1.2. Report of work done in 2008

This sector of EC environmental law is characterised by substantial new developments, in particular in the chemicals and pesticides sectors; however, legal enforcement action in these fields does not constitute a significant workload for the Commission.

#### *Chemicals*

REACH entered into force on 1 June 2007. This included the establishment of the European Chemicals Agency (ECHA) and the preparation of IT-systems to hold the new database. Registration of chemicals manufactured or imported in quantities of 1 tonne or more per year started on 1 June 2008. Between 1 June and 1 December 2008 manufacturers had the

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<sup>191</sup> OJ L 106, 17.4.2001, p. 1.

<sup>192</sup> OJ L 117, 8.5.1990, p. 1.

<sup>193</sup> OJ L 330, 5.12.1998, p. 13.

<sup>194</sup> OJ L 230, 19.8.1991, p. 1.

<sup>195</sup> OJ L 123, 24.4.1998, p. 1.

possibility to pre-register their phase-in substances. Pre-registration, as its name suggests, precedes full registration and provides for extended deadlines. Depending on the volumes and the hazardous properties of substances, these extended deadlines are 2010, 2013 or 2018. ECHA has received about 2.7 millions pre-registration dossiers. If a company failed to pre-register by 1 December 2008 it can no longer place its phase-in substances on the market until it has completed registration. Within the process of authorisation ECHA has identified 15 substances of very high concern (SVHC) for the candidate list subject to eventual authorisation. Out of these substances 7 were prioritised for authorisation. After a Commission decision to make a substance subject to authorisation (inclusion in Annex XIV REACH) any manufacturer, importer or downstream user of that substance must apply for authorisation to use it.

Member States were obliged to notify to the Commission their national provisions for penalties applicable for REACH infringements by 1 December 2008. The Commission drew Member States' attention to that obligation during the meetings of the REACH Competent Authorities and administrative letters before and after the notification deadline. A number of Member States did not fulfil that obligations and therefore by March 2009 legal enforcement action was launched against 8 Member States.

Every three years Member States shall forward to the Commission information on the application of the POPs Regulation including information on infringements and penalties and statistical data on production and placing on the market of particular substances. By the deadline of 20 May 2008 several Member States had not fulfilled these obligations. Five Member States did not provide any information and nine Member States did not send their annual reports. The Commission has sent reminders to Member States about these obligations and urged to provide information as soon as possible during a meeting of the Competent Authorities in January 2009.

#### *Pesticides, Biocides and Biotechnology*

A horizontal enforcement action against Member States dealing with incorrect transposition of Directive on Contained Use of genetically modified micro-organisms<sup>196</sup> was opened in 2007 and continued in 2008. In 2008, the Commission received replies to the first warning letters that were sent to twelve Member States and after their assessment was able to close almost half of the enforcement procedures after conformity has been achieved. The remaining conformity files are still being assessed with a view to ask Member States for clarifications and comments on their legislation, where necessary. It is expected that the relevant letters will be sent to the Member States in 2009.

In judgment in Case C-121/07 the European Court of Justice decided that France has to pay a lump sum of EUR 10 million for failure to comply with Judgment of 15 July 2004 (C-419/03) holding that France had failed to transpose Directive 2001/18/EC on the deliberate release into the environment of GMOs. The Court also found that France fully transposed the Directive in June 2008, thus it considered the imposition of a penalty to be unnecessary.

In Case T-75/06, the Court of First Instance dismissed an application for the annulment of Commission Decision 2005/864/EC of 2 December 2005 concerning the non-inclusion of

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<sup>196</sup> Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms as amended by Council Directive 98/81/EC.

Endosulfan in Annex I to Council Directive 91/414/EEC and the withdrawal of authorisations for plant protection products containing that active substance.

In the area of biocidal products, the Biocides Directive stipulates that Member States have to take the necessary steps to monitor their market and make sure it complies with the requirements of the Directive. The second composite report was prepared by the Commission in April 2008, covering the period December 2003 to November 2006.

During 2008 the Commission followed the transposition of the Commission Directives amending Directive 98/8/EC concerning the placing of biocidal products on the market. The Commission has closed most of the open infringement cases.

All Member States and Norway, Iceland and Liechtenstein have designated one or more authorities to monitor compliance and to perform market surveillance for biocidal products. However, most Member States consider that they dispose of insufficient human resources to cope with the different monitoring activities due to budgetary constraints and/or organisational problems.

All Member States and Norway showed specific efforts to comply with the phase-out provisions for certain biocidal products in accordance with Regulation (EC) No. 2032/2003<sup>197</sup>. However, only 12 out of 25 Member States<sup>198</sup> and Norway confirmed that they have mechanisms in place to correctly react to non-inclusion decisions.

In October 2008, the Commission prepared a report on the evaluation of the implementation of Directive 98/8/EC concerning the placing of biocidal products on the market (submitted in accordance with Article 18(5) of the Directive) and a progress report on the work programme referred to in Article 16(2) of the same Directive.

During 2008 the Commission opened horizontal non-communication cases concerning Commission Directive 2006/140/EC<sup>199</sup> of 20 December 2006 amending Directive 98/8/EC of the European Parliament and of the Council to include sulfuryl fluoride as an active substance in Annex I thereto, against 14 Member States. The referred cases were closed during the year, as soon as the transpositions were notified to the Commission.

The Commission also opened 11 horizontal non-communication cases concerning Commission Directive 2007/20/EC<sup>200</sup> of 3 April 2007 amending Directive 98/8/EC of the European Parliament and of the Council to include dichlofluanid as an active substance in Annex I thereto. Most of the aforementioned cases were closed during the year, but two of them are still open.

A similar situation followed the implementation of Commission Directive 2006/50/EC<sup>201</sup> of 29 May 2006 amending Annexes IVA and IVB to Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market, where out of seven non communication cases opened during 2008, only one is still open.

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<sup>197</sup> As of 31 December 2007, Regulation (EC) No. 2032/2003 has been repealed and replaced by Regulation (EC) No. 1451/2007.

<sup>198</sup> Since Bulgaria and Romania have acceded the EU as from 1 January 2007, they are not included in the second composite report which covers a period from December 2003 to November 2006.

<sup>199</sup> OJ L 414, 30.12.2006, p. 78.

<sup>200</sup> OJ L 94, 4.4.2007, p. 23.

<sup>201</sup> OJ L 142, 30.5.2006, p. 6.

In 2008 three non-communication cases were registered concerning Commission Directive 2007/69/EC<sup>202</sup> of 29 November 2007 amending Directive 98/8/EC of the European Parliament and of the Council to include difethialone as an active substance in Annex I thereto and two concerning Commission Directive 2007/70/EC<sup>203</sup> of 29 November 2007 amending Directive 98/8/EC of the European Parliament and of the Council to include carbon dioxide as an active substance in Annex IA thereto. All of these cases are still ongoing.

#### *7.8.2. Evaluation based on the current situation*

##### *Chemicals*

As the REACH Regulation entered into force on 1 June 2007 and its main obligations started applying on 1 June 2008, there is not yet sufficient information concerning its implementation in Member States. In order to ensure compliance, Member States should put in place effective monitoring and control measures. The Commission is concerned that Member States may not be able to make sufficient resources available to ensure compliance by economic operators. Every five years Member States must submit a report to the Commission on the operation of the Regulation in their respective territories, including sections on evaluation and enforcement. The first report has to be submitted by 1 June 2010. The Commission is currently preparing a reporting format and an IT system for these reports. Member States must furthermore lay down the provisions on penalties for non-compliance with the REACH Regulation. The penalties provided for must be effective, proportionate and dissuasive. They had to be notified to the Commission by 1 December 2008. By March 2009 notification was still missing from 8 Member States.

With regard to POPs Regulation, the reason for the failure to submit the annual reports could be that the Member States may consider them as low priority, as the reporting format only sets out four questions which remain the same every year. As for the three annual reports, the reasons could be linked to non-ratification of the Stockholm Convention on POPs and/or the Protocol to the regional UNECE Convention on Long-Range Transboundary Air Pollution (CLRTAP) on POPs.

##### *Pesticides, Biocides and Biotechnology*

Concerning the biotechnology sector, the overall situation as regards implementation has to be seen as poor. The studies obtained by the Commission and examined by the Commission in 2007 revealed a number of shortcomings in the national implementing legislation for Directive 90/219/EEC as amended by Directive 98/81/EC in several Member States. In 2008 the Commission continued legal enforcement actions launched in 2007 against several, mainly EU-15, Member States concerning incorrect transposition of the Directive. However, not all Member States' transposition measures have been appropriately assessed to conclude conformity.

As regards pesticides, the current legislative framework mainly concentrates on the beginning and the end of life stages of pesticides; therefore, the Commission aims to fill the current legislative gap regarding the use-phase of pesticides at EU level by setting minimum rules for the use of pesticides in the Community, so as to reduce risks to human health and the environment from the use of pesticides. The adoption of the new Framework Directive would

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<sup>202</sup> OJ L 312, 30.11.2007, p. 23.

<sup>203</sup> OJ L 312, 30.11.2007, p. 26.



help to achieve a more sustainable use of pesticides by reducing the risks and impacts of pesticide use on human health and the environment in a way that is consistent with the necessary crop protection.

In the area of biocidal products, the second composite report prepared by the Commission in April 2008, covering the period December 2003 to November 2006, has found that Member States have made significant progress in implementing and enforcing the directive's provisions by taking the appropriate measures.

All Member States and Norway, Iceland and Liechtenstein have designated one or more authorities to monitor compliance and to perform market surveillance for biocidal products. However, most Member States consider that they dispose of insufficient human resources to cope with the different monitoring activities due to budgetary constraints and/or organisational problems.

During 2008 the Commission followed the transposition of the Commission Directives amending Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market, most of the opened cases have been satisfactorily closed.

In 2008, the Commission carried out an impact assessment which concluded that certain changes should be made to the Directive to make it more effective and efficient, reducing unnecessary burdens for Member States and industry whilst maintaining a high level of protection of human health and environment. The Commission intends to present its proposal for a revision of the Biocides Directive in the course of the year 2009.

### *7.8.3. Evaluation results*

#### *7.8.3.1. Priorities*

##### *Chemicals*

Effective implementation of REACH is the main priority in the chemicals sector. The Chemicals Agency is playing a key role in the effective implementation of REACH. It will coordinate, over a period of 11 years, the registration of some 30 000 chemical substances in use today. To exchange information on enforcement, the Forum for Exchange of Information on Enforcement, composed of members nominated by the Member States, was set up within ECHA. The Forum coordinates a network of Member State authorities responsible for enforcement of the Regulation. Its main tasks include: proposing, coordinating and evaluating harmonised enforcement projects and joint inspections; identifying enforcement strategies and, best practice in enforcement; and examining proposals for restrictions with a view to advising on enforceability.

##### *Pesticides, Biocides and Biotechnology*

In biotechnology sector the main priority is to ensure correct transposition and implementation of Directive 90/219/EEC as amended in all Member States. The Commission will also determine whether further action is needed with respect to Member States which have not properly transposed Directive 90/219/EEC.

As regards pesticides, the adoption of the new Framework Directive is a priority for the Commission. It is expected that the Framework Directive on the sustainable use of pesticides will be adopted in the first half of 2009. Member States will have two years to transpose it.

The Commission will carefully monitor that the obligations of the Member States under the biocides review programme, including the delivery of competent authority reports, are being adequately resourced and met, and will take action where this is not the case.

The first applications for authorisations in accordance with the Biocides Directive are expected in 2009. In order to realise the environmental and human health benefits under the Directive, it will be necessary to ensure a uniform interpretation and implementation of the requirements concerning product authorisation and mutual recognition. In view of this, the Commission established an informal expert group on product authorisation and mutual recognition which aims to facilitate the implementation of the legal requirements and to provide for an exchange of views.

In 2008, the Commission carried out an impact assessment which concluded that certain changes should be made to the Directive to make it more effective and efficient, reducing unnecessary burdens for Member States and industry whilst maintaining a high level of protection of human health and environment. The Commission intends to present its proposal for a revision of the Biocides Directive in the course of the year 2009. The proposal will take form of a Biocides Regulation repealing and replacing the Biocides Directive. The main changes proposed by the Commission will include an extension of the scope to materials and articles treated with biocidal products, a possibility to have certain categories of products authorised at Community level, measures aimed at strengthening the mutual recognition, obligatory rules on data sharing of tests involving vertebrate animals and a partially harmonised fee structure.

#### 7.8.3.2. Planned action (2009 and beyond)

##### *Chemicals*

The Commission will continue to work to enhance good cooperation, coordination and exchange of information with the Member States and the European Chemicals Agency regarding enforcement so that the system established by the REACH Regulation can operate effectively. The Commission will work closely with the Forum for Exchange of Information on Enforcement in this regard.

The Commission has already launched legal enforcement action against 8 MS to ensure compliance with REACH on the obligation to put in place provisions on effective, proportionate and dissuasive penalties for breaches of REACH; during 2009 this enforcement action will be continued. Later in 2009 the Commission aims to finalise a study assessing the abovementioned national provisions on penalties for non-compliance with REACH. This study should provide Member States and the Commission with an overview of national regimes for penalties and identify discrepancies between them. It will be made available to the Member States with the aim to strengthen cooperation between them in the area of enforcement.

With regard to POPs Regulation the Commission will continue to stress to the Member States the importance of the continuity of the information provided by them. Furthermore the Commission intends to improve the reporting format with the aim to make it more user-friendly and less time consuming. This can be achieved by establishing links to the SEIS

(Shared Environmental Information System) initiative. A SEIS Regulation is currently under preparation. The Commission will also address reminders to Member States about their reporting obligations on the application of the POPs Regulation, followed by legal enforcement action where necessary.

#### *Pesticides, Biocides and Biotechnology*

In biotechnology sector, the Commission will continue legal enforcement actions already launched in 2007 and will take the necessary administrative and legal action to ensure correct transposition and implementation of Directive 90/219/EEC as amended in all Member States.

As regards pesticides, it is expected that the new Framework Directive on the sustainable use of pesticides will be adopted in the first half of 2009. Member States will have two years to transpose it. The Commission will carefully monitor its transposition on the basis of a risk-based implementation action plan. This will involve forward planning of work to encourage correct and timely transposition.

As regards the biocides, the Commission will continue to pursue infringement procedures concerning the non-communication of the national implementing measures of recently adopted directives that update the relevant Annexes.

The first applications for authorisations in accordance with the Biocides Directive are expected in 2009. The Commission will use the informal expert group on product authorisation and mutual recognition to ensure a uniform interpretation and implementation of the requirements concerning product authorisation and mutual recognition.

The Commission intends to present its proposal for a revision of the Biocides Directive in the course of 2009. The proposal will take form of a Biocides Regulation repealing and replacing the Biocides Directive. The main changes proposed by the Commission will include an extension of the scope to materials and articles treated with biocidal products, a possibility to have certain categories of products authorised at Community level, measures aimed at strengthening the mutual recognition, obligatory rules on data sharing of tests involving vertebrate animals and a partially harmonised fee structure. The choice of a legal instrument (i.e. regulation) will ensure the uniform application of the new instrument throughout the EU, in particular the procedures and deadlines for authorisation of biocidal products and mutual recognition of those authorisations. It will also eliminate the need for a transitional period and will advance the implementation of urgently needed provisions by approximately two years.

#### *7.8.4. Sector summary*

Chemicals, Pesticides, Biocides and Biotechnology sector of EC environmental law is characterised by substantial new developments. In the chemicals sector, as REACH main obligations started applying on June 2008 sufficient information on the implementation is not yet available and still full compliance has not been achieved concerning introduction of penalties. Concerning the biotechnology sector, the overall situation as regards implementation is seen as poor; therefore the main priority of the Commission is to achieve full conformity by all Member States. As regards pesticides and biocides, a review of the current legislative framework showed that improvements are necessary; therefore a new Framework Directive will be adopted in the first half of 2009 and the Commission aims to present a proposal for a revision of the Biocides Directive.

## 7.9. Governance and Environmental Liability

### 7.9.1. Current position

#### 7.9.1.1. General introduction

##### *Governance*

Public access to environmental information has always been considered as a key issue to promote greater awareness of environmental matters, a free exchange of views and more effective participation by the public in environmental decision-making. The EU decided as long ago as 1990 to introduce specific legislation; however, new impetus was given by the UN-ECE Aarhus Convention<sup>204</sup>. Directive 2003/4/EC<sup>205</sup> was adopted to fully comply with the requirements of the Convention and constitutes a significant improvement compared with the previous legislation. The objectives of the Directive are: a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of its exercise; and b) to ensure that, as a matter of course, environmental information is progressively available and disseminated to the public using in particular computer telecommunication or electronic technology. Both 'passive', i.e. upon request, and 'active' dissemination of environmental information are covered by the Directive. Its scope is broad due to the fact that 'environmental information' and 'public authority' are both given very wide definitions. The latter covers not only national, regional and local authorities, including public advisory bodies, but also private non-governmental bodies providing public services or performing public administrative functions in relation to the environment.

Directive 2003/4/EC had to be transposed by 14 February 2005. Despite some delays, all Member States have adopted the necessary legislation. It is, therefore, applied throughout the EU.

##### *Environmental Liability*

Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive)<sup>206</sup> establishes a framework for environmental liability based on the "polluter pays" principle, with a view to preventing and remedying environmental damage.

#### 7.9.1.2. Report of work done in 2008

##### *Governance*

All the Member States have transposed the Directive 2003/4/EC. The Commission contracted an external consultant to carry out studies dealing with the conformity of national implementing legislation with the requirements of the Directive. In 2008 these studies were

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<sup>204</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus on 25 June 1998. The European Community signed this convention the same date of the adoption and has become party since 17 May 2005, following the Council Decision of 17 February 2005 (2005/370/EC) in OJ L124, 17.05.2005, p.1-3.

<sup>205</sup> Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L41, 14.02.2003, p. 26.

<sup>206</sup> OJ L 143, 30.4.2004, p. 56.

finalised and examined by the competent services of the Commission with a view to asking Member States for clarifications and comments on their legislation, where necessary. It is expected that the relevant letters will be sent to most of the Member States in the first half of 2009.

While the Commission services have received a certain amount of requests from public authorities for interpretation concerning certain issues of the Directive 2003/4/EC, it appears that few petitions submitted to the European Parliament raised problems of its application in the Member States. On the basis of information available or supplementary documents supplied in the framework of the petitions, there was no evidence that public authorities applied the Directive incorrectly.

### *Environmental Liability*

The Environmental Liability Directive was to be transposed by 30 April 2007 at the latest. However, only four Member States had notified complete transposition by this transposition deadline, consequently first warning letters were addressed to 23 Member States. In 2008 a second warning letter was addressed to 16 Member States. On 26 June 2008 the Commission decided to refer to the European Court of Justice (ECJ) 9 Member States which still failed to transpose the Directive. By the end of 2008, still seven Member States failed to transpose or completely transpose the Directive (Austria, Finland, France, Greece, Luxemburg, Slovenia and the United Kingdom) and in December 2008, the ECJ rendered its first judgments for failure to transpose the ELD concerning Finland (C-328/08) and France (C-330/08).

The Commission commissioned an exploratory study in view of the reporting obligation on the effectiveness of the ELD in terms of actual remediation of environmental damages and on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by the scope of strict liability of the ELD. Within this study, two questionnaires were addressed to Member States and the insurance sector, interviews were carried out with a large number of companies in the EU and a verification workshop was held with all stakeholders in June 2008. The study was finalised in August 2008<sup>207</sup>.

#### *7.9.2. Evaluation based on the current situation*

##### *Governance*

It appears that, in general, public authorities at national and regional level have applied the Directive correctly. However, given the Directive's wide scope, it is less clear whether, at local level, notably in small municipalities or entities, public access to environmental information is always provided according to the relevant standards.

In addition, petitions to the European Parliament and requests for clarification to the Commission services show that public authorities need to make greater efforts to inform the public adequately of their rights under the Directive.

Moreover, public authorities need to pay specific attention to the active dissemination of environmental information to the public, in particular, through the Internet. Even if the

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European Commission, "Financial security in Environmental Liability Directive," final report August 2008. Available on the Internet at: <[http://ec.europa.eu/environment/legal/liability/pdf/eld\\_report.pdf](http://ec.europa.eu/environment/legal/liability/pdf/eld_report.pdf)>.

Commission services do not have a systematic overview of the situation, it appears that further progress is needed.

### *Environmental Liability*

The Directive is relatively new and at present not even completely transposed by all Member States (see ongoing infringement cases above). However, a first evaluation of important aspects of the ELD will be presented in the above mentioned Commission report on the effectiveness of the ELD and availability of financial security which is due by April 2010. Another, broader application report of the Commission will be due by April 2014, based on Member States application reports.

Apart from the application of the significance criteria (Annex I of the Directive) and the application of the appropriate measures to ensure the remedying of environmental damage ('primary', 'complementary' and 'compensatory' remediation according to Annex II of the Directive), the proper functioning of financial security instruments will be significant for successful implementation of the ELD in the Member States. Therefore, the Commission has given support to the Member States through interpretation of open questions in expert meetings and in particular through a project developing a tool-kit on the remediation methods. The results of the research programme REMEDE were made available in 2008<sup>208</sup>.

#### *7.9.3. Evaluation results*

##### *7.9.3.1. Priorities*

### *Governance*

The priority for the Commission is to verify the conformity of national legislation with the requirements of the Directive 2003/4/EC and ensure that the directive is applied correctly in practice by public authorities at all levels.

### *Environmental Liability*

The first priority is to ensure that all Member States complete transposition of the ELD as soon as possible. Therefore, the horizontal non-communication cases were rapidly processed in 2008 and will be continued in 2009 until the last Member States transposed the Directive. The next priority for the Commission is to ensure that the Environmental Liability Directive is correctly transposed in all Member States and in cooperation with Member States assess the national transposition measures and where necessary launch legal enforcement actions. Another priority for 2009 results from the mentioned reporting obligation before April 2014.

##### *7.9.3.2. Planned action (2009 and beyond)*

### *Governance*

As mentioned above, in 2009 a dialogue will be set up with Member States to address transposition and interpretation of certain provisions of the Directive or concrete difficulties encountered by public authorities in enforcement.

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Available on the Internet at the official Website of Resource Equivalency Methods for Assessing Environmental Damage in the EU (REMEDE): <<http://www.envliability.eu/>>.

In addition, according to the Directive, no later than 14 August 2009 Member States have to communicate to the Commission their reports on the experience gained in its application. A Guidance Document for these reports was drawn up by the Commission, in co-operation with Member State experts, in 2007. These reports will give the Commission a better understanding of the current situation. Based on the national reports, the Commission will report to the European Parliament and the Council.

Additional discussions, where appropriate, will be held with Member State experts in the framework of an Expert Group, chaired by the Commission, dealing with issues related to the Aarhus Convention.

### *Environmental Liability*

The Commission's efforts need to continue to ensure that the ELD is fully and correctly transposed. Apart from continuing the horizontal non communication action, the Commission will therefore in 2009 examine the conformity of the transposing legislation of the Member States and take enforcement action as necessary. In this context, the Commission will continue to discuss questions of interpretation and application of the ELD with government experts.

The Commission will finalise the draft report on the effectiveness of the ELD and availability of financial security by the end of 2009 in view of its presentation in April 2010. To this purpose, another more comprehensive study is being carried out this year including broader stakeholder consultation and a workshop. The study will be complemented by meetings with government experts in order to collect and verify the gathered information.

#### *7.9.4. Sector summary*

Overall, Member States apply the Directive on access to environmental information correctly, but the existing practice indicates that public authorities of all levels, in particular lower ones, need to make greater efforts to inform and respect the right of the public under the Directive. Full transposition of the Directive in the Member States is a priority for the Commission and in 2009 a dialogue with Member States will be set up to address that. ELD is relatively new and not fully transposed by all Member States; therefore the Commission's priority is to firstly achieve a full transposition by all Member States and consequently carry out the first evaluation of ELD that will be available in the first half of 2010.

## **8. INFORMATION SOCIETY AND MEDIA**

### **8.1. General Overview**

In *Information society and media* the regulatory framework for electronic communications continued to face a sizeable volume of incorrect implementation issues, despite genuine efforts on the part of most Member States. One challenge has been the independence of national regulatory authorities in certain Member States. Member States must ensure the independence and effectiveness of regulators, which are a prerequisite for ensuring fair and effective regulation of the sector. Ensuring the effective implementation of consumer protection rights, such as the ability to be located when calling the European emergency number '112', remains a key challenge for several Member States and the market players concerned. The increasingly challenging economic environment makes it more necessary than ever to ensure the correct implementation of the internal market *acquis*. Amendments to the

existing 2002 framework, as well as Commission guidance on e.g. next generation networks and tariffs for termination of calls on mobile networks, are expected to enhance predictability and legal certainty, and to create a level playing field in the EU's single market for electronic communications. In the audiovisual sector, while commercial communications continued to be an issue, preventive work has been undertaken with Member States aiming at ensuring effective implementation of the Audiovisual Media Services Directive by the end of 2009. Regarding the Public Sector Information Directive, main challenges include licensing and charging models that facilitate the availability and re-use of public information resources.

## 8.2. Electronic communications

### 8.2.1. Current position

#### 8.2.1.1. Existing measures in force

The Commission's overarching initiative for information society and media policies, **i2010**<sup>209</sup>, confronts the challenge of rapid convergence and technological change with a regulatory framework for electronic communications that promotes competition, investment, innovation, the single market, and consumer benefits. Enforcing full and effective implementation of the regulatory framework in electronic communications is therefore essential for the sector's contribution to the overall Lisbon goals.

The EU **regulatory framework for electronic communications** came into force in 2002. It consists of five Directives<sup>210</sup>. The Framework Directive outlines the general principles, objectives, and procedures. The Authorisation Directive creates a regime of general authorisations for providers of communications services. The Access and Interconnection Directive sets out rules for a multi-carrier marketplace, ensuring, in particular, access to networks and services and interoperability. The Universal Service Directive guarantees basic rights for consumers and minimum levels of availability and affordability. The e-Privacy Directive covers protection of privacy and personal data communicated over public networks. Transposition of the regulatory framework into the national law of the 27 Member States was completed in 2007 with the adoption of primary legislation by Bulgaria and Romania.

The **Roaming Regulation**<sup>211</sup>, which entered into force in June 2007, has ensured that consumers continue to benefit from significant cost savings when making or receiving calls while in another Member State. The Roaming Regulation introduced maximum ceilings (Eurotariff)<sup>212</sup> on retail prices for making and receiving calls in the EU and improved transparency for consumers by ensuring that operators send pricing information to their customers when they cross a border.

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<sup>209</sup> COM(2005) 229

<sup>210</sup> Directive 2002/21/EC (Framework Directive), Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive) and Directive 2002/58/EC on privacy and electronic communications (further referred to as the ePrivacy Directive).

<sup>211</sup> Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, OJ L 171, 29.6.2007, p. 32.

<sup>212</sup> It is estimated that over 400 million EU citizens could benefit from the 'Eurotariff' which makes it the standard default tariff in Europe.



The European Parliament and the Council adopted on 30 June 2008 Decision No 626/2008/EC on the selection and authorisation of systems providing **mobile satellite services** (MSS)<sup>213</sup>, setting out a transparent and legally binding framework for the coordinated selection and authorisation of pan-European MSS systems. This was followed by a call for applications for pan-European systems providing mobile satellite services (MSS), published by the Commission on 7 August 2008<sup>214</sup>. Effective implementation of the Selection Decision by Member States will be monitored closely by the Commission.

The 2004 and 2005 Commission **radio spectrum harmonisation decisions**<sup>215</sup> have been implemented by all Member States, except Bulgaria which has yet to implement Decision 2005/928/EC. The 2006 decisions<sup>216</sup> have been implemented in most Member States, except for Belgium regarding Decision 2006/771/EC and Latvia regarding both Decisions. As for the 2007 decisions<sup>217</sup>, Latvia and Slovakia have not implemented Decision 2007/90/EC. A similar situation could be observed for Decision 2007/98/EC in Hungary, and for Decision 2007/131/EC in Bulgaria and Romania. Latvia did not provide information on the implementation of Decisions 2007/98/EC and 2007/131/EC. Decision 2007/344/EC on harmonised availability of information regarding spectrum use within the Community had not been completely implemented in as many as 20 Member States.

In 2008, the Commission adopted the following six spectrum harmonisation decisions: Decision 2008/294/EC of 7 April 2008 on harmonised conditions of spectrum use for the operation of mobile communication services on aircraft (MCA services) in the Community; Decision 2008/411/EC of 21 May 2008 on the harmonisation of the 3400 - 3800 MHz frequency band for terrestrial systems capable of providing electronic communications services in the Community, 2008/432/EC of 23 May 2008 amending Commission Decision 2006/771/EC on harmonisation of the radio spectrum for use by short-range devices (SRD); Decision 2008/477/EC of 13 June 2008 on the harmonisation of the 2500-2690 MHz frequency band for terrestrial systems capable of providing electronic communications services in the Community; Decision 2008/671/EC of 5 August 2008 on the harmonised use of radio spectrum in the 5875 - 5905 MHz frequency band for safety related applications of

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<sup>213</sup> OJ L 172, 2.7.2008, p. 15.

<sup>214</sup> OJ C 201, 7.8.2008, p. 4.

<sup>215</sup> Commission Decision 2005/928/EC of 20 December 2005 on the harmonisation of the 169,4-169,8125 MHz frequency band in the Community (frequency band originally designated for the ERMES paging system); Commission Decision 2005/513/EC of 11 July 2005 on the harmonised use of radio spectrum in the 5 GHz frequency band for implementation of Wireless Access Systems including Radio Local Area Networks (WAS/RLANs); Commission Decision 2005/50/EC of 17 January 2005 on the harmonisation of the 24 GHz range radio spectrum band for the time-limited use by automotive short-range radar equipment in the Community; and Commission Decision 2004/545/EC of 26 July 2004 on the harmonisation of radio spectrum in the 79 GHz range for the use of automotive short-range radar equipment in the Community.

<sup>216</sup> Including Commission Decision 2006/771/EC of 9 November 2006 on the harmonisation of the radio spectrum for use by short-range devices (SRD) and Commission Decision 2006/804/EC of 23 November 2006 on harmonisation of the radio spectrum for radio frequency identification (RFID) devices operating in the ultra high frequency (UHF) band.

<sup>217</sup> Commission Decision 2007/90/EC of 12 February 2007 amending EC Decision 2005/513/EC of 11 July 2005 on 5 GHz WAS/RLAN, Commission Decision 2007/98/EC of 14 February 2007 on the harmonised use of radio spectrum in the 2 GHz frequency bands for the implementation of systems providing mobile satellite services (MSS), Commission Decision 2007/131/EC of 21 February 2007 on allowing the use of the radio spectrum for equipment using ultra-wideband technology in a harmonised manner in the Community (UWB) and Commission Decision 2007/344/EC of 16 May 2007 on harmonised availability of information regarding spectrum use within the Community. Decision 2007/344/EC entered into force on 1 January 2008.

Intelligent Transport Systems (ITS); and Decision 2008/673/EC of 13 August 2008 amending Decision 2005/928/EC on the harmonisation of the 169,4-169,8125 MHz frequency band in the Community.

#### 8.2.1.2. Report of work done in 2008

In line with the Commission Communication on better monitoring of the application of Community law<sup>218</sup>, the Commission services have continued to avoid the need for recourse to infringement proceedings by providing general guidance on implementation requirements via the Communications Committee (COCOM) and the Radio Spectrum Committee (RSC), and by making use of bilateral contacts with the relevant national authorities. The main issues discussed at the 2008 COCOM meetings were the implementation of the European emergency number '112', the implementation of the number range '116', and the Community consultation procedure involving the national regulatory authorities and the Commission, which aims at consolidating the internal market for electronic communications (Article 7 procedure).

At the heart of the 2002 regulatory framework for electronic communications lies the principle that undertakings should not be subject to *ex ante* regulatory obligations unless they have been found to be dominant in a relevant market, on the basis of a thorough market review by their national regulatory authority (NRA). Following the adoption of the revised Commission Recommendation on relevant markets of 17 December 2007, NRAs were active in carrying out market reviews in 2008, leading to progress on the second round of market analysis. Following some recent notifications all Member States have now completed the first round of market analyses with the exception of Bulgaria and Romania.

An increasing need for consumer protection goes hand in hand with the growth and diversification of electronic communication services and a growing number of service providers. A mechanism to settle disputes between consumers and service providers that offers a more flexible, cheaper less expensive, and less formal alternative to court proceedings is therefore required under the Universal Service Directive. Although practical applications of the dispute resolution mechanism vary from one Member State to another, this has produced overall positive results, and a huge number of consumer complaints are dealt with at national level.

Finally, the Commission services continued to monitor the general state of implementation of the regulatory framework, in close contact with the national authorities and other stakeholders, when preparing for the Commission's sector specific annual Progress Report addressed to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions<sup>219</sup>. The Commission continued to monitor implementation of the Roaming Regulation which in general continued to run smoothly. In that context, the Commission worked closely with the European Regulators Group which, by means of its extensive six-monthly roaming data collection exercise, provided a key input to the Commission's monitoring activities as well as the preparations for its review of the Regulation.

Enforcing effective implementation of the regulatory framework for electronic communications continued to be a priority in 2008. The Commission monitors the correct

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<sup>218</sup> COM(2002) 725, of 11 December 2002.

<sup>219</sup> "Towards a Single European Telecoms Market (14<sup>th</sup> Progress Report)", COM(2009) 140Final of 24 March 2009.

application of the provisions contained in the EU regulatory framework, also via contacts with stakeholders and complaints received from EU citizens. In the area of Information Society and Media, the new online web tool (the EU Pilot), set up to provide quicker and better solutions to problems arising in the application of EU laws, has been increasingly used to facilitate the contacts with the 15 participating Member States on the implementation of the EU rules relating e-communications. Overall, during the first year since the launching of the project in April 2008, 11 cases have been opened in the EU Pilot.

During 2008, the Commission opened six new proceedings, while seven pending cases were taken to the second phase with a reasoned opinion being sent to the Member States concerned. The Commission decided to refer six cases to the Court of Justice in 2008. At the same time, the Commission decided to close 13 proceedings following action by the Member States. Finally, although all 27 Member States had completed formal transposition of the regulatory framework in 2007, there were still 28 proceedings for incorrect implementation pending at the end of 2008.

New proceedings opened in 2008 focused on the independence and effectiveness of the telecom regulators in Luxembourg (now closed), Latvia, Lithuania and Sweden. Furthermore, the Commission started to verify the compliance of restructuring measures taken in 2008 and which could have had an impact on the independence of the regulatory authorities in Romania and Slovakia. As for consumer issues, a new infringement proceeding was launched due to the Commission's concerns related to the handling of the single European emergency number 112 in Italy.

Out of the six cases which the Commission decided to refer to the Court of Justice in 2008, two concerned the non-availability of caller location information for calls to emergency number 112 (Bulgaria, and Romania), and one concerned the independence of the national regulatory authority (Poland). Universal service issues in relation to the designation of the universal service provider and the financing mechanism were also high on the Commission's agenda given its negative impact for consumers, and thus infringement proceedings continued against several Member States. Portugal and Spain were sent reasoned opinions, whereas Belgium was referred to the Court of Justice. Finally, Poland and Cyprus were referred to the Court for persistent deficiencies relating to, respectively, broadband retail regulation and rights of way regime for mobile operators.

The Commission welcomed the progress made by Member States and continued to apply its policy of closing cases as soon as the problems were resolved. In 2008, a total of 13 cases were closed following progress in the implementation process. Amongst those, two cases were closed following the introduction of effective caller location information for 112 in Latvia and Poland. Following consistent action by the Commission, the single European emergency number 112 is now available in all Member States, though there is still work to be done to ensure the proper functioning of the European Emergency number on issues such as the availability of caller location information. All but one case concerning the completion of the first round of market reviews could be closed. A case against Bulgaria relating to the independence and functioning of the national regulator, and a case against Slovakia relating to the separation of regulatory functions were also closed, as the issues raised by the Commission were resolved.

Comprehensive directory inquiry services were made available at the beginning of 2008 in Poland, and the relevant case was subsequently closed by the Commission. One case concerning must-carry was closed (Finland). Finally, a case against France regarding an

improper universal service designation mechanism was closed, as France changed its legislation, following the European Court of Justice ruling. The remaining closed cases dealt with non-conformity issues in several other Member States (Germany, Latvia, and Finland).

However, not all Member States have complied with the regulatory framework in due course, and as of early 2009 the Court of Justice ruled on four 112 cases, finding breaches of the EU law since caller location information was only partially available in Slovakia, Lithuania, the Netherlands and Italy. Whilst the Slovakian case has been solved in the meantime, the Commission is closely following the other cases, in order to ensure full respect of the judgments as required under Article 228 of the Treaty.

By the end of the reporting year the Commission has opened some 160 infringement proceedings under Article 226 of the Treaty since the date of application of the new regulatory framework. In more than 100 cases this was due to failures to implement the regulatory framework correctly. While all EU 27 Member States have been concerned by enforcement action, a significant number of issues have been settled since.

The relatively high number of non-conformity cases is the result of the Commission's proactive monitoring policy which entails a systematic conformity assessment of the national transposition measures notified to the Commission. This approach has proven to be critical for electronic communications, being a highly innovative and dynamic sector which requires swift action to ensure regulatory consistency. The conformity assessment for each Member State is carried out on the basis of correlation tables which had been discussed and communicated to the Member States via the Communications Committee already before the date of application of the current regulatory framework.

In addition to the pending infringement proceedings, there were nine complaints pending at the end of 2008. These complaints were mainly related to authorisation issues, including frequency management, and to obligations resulting from the Universal Service Directive.

The Commission continues to frequently issue press releases at various stages of the opened proceedings. These press releases are available on the implementation and enforcement website dedicated to Information Society and Media sector<sup>220</sup> together with overview tables for all cases, which are updated regularly.

In 2008, EIPA and the Commission organised a seminar for national judges and the NRAs on legal issues related to the implementation of the regulatory framework. The aim was to raise awareness on (i) the goals of the regulatory framework for e-communications and Article 7 procedures and (ii) on the role of national courts in furthering consistency and legal certainty on the telecommunications markets.

### Petitions

In 2008, four petitions on the regulatory framework were registered. These petitions involved telecom prices in Estonia, international roaming charges in the Czech Republic, discrimination by telecom companies in Sweden, and liability of telecom companies in several EU countries. All were answered without opening an infringement proceeding.

### European Court of Justice

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<sup>220</sup> [http://ec.europa.eu/information\\_society/policy/ecomm/implementation\\_enforcement/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/index_en.htm)

Finally, the European Court of Justice issued several important judgments on substance in the electronic communication area in 2008, in particular on request for preliminary ruling by a national court or tribunal under Article 234 of the Treaty. These covered amongst others the right of use of TV frequencies (C-380/05 - *Centro EUROPA 7*), the right of appeal (C426/05 – *Tele2 Telecommunication*), licence fees (C-296/06 – *Telecom ITALIA*) and must-carry obligations (C-336/07 – *Kabel Deutschland Vertrieb*).

### 8.2.2. Changes underway

In order to realise the full potential of the internal market, more consistency of application across the EU and a strengthening of the framework in areas such as the application of remedies in termination and broadband markets, spectrum management, swift number portability and privacy over electronic communications are needed. These needs were considered in the Review of the current regulatory framework.

#### 8.2.2.1. New measures recently adopted

In accordance with Article 25 of the Framework Directive, the Commission proposed a review of the regulatory framework in November 2007<sup>221</sup>. The proposals aim to consolidate a competitive internal market through more consistent national regulatory approaches, reinforce consumer protection and users' rights, and provide for more effective spectrum management and implementation. The European Parliament and the Council adopted these reforms on 25 November 2009.

During the year, the Commission carried out an extensive review of the Roaming Regulation including a public consultation. The Commission concluded that national level trends in prices for data and SMS are not reflected in prices for SMS roaming and to some extent prices for data roaming services which also remain unjustifiably high across the EU. Therefore, the Commission made a proposal to the European Parliament and Council to extend the regulation by a further three years up to June 2013 and to include SMS and data roaming services in addition to voice. The European Parliament and Council adopted the Regulation on 18 June 2009<sup>222</sup>.

#### 8.2.2.2. Volume of enquiries and priorities

In the light of complaints and issues raised by market players and national regulatory authorities, the priorities will most likely remain the same as in the reporting year: the functioning of the national regulatory authorities and consumer protection rights. Regarding the latter, the Commission is paying increasing attention to consumers' privacy, based on the ePrivacy Directive. Finally, compliance with judgments of the Court of Justice might become an issue as case law develops in the area.

The number of cases of infringements, complaints, enquiries and petitions is expected to stay at the same level as in previous years. Priorities may have to evolve depending on the

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<sup>221</sup> Commission proposal for a directive of the European Parliament and of the Council, SEC(2007) 1472 and SEC(2007) 1473 and Proposal for a regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority COM(2007)699, for an overview, see website of DG Information Society:

<sup>222</sup> [http://www.ec.europa.eu/information\\_society/policy/ecomms/library/proposals/index\\_en.htm](http://www.ec.europa.eu/information_society/policy/ecomms/library/proposals/index_en.htm)  
[http://ec.europa.eu/information\\_society/activities/roaming/regulation/index\\_en.htm#new\\_rules](http://ec.europa.eu/information_society/activities/roaming/regulation/index_en.htm#new_rules).

amendments eventually adopted by the co-legislators in the context of the review of the regulatory framework.

#### 8.2.3. *Evaluation based on the current situation*

Overall, the implementation of the regulatory framework is working to bring competition to electronic communications markets, with resulting benefits to consumers in terms of prices and innovative converged services. Examples of best practice are available from every Member State across the range of regulatory and market issues. However, there is considerable scope for further benefits to flow from a reinforced single market, strengthened competition and a reduction in the regulatory burden.

While all issues of late transposition and more than two-thirds of the implementation issues addressed by formal infringement proceedings have been settled, a significant number of non-conformity and incorrect application issues remains. These issues require attention and appropriate follow-up with a continued focus on the functioning of the national regulatory authorities and consumer protection rights. The Commission's legislative proposals currently before the European Parliament and Council seek to address identified weaknesses of the 2002 regulatory framework, while retaining its basic overall concept.

#### 8.2.4. *Evaluation: priorities and planned action (2009 and beyond)*

Priorities for 2009 will likely remain similar to those of the reporting year. The number of cases is expected to remain about the same as in the reporting year.

In electronic communications, monitoring is expected to focus again on structural issues, such as the functioning and the independence of the national regulatory authorities. Greater attention is being paid to the full application of the Community consultation procedure involving national regulatory authorities and the Commission which aims to consolidate the internal market for electronic communications (Article 7 procedure).

A second priority concerns the protection of consumer rights, with a special focus on the full functioning of the European emergency number '112'. The Commission will continue to closely monitor the implementation of the Roaming Regulation which has ensured that consumers benefited from significant cost savings when making or receiving calls while in another Member State.

Priorities may evolve depending on the final shape of the amendments to the regulatory framework. Preventive work, such as guidelines and technical meetings, is expected to start as soon as possible after the adoption of these amendments.

### **8.3. The Audiovisual and Media**

#### 8.3.1. *Current position*

##### 8.3.1.1. Existing measures in force

The main instrument is the Television without Frontiers (TWF) Directive which was modified into the **Audiovisual Media Services Directive**<sup>223</sup> in 2007 (hereafter the “AVMS Directive”).

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<sup>223</sup> Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member

It combines the country of origin principle with a minimum harmonisation of the laws applicable to all audiovisual media services (television and on-demand). Non-binding measures include the Recommendation on Film Heritage<sup>224</sup> and the Recommendation on the protection of minors and human dignity in audiovisual and information services<sup>225</sup>.

### 8.3.1.2. Report of completed work in 2008

Three new cases were opened (two complaints and one identified infringement, all referring to TWF). One case was closed. It was decided to refer Spain to the Court of Justice according to Article 226 of the Treaty in another case concerning the incorrect application of the quantitative rules on TV advertising. After expiration of the framework contract, an invitation to tender for studies on the application of audiovisual commercial communication rules in Member States was issued and finally awarded to the contractor GfK Audimetrie. The monitoring will take account of the extended scope of the AVMS Directive (now including on-demand audiovisual media services) as well as qualitative aspects of TV advertising such as the safeguards for product placement and the rules on protection of minors.

In a judgment adopted on 13 March 2008, the European Court of Justice narrowed the meaning of decision of ‘direct and individual’ concern to a natural or legal person. It clarified under which conditions a natural or legal person could challenge the decisions of the Commission concerning the application of the provisions on the retransmission of events of major importance for the society (Article 3a TWF Directive). Two of these decisions concerning the UK and the Belgian lists of events of major importance for society have been challenged before the Court of First Instance.

On 22 July 2008, the Commission adopted the Eighth Report relating to the promotion of European works and independent productions (Articles 4 and 5 of the TWF Directive) for the period 2005 – 2006. The first implementation report on the Recommendation on film heritage was published in August 2008.

The amending Directive was adopted at the end of 2007 so that Member States have until the end of 2009 to transpose the AVMS Directive. Questions faced by all Member States in the transposition process were clarified at an early stage in meetings of the Contact Committee set up under Article 23a of the Directive. The Contact Committee met four times in 2008. An unofficial consolidated version of the AVMS Directive was published at the end of 2008.

The AVMS Directive changed the number and order of subsidiary jurisdiction criteria for satellite retransmissions. A non-coordinated approach of Member States implementing the Directive during the transposition period could have led to cases of double jurisdiction or a situation where no Member State claims jurisdiction. Therefore, the Contact Committee agreed on a coordinated entry into force of national measures implementing this provision at the end of the transposition period set for 19 December 2009.

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<sup>224</sup> States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) as last amended by Directive 2007/65/EC of 11 December 2007, OJ L 332 of 18 December 2007.

<sup>225</sup> Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities, OJ L 323 of 9 December 2005, p. 57.

<sup>225</sup> Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, OJ L 378 of 27 December 2006, p. 72.

### 8.3.2. *Changes Underway*

#### 8.3.2.1. Recently adopted measures

#### 8.3.2.2. New measures due to be adopted

The Commission is working on the adoption of a proposal for a codified version of the AVMS Directive. It is expected to be adopted in a fast-track co-decision procedure by the Council and the European Parliament.

After discussion in the Contact Committee it was decided to produce a document identifying the media services that need special attention at the moment of entry into force of those national implementing measures which will change jurisdiction for satellite retransmissions (Article 2(4) AVMS Directive).

#### 8.3.2.3. Volume of enquiries and priorities

In the light of complaints and parliamentary questions received so far, attention will most likely be on the following areas: television advertising, protection of minors, non-incitement to hatred, promotion of European and independent works, and jurisdiction. The issue of events of major importance for society, with the cases brought before the Court of Justice against the UK and Belgian measures, will also be followed closely. In general, the number of cases of infringements and petitions is expected to stay at the same level as in previous years. There was, however, an increase in 2008 of complaints on alleged hate speech as well as pornographic content transmitted during daytime and without encryption via satellite broadcasts. The monitoring of audiovisual commercial communication rules will be extended (see above), possibly involving further infringement proceedings.

### 8.3.3. *Evaluation based on the current situation*

The application of the provisions of the present regulatory framework in force (i.e. prior to the adoption of the amending Directive) has been satisfactory. However, it remains necessary to carry out a close monitoring of the application of audiovisual commercial communication rules in the Member States. In addition, the economic crisis could impair the Member States' monitoring capacities.

In the past, there were cases where satellite channels tried to hide their country of origin in order to escape regulation. With the change of subsidiary jurisdiction criteria for satellite retransmissions, it might be easier for those channels to change jurisdiction. Therefore, cooperation between national regulators and with the Commission should be further improved.

### 8.3.4. *Evaluation results: priorities and planned action (2009 and beyond)*

Priorities for 2009 will likely remain similar to those of the reporting year. The protection of consumer rights remains a key issue. Regarding TV advertising, monitoring will not only address quantitative restrictions but also qualitative rules e.g. the rules on the protection of minors and/or restrictions on alcohol advertising.

Building on the dialogue undertaken with Member States, preventive work will continue concerning the transposition of the AVMS Directive, in particular the extension of its scope to cover on-demand services.



## 8.4. Public Sector Information

### 8.4.1. Current Position

#### 8.4.1.1. General introduction

Public Sector Information (PSI) is the single largest source of information in Europe (e.g. maps and satellite images, legislation, statistics and company registers) and is used as raw material for a variety of added-value products and services. **Directive 2003/98 on the re-use of public sector information** (PSI Directive) aims at enhancing an effective cross-border re-use of PSI and to limit distortions of competition in the Community market.

The Directive is built around two pillars of the internal market; transparency and fair competition. It contains provisions on transparency of conditions and non-discrimination, on prohibition of cross-subsidies and exclusive arrangements, on procedures regarding handling of re-use requests, on upper limits for charging, as well as on practical means to facilitate finding and using the material available for re-use. Ultimately, the Directive aims at a change of culture in the public sector, creating a favourable environment for the re-use of its information resources.

The Commission applies the principles of the PSI Directive also to its own documents through a Commission re-use policy. Commission Decision 2006/291/EC, Euratom goes beyond the Directive by applying charges based on (at most) marginal costs and by making all documents re-usable. Examples are EUROSTAT's statistical data, Commission translation memories, the EC law database EUR-Lex and studies.

#### 8.4.1.2. Report of work done in 2008

The deadline for implementing the PSI Directive by the Member States was 1 July 2005. By May 2008, all Member States had notified full implementation of the Directive.

Infringement procedures under Article 226 EC for non-communication of national implementation measures were initially launched against 15 Member States and completed by the end of 2007 when the Court of Justice gave four judgments for failure to implement the Directive (AT, BE, LU and ES). Priority then shifted in 2008 to ensuring full and correct implementation of the Directive. The Commission pursued infringement procedures in 2008 for incomplete and incorrect implementation regarding Sweden and opened a new case regarding Poland. The evaluation of the conformity of the notified national transposition measures continued during 2008 in parallel with the management of complaints.

In conformity with the Commission Communication on better monitoring of the application of Community law (COM (2002)725), the Commission continued to pursue various accompanying measures in addition to formal infringement procedures in 2008. It has been closely monitoring the implementation process and providing technical assistance.

In particular, the Commission pursued close bilateral contacts with Member States in view of ensuring correct implementation and application of the Directive. These have led to legislative changes in several Member States, which had originally notified insufficient implementation measures. The Commission also organised and chaired the PSI Group for Member State experts and stakeholders in order to provide assistance regarding implementation issues and to facilitate the exchange of good practices. In addition, the Commission contributed to awareness-raising and stimulation activities by participating in seminars and workshops

organised in the Member States, networking across Europe and in a wider international context (notably the OECD) and co-funding a project for promoting pan-European PSI re-use (ePSIplus, to be taken over in 2009 by the European PSI platform) to further stimulate action and monitor progress towards a stronger and more transparent environment for the growth of European PSI re-use markets. Finally, the Commission undertook studies on PSI re-use. A study assessing PSI re-use in the geographical, meteorological and legal information sectors was delivered end of 2008 and a study assessing the economic and social value of the public domain, which includes a chapter on cultural content with regard to the PSI Directive, was also conducted in 2008.

The Commission also carried out preparatory work in view of reviewing the application of the PSI Directive, leading to a Commission Communication and Staff working document in 2009. In accordance with Article 13 of the Directive, the review addresses, in particular, the scope and impact of the Directive. This includes the extent of the increase in re-use of public sector documents, the effects of the principles applied to charging, and the re-use of official texts of a legislative and administrative nature. The Commission also consulted the Member States and stakeholders in 2008 for the review.

#### *8.4.2. Evaluation based on the current situation*

It should be noted that the PSI Directive was implemented by many Member States with considerable delay, requiring infringement procedures launched by the Commission and leading eventually to four judgments of the Court of Justice. The situation is in the process of development of new "acquis" as it is a first ever Directive in this area, with notification of implementation measures recently being completed in all Member States. The number of complaints is still scarce and there are no preliminary rulings based on the Directive.

A positive evolution and progress has taken place since the adoption of the Directive. The respondents to the public consultation considered that the PSI Directive has had positive effects on PSI re-use, which has also been confirmed by studies. However, the full potential of PSI re-use has not yet been realised, implementation of the Directive and measures to facilitate re-use in the Member States are uneven, and barriers to re-use still exist. Problems and action by Member States to redress them need to be carefully monitored and assessed.

Commission action carried out in 2008 through infringement procedures, bilateral cooperation with Member States, facilitating the exchange of good practices, and awareness-raising have led to positive developments in some Member States, notably on the process of legislative changes in view of ensuring correct implementation of the Directive.

#### *8.4.3. Evaluation results*

##### *8.4.3.1. Priorities*

Priority has shifted now from the first stage of adopting national implementation measures and notifying them to the Commission, to ensuring compliance and effective application of the Directive in all 27 Member States. In the light of the evaluation of the conformity of the notified national measures and complaints, the main substance issues remain the same and are related notably to the scope and definitions, non-discrimination, charging, exclusive arrangements, and transparency. Efforts should now focus on full and correct implementation and application of the Directive, terminating exclusive arrangements, applying licensing and charging models that facilitate the availability and re-use of PSI, and ensuring equal

conditions for public bodies re-using their own documents and other re-users. Member States are encouraged to set up quick and inexpensive conflict resolution mechanisms.

#### 8.4.3.2. Planned action (2009 and beyond)

It is important now to ensure compliance and effective application of the Directive in the Member States. The completion of implementation of the Directive in the Member States may have an impact on the number of complaints received by the Commission in the future. Enforcement action through the launch of new infringement procedures for incorrect implementation and/or application of the Directive is likely in 2009 and beyond. One area that the Commission will monitor particularly closely concerns exclusive arrangements, for which the transitional period foreseen in Article 11 of the Directive expired at the end of 2008. An exercise investigating the extent of exclusive arrangements will be launched in summer 2009. The Commission will continue to monitor closely implementation issues, to facilitate the exchange of good practices and to provide technical assistance especially through close administrative cooperation with the Member States, the PSI expert group, as well as through other accompanying measures such as the European PSI platform. In addition, a thematic network on the legal aspects of PSI will be set up to identify and discuss legal barriers to re-use PSI in the digital environment and to suggest ways to overcome them. A further review of the PSI Directive is envisaged by the Commission by 2012 when more evidence on the impact, effects and application of the Directive should be available. Possible legislative amendments will be considered at that stage, taking into consideration progress made in the meantime.

#### 8.4.4. Sector summary

A positive evolution and progress has taken place. However, the full potential of PSI re-use has not yet been realised and implementation of the Directive in the Member States is uneven. Problems and action by Member States to redress them need to be carefully monitored and assessed. The priority has shifted now from the first stage of adopting national implementation measures and notifying them to the Commission, to ensuring full compliance and effective application of the Directive in the Member States. The Commission will continue to closely monitor implementation issues, to launch infringement procedures where necessary, as well as to facilitate the exchange of good practices and awareness-raising.

#### 8.4.5. Measures in force

More information on the re-use of public sector information:

[http://ec.europa.eu/information\\_society/policy/psi/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/index_en.htm)

## 8.5. Electronic Signatures

### 8.5.1. Current Position

#### 8.5.1.1. Existing measures in force

The principal instrument is **Directive 1999/93/EC on a community framework for electronic signatures**<sup>226</sup>. The implementing measures include the Commission Decision on

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<sup>226</sup> OJ L 13, 19.01.2000, p.12

the minimum criteria for the designated bodies<sup>227</sup> and the Commission Decision on the generally recognised standards for some electronic signatures products<sup>228</sup>.

The general principles of the Directive were indeed transposed by all Member States. There is no open infringement procedure. However, in 2008 one complaint<sup>229</sup> was filed by a consumer association regarding implementation issues of Directive 1999/93/EC in the Italian legislation which is still being investigated.

Further, indirect aspects pertaining to eSignature were identified and are investigated in two additional complaints handled by Commission services. The former complaint concerns the legislation on the registration of medical device<sup>230</sup> and involves Directives 90/385/EC and 93/45/EC. The latter complaint concerns the legislation governing the refund of excise duties<sup>231</sup> and pertains to Directive 2003/96/EC.

#### 8.5.1.2. Report of work done in 2008

In December 2008 the Commission adopted an *Action Plan on e-signatures and e-identification to facilitate the provision of cross-border public services in the Single Market*<sup>232</sup>. The main objective of the action plan is to promote the implementation of mutually recognised and interoperable electronic signatures and e-authentication solutions in Europe.

#### 8.5.2. Evaluation

In 2006 the Commission acknowledged, based on a report<sup>233</sup> on the operation of the Directive, problems of mutual recognition and cross-border interoperability of eSignature. The Commission's position is that it intends to address the legal, technical, and standardisation causes of these issues.

Regarding legal issues, the Commission stated that a formal analysis of the legislation transposing the Directive has not been completed. As national laws may have evolved since the time of the transposition of the Directive, the Commission is considering carrying out, in 2009, a comprehensive review to re-assess the compliance of Member States' national implementing measures.

## 9. MARITIME AFFAIRS AND FISHERIES

### 9.1. Current situation

#### 9.1.1. General introduction

By virtue of the provisions of Articles 3 and 32 of the EC Treaty, Member States have transferred competence to the Community with regard to the conservation and management of

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<sup>227</sup> OJ L 298, 16.11.2000, p.42

<sup>228</sup> OJ L 45, 15.07.2003, p.45

<sup>229</sup> 2008/4516

<sup>230</sup> 2007/4516

<sup>231</sup> 2007/4715

<sup>232</sup> COM(2008)798

<sup>233</sup> Report on the operation of Directive 1999/93/EC on a Community framework for electronic signatures – COM(2006)120 of 15.3.06

fisheries resources. Hence, in this field, legislative or prescriptive jurisdiction rests with the Community such that it is for the Community to adopt relevant conservation and management measures while it remains for the Member States to implement and enforce those measures. Consequently, the Common Fisheries Policy has been established in pursuance of the objectives laid down in Article 33 of the EC Treaty and, in its current version, it encompasses (1) a conservation regime together with a concomitant control and enforcement framework, (2) a structural policy through the new European Fisheries Fund, (3) a common organisation of the markets in fishery and aquaculture products and (4) the international dimension covering bilateral Fisheries Partnership Agreements, multilateral Regional Fisheries Management Organisations and conclusion of global international treaties such as the 1982 United Nations Convention on the Law of the Sea<sup>234</sup> and the 1995 Agreement on the implementation of the provisions of the United Nations Convention on the Law of the Sea relating to the conservation and management of straddling fish stocks and highly migratory fish stocks<sup>235</sup>. The full set of rules adopted under the Common Fisheries Policy can be found on the following website: [http://ec.europa.eu/fisheries/index\\_en.htm](http://ec.europa.eu/fisheries/index_en.htm).

The conservation regime in its current version is governed by the basic Council Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy<sup>236</sup>, Article 2(1) of which spells out that the Common Fisheries Policy shall ensure exploitation of living resources that provides sustainable economic, environmental and social conditions. The control system is circumscribed by the provisions of Article 23 of Council Regulation (EC) No 2371/2002 and Article 1 of Council Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy<sup>237</sup>, all of which place a general obligation on Member States to ensure effective control, inspection and enforcement of the rules of the Common Fisheries Policy.

#### 9.1.2. *Work done in 2008*

The Commission decided on a far-reaching re-organisation of the Directorate General responsible for maritime affairs and fisheries. The new structure became effective on 29 March 2008 and replaced the former thematic structure by three geographical Directorates and one External Policy Directorate, all of which are complemented by a Directorate responsible for Policy Development and Co-ordination and supported by a Resource Directorate. The Legal Unit, which is also tasked with the handling of State aid cases and infringement proceedings, has now been incorporated into the Resource Directorate in order to secure appropriate segregation of tasks. One other specific feature of the new structure is that it has brought responsibilities for conservation and for control and inspection closer together within the respective geographical Directorates.

Work mainly concentrated on the conduct of an unprecedented, sustained and, in the end, successful control campaign to protect the sensitive bluefin tuna stocks, which resulted in the early closure of the purse seine fishery by way of Commission Regulation (EC) No 530/2008<sup>238</sup>. The closure was decided at the Commission's own initiative in order to forestall an overrun of the relevant catch quota and thus a serious threat to the conservation of the

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<sup>234</sup> OJ L 179, 23.06.1998, p. 1

<sup>235</sup> OJ L 189, 03.07.1998, p.14

<sup>236</sup> OJ L 358, 31.12.2002, p. 59

<sup>237</sup> OJ L 261, 20.10.1993, p. 1

<sup>238</sup> OJ L 155, 13.06.2008, p. 9

stocks concerned and to honour the Community's international obligations vis-à-vis the International Commission for the Conservation of Atlantic Tunas.

In the process leading up to Council Regulation (EC) No 338/2008 providing for the adaptation of the Polish cod quota on account of the overfishing in 2007<sup>239</sup>, Poland undertook to lay particular emphasis on control and agreed with the Commission inspectors on specific benchmarks for control and inspection activities in the Baltic Sea cod fisheries in 2008 and beyond. On 24 June 2008, Poland withdrew its application in Court Case T-379/07 where it had sought to obtain the annulment of the Commission decision to close the cod fishery for the remainder of 2007. Unlike 2007, Poland did close the cod fishery in good time in 2008.

As yet another priority issue, the Commission prepared and presented a legislative proposal<sup>240</sup> for a radical overhaul of the existing control and enforcement framework as laid down on Council Regulation (EEC) No 2847/93. This aims at addressing the serious shortcomings of the Common Fisheries Policy in this field as identified by the Court of Auditors in its Special Report No 7/2007<sup>241</sup> and discussed at the Audit Progress Committee in 2008. The proposed new rules are designed to strengthen the existing regulatory framework, to ensure a level playing field and to bring about a true compliance culture all across the European Union.

Furthermore, the Commission initiated a full review of the entire policy in order to prepare the ground for a root-and-branch reform. A first discussion took place at the Fisheries Council in September 2008. A Green Paper has been issued on 22 April 2009 for the purposes of launching a broad public consultation on the reform of the Common Fisheries Policy.

The Council adopted Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing<sup>242</sup>. This instrument will enter into force on 1 January 2010 and it will bring with it tough and innovative measures designed to bring under control fishing practices that have become a scourge in international fisheries.

Furthermore, the Council adopted Regulation (EC) No 1006/2008 concerning authorisations for fishing activities of Community fishing vessels outside Community waters and access of third country vessels to Community waters<sup>243</sup>.

Infringement proceedings instituted against Italy on grounds of failure to ensure compliance with the driftnet ban under applicable Community rules was referred to the Court of Justice and now forms the subject-matter of Case C-249/08.

The Commission decided to close infringement proceedings against Cyprus, Malta and Portugal relating to non-communication of catch data during the bluefin tuna fishing campaign in 2007.

In proceedings instituted on grounds of insufficient controls of landings of and trade in fishery products, the Court of Justice rendered a judgment on 22 December 2008<sup>244</sup> declaring that Spain has failed to fulfil its obligations under Regulation (EC) No 2847/93 by not carrying out

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<sup>239</sup> OJ L 107, 17.04.2008, p. 1

<sup>240</sup> COM(2008) 721 final of 14.11.2008

<sup>241</sup> OJ C 317, 28.12.2007, p. 1

<sup>242</sup> OJ L 286, 29.10.2008; p. 1

<sup>243</sup> OJ L 286, 29.10.2008, p. 33

<sup>244</sup> Case C-189/07, Commission v. Spain

sufficient controls over landings and marketing of undersized fish and by not imposing dissuasive sanctions upon perpetrators who acted in breach of relevant Community rules. This judgment is also interesting inasmuch as the Court confirmed that the subject-matter of a dispute may be extended to facts that occurred after the delivery of the reasoned opinion in so far as they are of the same kind and constitute the same conduct as the facts to which the opinion referred. It therefore held that, in this case, the Commission was entitled also to rely on inspection results obtained after the delivery of the reasoned opinion in order to illustrate a general failure on the side of the Member State concerned.

Pursuant to Council Regulation (EC) No 1447/1999 establishing a list of types of behaviour which seriously infringe the rules of the common fisheries policy<sup>245</sup>, the Commission addressed a Communication to the Council and the European Parliament on the Member States' annual reports on such behaviour in 2006<sup>246</sup>.

## 9.2. Evaluation

The success of the policy on the sustainable management of fisheries depends on effective implementation of the applicable Community rules in this area and, more particularly, on the implementation of effective control, inspection and enforcement system by the Member States. Yet, Member States' compliance record somewhat move in cycles.

When France was sentenced to pay a financial penalty<sup>247</sup> in 2005, all Member States, and certainly those, against which infringement proceedings had been instituted, adjusted their discharge of their obligations in the fields of control and enforcement. This coincided with infringement proceedings targeting all deficiencies in the Member States' control systems. That approach did yield certain positive results. In the meantime, there are signs of much more indulgence on the side of Member States.

There is also a link with the status of fish stocks and the endemic overcapacity of the Community fishing fleet. Where fishing opportunities decrease, Member States should step up their control and enforcement efforts. Yet, control and enforcement become politically unpopular in such situations and certainly so when dire fish stock situations become coupled with an economic crisis.

It is against this background that the Commission proposed a complete overhaul of the control and enforcement framework. That proposal is also for the introduction of novel counter-measures (e.g. financial measures, preventive measures deduction of overfished quantities). The new control system, once adopted by the Council, will facilitate a coordinated recourse either to infringement proceedings or to other instruments, or both, depending on the particularities of each case. That will secure a genuine compliance culture in the area of the Common Fisheries Policy, i.e. something which at best only exists in part in the currently prevailing circumstances.

One particular challenge in fishery-related infringement cases is that non-compliance mainly consists of an administrative malpractice on the side of the Member State concerned. This requires a continuous deployment of inspection means and effort on the side of the Commission to assemble the necessary means of proof for the purposes of demonstrating that

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<sup>245</sup> OJ L 167, 02.07.1999, p. 5

<sup>246</sup> COM(2008) 670 final of 04.11.2008

<sup>247</sup> Judgment of 12.07.2005 in case C-304/02, Commission v. France

the compliance failure is both general and ongoing. One other challenge resides in often very rapid developments on account of biological and environmental sustainability factors.

### **9.3. Evaluation results**

#### *9.3.1. Priorities*

Next to the completion of the legislative process concerning the intended new Community control system and to the forthcoming reform of the Common Fisheries Policy, and based on the experience gained with infringement cases so far, a new more focussed and systematic approach to infringement proceedings shall be put into operation. That new approach is also designed to build upon the synergies derived from the re-organisation of the Directorate General for Maritime Affairs and Fisheries and mainly rests on two basic ideas, namely (1) to link infringement proceedings to the relevant policy priorities and (2) to make anticipatory planning the core of case-handling. The new approach will consist of the following building blocks:

1. A systematic, generalised and immediate formal follow-up to all discovered instances of non-compliance with applicable rules by Member States at the pre-contentious stage. Priority, in this context, shall be given to conservation, compliance and control issues as well as to issues pertaining to the Community exclusive competence in the field of fisheries.
2. A prioritised passage to formal infringement proceedings and a coordinated use of other instruments. It is at this stage that priority-setting will take place by drawing upon the "critical mass" gathered by way of pre-contentious correspondence and contacts with Member States and in line with the 2007 Commission Communication "A Europe of results – Applying Community Law"<sup>248</sup>; and
3. Clear anticipatory planning and allocation of resources at the formal stage of infringement proceedings so that there be a full overview of the features of the case and the corresponding inspection needs at the time of the initiation of infringement proceedings in each case.

#### *9.3.2. Planned action (for 2009 and beyond)*

The Commission will put into operation a new approach to infringement proceedings, which is capable of securing a strengthened infringement policy, in effective handling of infringement cases in a resource-efficient manner and ultimately a genuine compliance culture in the Common Fisheries Policy. Priority will be given to recurrent problems putting the Common Fisheries Policy particularly at risk (e.g. illegal driftnetting, infringements in connection with fish stocks which are subject to recovery plans).

The Commission will accompany the already ongoing legislative process concerning the intended new Community control system and, to the extent possible, see to it that it can be concluded in 2009.

After the close of the already launched public consultation on the reform of the Common Fisheries Policy by 31 December 2009, the Commission will summarise its results in the first semester of 2010 and develop a proposal for a new basic regulation in 2010.

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<sup>248</sup> COM(2007) 502 final of 05.09.2007



#### **9.4. Measures in force**

The Common Fisheries Policy is based on the provisions of Article 3, 32 and 33 of the EC Treaty. The full set of rules adopted under the Common Fisheries Policy as well as new measures already proposed can be found on the following website: [http://ec.europa.eu/fisheries/index\\_en.htm](http://ec.europa.eu/fisheries/index_en.htm).

### **10. INTERNAL MARKET AND SERVICES**

#### **10.1. General overview**

##### *10.1.1. Efficient and effective enforcement of Community law – achievements in 2008*

###### 1. The prioritisation of infringements

The objective of an infringement procedure is to find appropriate solutions for breaches of Community law. The prioritisation of infringements is a means to determine which problems have particularly detrimental effects on the good functioning of the Internal Market and to ensure that these problems are solved as quickly as possible.

In line with the Commission's Communication "A Europe of results", a set of horizontal criteria exists to determine priorities specific to the Internal Market and Services. These criteria complement the categories of priorities identified in the aforesaid Commission Communication (i.e. non-communication of transposition measures and proper execution of judgments of the European Court of Justice):

a) Policy priorities in the field of Internal Market and Services: one example of such priorities is serious breaches of the Remedies' Directive and the related case law of the European Court of Justice in the public procurement sector. An effective national remedies system is essential for the efficient and effective enforcement of public procurement rules as confirmed by the recent adoption of a new Remedies Directive. Another example is cases where national measures highlight an overall incorrect transposition of a recently adopted Directive)

b) Cases having a significant legal dimension: This covers a range of issues, inter alia cases where fundamental freedoms are violated with a significant impact on citizens' rights, breaches threatening the good functioning of sectoral legislation or cases giving rise to important legal questions where a clarification by the Court of Justice is deemed important. One example is the nationality requirement established in several Member States for the exercise of a profession or cases where the national measures prevent the EU insurance legislation or occupational pension funds system to work properly in a given member State

c) Cases having a significant economic impact: In the area of public procurement cases with substantial contract value, often including substantial EU co-financing, are treated with priority. National measures precluding, making extremely difficult or discouraging mergers or acquisition of shares in big companies and/or strategic sectors (e.g. energy or the financial sector) are considered priority cases as well.

Priority cases require a significant investment in terms of efforts and resources. They are often legally or technically complex and must be treated fast so as to limit the negative effects of the national measure in question. These efforts have produced good results.

Some priority cases closed in 2008 illustrate the successfulness of the approach.

Following the "*Alcatel*" case law (effectiveness of the national review systems in public procurement area) the Commission asked the United Kingdom to align its rules to the said ECJ case law. The Commission moved quite fast until the Reasoned Opinion. Negotiations were intensified after this stage and the UK adapted national measures before the case was brought to ECJ.

A vigorous use of the infringement procedure as a leverage to move forward in constructive negotiations solved two difficult and sensitive cases in the respective countries related to the freedom of establishment: IT accelerated and finalised its amendments to the law concerning the *petrol stations* after referral decision; FR adopted appropriate modifications to the law on *hydroelectric concessions* after referral to Court.

## 2. Preventive action: risk-based approach, pro-active guidance to MS and partnership

Infringement cases are sometimes a reflection of a problem elsewhere. Resolving the case may not remove the source of the problem, e.g. late transposition is often due to lack of priority given to this legal obligation by national administrations. For example, a risk-based transposition plan is now established for all new directives. Such plans identify the major risks related to late or incorrect transposition and outline the actions planned to address those risks during the transposition period. In 2008 substantial work has been devoted to accompany the transposition of the new Postal Services Directive, the new Remedies Directive, in addition to ongoing activities related to the Services Directive and the Payment Services Directive. A plan is being prepared to support the Solvency II directive and the Defence procurement directive which should be adopted at the end of the current legislature (Spring 2009).

Throughout the transposition period (and after) the Commission services provide technical support and guidance to national authorities. To prevent or detect incorrect transposition, advisory or regulatory committees, sectoral working groups and transposition workshops are used to clarify national legislation<sup>249</sup> and achieve a substantial convergence of the practices. Detailed questionnaires are regularly sent to Member States in order to follow the transposition process<sup>250</sup> and bilateral technical assistance is offered to national authorities. Web-pages with "Most Frequently Asked Questions and Answers" have been used extensively in some areas; dedicated transposition scoreboards are published on Internal Market website and regularly updated.

Transposition package meetings have been organised in Member States with particularly high transposition deficits. In 2008, such meetings took place in Poland, Sweden and Greece. They serve two different purposes: they address problems before the deadline for transposition expires and keep up pressure on Member States to transpose Directives on time. Experience shows that such meetings are useful to improve Member States track record and maintain a genuine cooperation spirit between Member States and the Commission.

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<sup>249</sup> E.g. Directive 2007/44/EC<sup>249</sup>, amending some directives in the financial sector (banking, insurance and securities) by introducing new rules and evaluation criteria for the prudential assessment of acquisitions and mergers. This Directive has to be implemented by 21 March 2009; directive 2006/43/EC and 2006/46/EC in accounting and auditing areas.

<sup>250</sup> E.g. in the case of the UCITS Directive or for the audit Directive.

The on-going work with Member States on a Commission Recommendation on Partnership in Implementing the Single Market illustrates the priority given to prevention. The partnership approach is based on the idea that if we want the Internal Market to work in practice for citizens and businesses, then we need a close cooperation between the Member States and with the Commission. The infringement procedure and other problem-solving mechanisms play an essential role for the good application of EU law but cannot by themselves achieve this objective.

### 3. Petitions

The Commission services replied to about 165 questions in 2008 (including joint replies) 70 new petitions have been received and professional qualifications recognition remains the most important field (40%, followed by services (25%) public procurement (10%) and financial services 10%). Petitions linked to infringements concern one third of ongoing petitions and 1/5 of new ones. 3 areas were particularly affected: public procurements (more than 45% of replies), professional qualifications (25%), services (20%) and financial services (10%).

In the area of services, several petitions have been lodged on the Spanish case concerning pharmacists' activity. The closure of the case at the end of 2008 on the German law for chimney sweepers should also produce its effects on the petitions related to this file. There are still some open petitions concerning gambling. Questions on postal services are regularly answered by referring the petitioners to national authorities.

As for financial services, petitions relate mainly to insurance, company law, securities, capital movement and payments. They are often complex and pertaining to individual situations or of general nature but outside Community law. Pension funds remain an important topic. The report of the UK Ombudsman who intervened in the petition Committee on the "Equitable life" affair could allow finding a satisfactory solution.

Less than 10 cases have been sent to SOLVIT. Only one case highlighted a misapplication of Community law; 2 have been introduced in the EU-Pilot system (insurance and professional qualifications).

### 4. Complementary problem solving mechanisms (SOLVIT and EU-Pilot)

Problems with the application of EU law which are not considered a priority are either handled via the formal infringement procedure albeit with a lesser degree of intensity, in EU Pilot or in SOLVIT.

The number of SOLVIT cases is increasing: in 2008 it increased by 22% and reached 1,000 cases. However, the number of problems submitted by businesses has remained stable over the past years and as a result their relative share in SOLVIT case flow has decreased from 32% in 2004 to 14% in 2008. The resolution rate remained high at 83% of all cases. As in 2007, in 2008 the number of SOLVIT cases exceeds the number of opened infringement cases on the basis of complaints in the same area.

SOLVIT has become a very potent and efficient complementary instrument. In particular, it offers assistance and resolves many of the problems experienced by individual citizens and businesses and helps to identify structural issues which may still need to be resolved in order to improve the operation of the Internal Market.

In 2008 both SOLVIT and Citizens SignPost Service received a high number of requests in the areas of social security, professional qualifications and free movement of persons. It is noticeable that late transposition or ineffective application of certain Internal Market rules tends to increase the number of cases submitted to these services.

The *EU-Pilot* is still in a test phase, but the Commission has already been able to handle a certain number of cases in the area of Internal Market and Services (about 50 at the end of 2008).

#### 5. The Internal Market Scoreboard: transposition deficit and infringements reduction

The IM Scoreboard has proved a major success in terms of reducing Member States transposition deficit. The average deficit for Internal Market directives is down to 1% in 2008. While the objective must be to reduce this deficit even further there would be good reason to focus more on the application of EU law in Member States. The fact remains that in this area the situation has not improved in recent years. In 2008, the IM Scoreboard turned its attention to infringements of Community law other than late transposition of Directives. This will continue in 2009, inter alia by taking a closer look at specific sectors where Member States appear to face particular difficulties in complying with the law, the nature of the problems identified and the efforts by Member States to comply with their legal obligations.

##### *10.1.2. Key challenges for 2009-2010*

#### 1. Enforcement and the economic and financial crisis

The current economic and financial crisis may pose particular challenges for the enforcement of Internal Market rules, notably in the area of public procurement but also in the area of free movement of capital and financial services. .

There have been some examples already in 2008: to counter the negative effects of the financial crisis certain Member States have introduced flexibility measures in the national regulations for UCITS which may raise doubts as to the compliance with the relevant directive. Problems may also occur in the field of public procurement. Alongside useful measures to cut red tape, Member States may be tempted to introduce possibilities for local awards of public contracts without European-wide competition, as they see this as a way to boost local businesses. The free movement of capital may also be affected: Member State interventions must be notified to the Commission under state aid rules, but measures that do not have an aid component and affect capital movements may go unnoticed by the Commission. In this context, the necessary and continued monitoring activities related to strategic foreign investment control by MS as well as to specific measures in the financial sector will be important.

The Commission response to the recent financial crisis represents a major priority in the financial services area. This will trigger substantial legislative and quasi-legislative measures in 2009 and beyond. In 2010 and beyond the transposition and effective application of this legislative package will be a key priority. At the same time, a close monitoring of measures taken by Member States in the context of the crisis is needed in order to avoid that they jeopardise the Treaty principles and existing legislation.

The financial crisis may finally be a factor of risk which could delay the successful transposition of directives: it may modify priorities at national level and the allocation of resources in accordance with these new priorities.

## 2. Ensuring the proper functioning of the Internal Market for services both for the benefit of business and citizens

Services represent around 70% of GDP and employment and have been the essential source of job creation in recent years. Despite this exceptional economic performance, the significant growth potential of the internal market for services largely remains untapped due to the existence of numerous legal and administrative barriers. These barriers involve substantial delays and costs for companies who want to set up an establishment or provide services abroad. The absence of a well-functioning internal market for services also harms recipients, as existing barriers limit choice and lack of competition keeps prices unnecessarily high.

The Services Directive aims at knocking down these obstacles and releasing the unexploited potential of services. Thus, its effective application will be a key priority in 2010 and beyond. Moreover, the process of mutual evaluation of legislation affecting the services sector which the Directive requires the Commission and Member States to carry out in 2010 will constitute a fundamental tool to gauge the state of the Internal Market for services following implementation of the Directive and to identify sectors or aspects where further Community initiatives may be required. A key priority for the Commission will therefore be to take all necessary measures to make sure that this process is carried out in an effective way so that it may bring real added value to the development of the Internal Market.

## 3. Empowering citizens

A staff working document has been adopted in May 2008 and contains an action plan for the streamlining of a whole range of *existing information and assistance services* including SOLVIT, to help citizens and businesses to better understand and make full use of their rights and benefits in the EU. The objectives of the plan are to make it easier for users to access these services. A single point of access which will increase cooperation between the services is to be created and this will provide users with a better and faster service. The plan is also expected to have a positive effect on the functioning of SOLVIT since it will address one of the main obstacles reported by the SOLVIT centres, namely the very large volume of non-SOLVIT cases that they are receiving. Better filtering of cases at the point of entry and more efficient signposting of citizens and businesses to the most appropriate service will help to reduce the percentage of cases that cannot be handled within SOLVIT.

The action plan also provides for better integration of the single market assistance services with the Commission's complaint handling tasks. While the Commission is responsible for addressing complaints about infringements of EU law by EU Member States, much of the incoming correspondence it receives is about requests for information and assistance that could be provided more efficiently by the single market assistance services. For instance, many complaints about incorrect application of EU law can be resolved quickly and successfully through SOLVIT and many queries about EU rights and how to enforce them can be addressed by the Citizens Signpost Service. While some Commission services already make good use of the single market assistance services by referring to them on their web pages, a more systematic approach across the board is needed to develop the full potential of these synergies.

A clear need for measures helping citizens to enforce their rights and fully benefit from Internal Market opportunities has been also identified in financial services area. The current financial crisis has highlighted the crucial importance of an effective legal framework for *retail financial services*, both in ensuring a sustainable balance in the credit markets, and in restoring mutual confidence between consumers and financial institutions. In this context, the Commission intends to reflect on how to ensure responsible lending and borrowing, including a reliable framework on credit intermediation; find ways to ensure that the voice of European investors is much more strongly heard on all financial issues; examine ways to ensure that foreclosure procedures are avoided wherever possible, to prevent citizens from losing their homes.

#### 4. Speeding up the delivery of solutions

Through a formal infringement procedure the Commission aims at finding a solution to the identified violation within the shortest time possible. This is particularly important for priority cases, where the consequences of the violation are more significant from the legal or economic point of view and there is a more urgent need to introduce the necessary corrections. In the Internal Market and services area experience has shown that the treatment of such cases is often rather complex and lengthy despite the additional efforts put in place to ensure closer follow-up.

The duration of priority cases can be tackled under different angles: on the one hand progress can be improved through a more developed strategy to manage the infringement caseload. On the other hand, parallel negotiations with Member States must be pursued only if the national authorities have clearly understood that the purpose of the negotiation is to assist them in finding solutions, and not to suspend the procedure. Hence, the identified solution has to be put in place as quickly as possible. Unjustified delays may immediately let to the following step of the infringement procedure.

Furthermore, cases which are not identified as priorities according to the criteria are particularly appropriate to be treated first by means other than the formal infringement procedure. The potential of alternative problem-solving means such as EU Pilot and SOLVIT is not yet fully exploited. They should be used to the maximum in particular to deal with non-priority cases and cases related to non-structural issues, where the solution can be rapidly found at national level without the need for legislative measures. The evaluation of EU Pilot in 2009 should be therefore used to achieve the necessary improvements and find ways to maximise the benefits of this supplementary mechanism.

Finally, cases should be dealt with by the authority which is the best placed to examine facts and respective positions. Many of the complaints brought to the attention of the Commission could be more efficiently tackled by national bodies or courts, which have better knowledge of the context where Community and national legislation linked to the case must be applied. Complainants can be therefore encouraged to lean on national remedies before having recourse to the Commission services.

This general approach encourages and obliges Member States to assume their part of responsibility and is in full line with the partnership approach promoted by the Commission in the Single market review, as well as in the Communication "A Europe of Results".

#### 5. Timely and correct transposition, conformity checks

Transposition deficit rate in the area of Internal market and Services is at the end of 2008 3.1% against a 1% target for overall Internal market. This is a cause of serious concern.

Focus will be on Member States with the highest deficit: transposition package meetings will be organised in these Member States and when appropriate political pressure will be exerted to improve the situation. Some sectors seem more affected than others (e.g. anti-money laundering, cross border mergers and regulated professions), depending on the sensitivity of the legislation to be transposed and on the number / breadth of measures to be adopted at national level to complete the process.

Alongside the work on reducing the transposition deficit, the conformity checks represent a major task for 2009-2010: there is a substantial volume of national transposition measures to analyse, in particular in the area of company law but also in the area of mutual recognition of professional qualifications. To manage this workload will require a risk-based approach, in order to check first those measures which correspond to key provisions or provisions likely to trigger interpretation problems, incorrect transposition or gold plating. Transposition tables are often absent: Many member States are reluctant to provide them on a voluntary basis and are often late. When tables are provided it is at a late stage or the information included in the table is of limited help. Furthermore, translation needs necessarily delay the process. The outsourcing of certain tasks related to this work is under consideration, in particular translations, the drawing up of transpositions tables and first conformity checks. This will be taken forward in 2009/2010.

#### *The test case: services directive*

The *implementation of the Services Directive* was in 2008 and remains for 2009 a particularly complex and demanding exercise for Member States as well as for the Commission. Member States are required to carry out several large scale projects, such as the implementation of "points of single contact", an extensive review of national legislation and the setting up of an electronic system for administrative cooperation between Member States' administrations. Implementation therefore involves intensive coordination and organisational efforts.

Any delay or deficiency will have important consequences on the level playing field for services providers all over Europe and on the effective functioning of the points of single contact. It seems clear that without the approach taken by the Commission to work in close partnership with Member States (and to devote the required resources and efforts to do this) the implementation of the Services Directive would have been an even more challenging exercise.

A detailed and ambitious transposition plan served as the basis for almost daily cooperation between Member states competent authorities and the Commission. Key provisions, risks connected to misinterpretations, specific needs of each Member States were identified through working groups and bilateral technical meetings. Political support at the highest level has also been part of the flanking actions. The efforts to accompany Member States in this difficult and challenging process have been massive and hopefully will be rewarded by minimum delay in transposition. The quality of the transposition at national level and the concrete functioning of the mechanisms put in place by the Directive will represent a major challenge for 2010.

#### 6. Partnership with Member States

Member States share with the Commission the responsibility for a single market working well and delivering all its benefits to citizens and businesses. A more coordinated and cooperative

approach amongst Member States and between Member States and the Commission can enhance the functioning of the internal market, by helping to better implement and enforce single market rules.

The Commission adopted, in June 2009, a Recommendation addressed to Member States which identify the main components of this closer partnership<sup>251</sup>. The Recommendation is likely to address issues concerning the transposition, application and enforcement of single market rules and means to encourage Member States to prevent problems early on, to promote problem-solving tools, better to inform citizens and businesses about their rights and opportunities, and to monitor market developments to identify remaining obstacles to the single market.

The Recommendation is part of a cooperative process. It has been prepared in close cooperation with all Member States and its effects will be monitored jointly with Member States. Involvement and cooperation of national authorities is a prerequisite for achieving results. It is hoped that this joint work will stimulate ownership of national authorities as well as a "European reflex".

## **10.2. Analysis by sector**

### *10.2.1. Freedom to provide services and freedom of establishment (other than Financial Services)*

#### 10.2.1.1. Current position

##### (1) General introduction

The relevant legal framework consists of Article 43 of the EC Treaty on the freedom of establishment as well as of Article 49 of the Treaty on the freedom to provide services.

This framework is complemented by a number of Internal Market Directives which develop these freedoms as regards specific service activities or specific legal aspect (Postal Services Directive<sup>252</sup>, the Directive on the legal protection of conditional access services<sup>253</sup> and the E-commerce Directive<sup>254</sup>).

Besides these specific instruments we find Directive 2006/123/CE on services in the Internal Market<sup>255</sup> adopted in December 2006. This is an important horizontal instrument which will apply alongside other existing Directive and complement them. It has to be implemented by Member States before the end of 2009.

##### (2) Report of work done in 2008

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<sup>251</sup> COMMISSION RECOMMENDATION of 29 June 2009 on measures to improve the functioning of the single market (2009/524/EC), OJ L176 of 7.7.2009."

<sup>252</sup> Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJ L 52, 27.2.2008

<sup>253</sup> Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access - OJ L 320, 28.11.1998, p. 54–57.

<sup>254</sup> Directive 2003/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178 of 17.7.2000, p. 1.

<sup>255</sup> O.J. L 376/36 of 27.12.2006



#### a. Management of legislation, including in committees and working groups

The Services Directive is more than just a piece of legislation to be implemented into national law. It sets out a comprehensive modernisation programme for national administrations.

In response to a request formulated by the Council, the Commission had already in 2007 taken the commitment to provide guidance and assistance to Member States throughout the implementation process. Thus, following the final adoption of the Services Directive, an implementation strategy has been put in place to support and guide Member States' implementation efforts. Concrete actions in 2008 include:

- More than 30 bilateral meetings with Member States.
- 13 meetings of the "Expert Group on the implementation of the Services Directive" on specific implementation aspects allowing not only to exchange best practice but, most importantly, to ensure a similar level of understanding by all Member States of the work required and the priorities for action.
- Agreement with Member States on an on-line tool to be used by them to comply with the comprehensive reporting obligation they have under the Directive (reporting of legislation affecting service providers).
- As regards the Points of Single Contact, work focussed on providing practical guidance in the Expert Group by defining benchmarking criteria and facilitating exchange of best practices between Member States. Work was also undertaken on "branding" of the PSCs and a high-visibility single "European Webgate" to the national PSCs.
- Work to facilitate the cross border use of electronic procedures advanced considerably and very concrete options are being discussed in 2009 for implementation via a Comitology decision.
- A very important effort was deployed to prepare the use of IMI, the "Internal Market Information System", an electronic network which allows for direct communication and exchange of information between competent authorities in different Member States and thus facilitates the administrative cooperation required by the Services Directive, including the preparation of a Comitology decision with the related practical arrangements and the preparations for the launching of a pilot in 2009.

A second implementation report on the *conditional access services* was adopted in 2008<sup>256</sup>. The report details its usefulness to protect pay-TV services as well as new audiovisual information society services against piracy in the current world. Simultaneously, an expert group was created in order to discuss a number of issues linked to a better implementation of the Directive. Moreover, the Commission will propose to the Council in 2009 to ratify the Convention on the Legal Protection of Services based on, or consisting of, Conditional Access adopted by the Council of Europe on 24 January 2001<sup>257</sup>.

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<sup>256</sup> COM(2008) 593 final

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<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=178&CM=8&DF=8/12/2008&CL=ENG>

Concerning the *e-commerce Directive*, the interest of citizens and operators focused on questions regarding liability of the e-commerce service providers. Thanks to differing national interpretations of the relevant provisions of the e-commerce directive uncertainty has arisen within the on-line market as to the extent of the limited liability of internet service providers. In order to redress these misunderstandings, the Commission's services discussed this in detail with the Expert group of e-commerce made up of representatives from the Member States' authorities. Moreover, negotiations with third countries (e.g. USA, India, Ukraine) continued in order to strengthen e-commerce services.

#### b. management of Infringements

The Commission also carried out its control of the application of articles 43 and 49 of the Treaty by means of infringement proceedings concerning restrictions in various areas of the Internal Market. A number of procedures concerned the reimbursement of medical costs incurred in another Member State (the so-called mobility of patients).

Spain was referred to the Court of Justice<sup>258</sup>, because of the refusal to grant additional reimbursement of the costs incurred for hospital care required during a temporary stay in another Member State. This refusal deprives European citizens of a right granted to them by the Court under Article 49 of the Treaty as interpreted in the *Vanbraeckel* case<sup>259</sup>. The Commission also decided to take France to the Court for the continued existence of prior authorisation for the reimbursement of certain types of non hospital treatment which was considered contrary to Article 49 of the EC Treaty as recognised by the Court. In addition, patients treated in a hospital in another Member State cannot be reimbursed at levels at least equivalent to what they would have received had they received treatment in a French hospital. This is again a breach of Article 49 of the treaty as interpreted on the *Vanbraeckel* case.<sup>260</sup>

Since prior authorisation continues to be required for the reimbursement of non hospital treatment in Spain, the Commission has decided to also send a reasoned opinion to Spain. At the same time, Spain is criticised for requiring prior authorisation for the reimbursement of the cost of hospital treatment, despite not having a system for the issuing of such authorisations that is in line with legal certainty and transparency criteria.

A reasoned opinion was issued to Luxembourg for failure to reimburse the cost of medical tests carried out in another Member State. The Commission considers that the systematic refusal to reimburse patients in respect of these costs is incompatible with article 49 of the Treaty.

And finally, the Commission has sent a reasoned opinion to Estonia in view of its rules prohibiting the recognition of medical prescriptions made out by medical practitioners who are qualified to act in their Member State of establishment but are not registered in Estonia.

In other areas, the Commission has sent a supplementary reasoned opinion to Belgium on disproportionate requirements for temporary employment agencies which are established in other Member States and wish to provide their services in Belgium on a temporary basis.<sup>261</sup>

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<sup>258</sup> C-211/2008.

<sup>259</sup> C-368/98.

<sup>260</sup> C-512/2008.

<sup>261</sup> The requirement to have a representative resident or domiciled in Belgium or, if such a representative is no longer required, to have an address in the region concerned is equally disproportionate as the

The Commission has referred Portugal to the Court<sup>262</sup> and issued a reasoned opinion to this Member State for not making a distinction between requirements applying to a service provider who wants to provide temporary services in Portugal and a service provider wanting to establish in Portugal<sup>263</sup>.

Austria and the United Kingdom have received reasoned opinions for requiring service providers to have an address in the respective country, in Austria for actions relating to insolvency proceedings, in the United Kingdom for actions relating to trademarks and patents.

Italy has been referred to the Court of Justice for its regulations on the schedule of maximum fees for lawyers' services.<sup>264</sup>

In the field of establishment, the Commission has decided to refer Spain to the Court of Justice<sup>265</sup> for its national legislation and the legislation of Catalonia relating to the **establishment of retail outlets**<sup>266</sup>. The Commission has sent at the same time to Spain a letter of formal notice targeting specifically the legislation of Andalusia<sup>267</sup>.

In addition, the European Commission decided to close the infringement proceedings against Italy relating to the national and regional legislation on the **establishment of petrol stations**<sup>268</sup> following the removal of all disputed restrictions (i.e. compulsory minimum size and additional “non-oil” commercial activities; minimum distances between installations; constraints regarding opening hours, etc).

Following the implementation in 2008 by Italy of the judgment of the Court of Justice of 18 July 2007<sup>269</sup>, which confirmed that certain national restrictions on **extrajudicial debt recovery agencies**, were incompatible with the freedom of establishment (Article 43 EC Treaty) and the freedom to provide services (Article 49 EC Treaty), the Commission decided to close the infringement proceedings<sup>270</sup>.

In the field of *establishment of pharmacies*, formal requests to amend their legislation relating to ownership of pharmacies were sent to Germany, Portugal<sup>271</sup> and Italy<sup>272</sup>. The reasoned opinions generally concern the reserve of the pharmacy ownership to pharmacists, restrictions on the number of outlets owned, prohibitions for medicines wholesaling companies on owning pharmacies, and restrictions relating to the localisation of the pharmacies. In parallel to the infringement proceedings the Commission held in October 2008

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limitation of the activities of the service provider to those relating to human resources or the requirement to have a specific legal company form.

<sup>262</sup> C-458/2008.

<sup>263</sup> On the one hand it concerned the rules on the provision of construction services, on the other hand the rules on estate agent services and real estate brokerage firms. The failure to make such a distinction infringes Article 49 of the EC Treaty

<sup>264</sup> C-565/2008. The Commission questions the need for such provisions, the result of which is to restrict the access of service providers from other Member States to the Italian market, while not however guaranteeing access to justice and its proper administration or protecting those receiving the services in a way which is proportionate with the general interest objectives sought

<sup>265</sup> Case C-400/2008.

<sup>266</sup> IP/08/507.

<sup>267</sup> IP/08/861.

<sup>268</sup> IP/08/1792.

<sup>269</sup> Case C-134/05, Commission v Italy.

<sup>270</sup> IP/08/1360.

<sup>271</sup> IP/08/1352.

<sup>272</sup> IP/08/1785.

a workshop on access to high quality pharmacy services aimed at continuing the constructive dialogue with Member States and the main stakeholders in the pharmacy sector. The Commission's services intend to continue the fruitful dialogue with stakeholders and Member States by organising a second workshop on pharmacies in 2009. The Commission dealt also with several petitions (most of them related to the infringement proceedings 2001/5261 Spain) and written questions relating to restrictions on the establishment of pharmacies. The upcoming judgment of the Court of Justice in Case C-531/06, *Commission v Italy*, relating to restrictions on the ownership of pharmacies by non-pharmacists, will be taken into account when dealing with such restrictions<sup>273</sup>.

In the area of **gaming services**, a formal request to amend national rules was sent to Sweden in relation to restrictions on the freedom to provide on-line poker services and to promote both on-line and off-line poker games and tournaments. The Commission inquired also into restrictions on gaming services in Germany focusing on a number of provisions of the new German gaming legislation which entered into force on 1.1.2008, notably the prohibition of games of chance on the Internet<sup>274</sup>. In addition, the Commission sent reasoned opinions to Greece and the Netherlands requesting them to amend their gambling legislation<sup>275</sup>. The reasoned opinions concern the fact that providers lawfully licensed in another Member State are not allowed to provide or to promote gaming services.

The Commission notes with satisfaction that some Member States (France, Italy, Hungary) have already announced amendments of their gaming legislation in 2009 in order to comply with the requirements of EC law. The Commission will examine the new draft legislation and will continue the dialogue with Member States with a view to ensuring the full application of the Treaty in the gaming sector.

In the summer of 2008 under the French Presidency of the Council a Working Party was created in order to discuss the problems relating to gambling, including on-line gambling. This work continues under the Czech and the Swedish Presidency of the Council. In parallel, the European Parliament prepared an own-initiative report on integrity of on-line gambling which has been adopted by the plenary in March 2009.

It should be recalled that by the end of 2008, many preliminary questions relating to gaming services were submitted or are still pending for a preliminary ruling of the Court of Justice<sup>276</sup>. The Court is expected to rule in the preliminary case C-42/07, *Liga Portuguesa de Futebol*, in 2009.

Following the implementation by Member States of Court judgments, a number of infringement cases could be closed in 2008:

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<sup>273</sup> Also in preliminary Joined Cases C-171/07 and C-171/07, *Apothekerkammer Saarlandes*. See also requests for preliminary ruling by the Tribunal Superior de Justicia de Asturias, Joined Cases C-570/07 and C-571/07, Blanco Pérez.

<sup>274</sup> IP/08/119 of 31.1.2008.

<sup>275</sup> IP/08/330 of 28.2.2008.

<sup>276</sup> **AT**: Engelmann (C-64/08) Langer (C-235/08) on casinos; **DE**: Winner Wetten (C-409/06), Carmen Media Group (C-46/08), Markus Stoss (Joined cases C-316/07, C-358/07, C-360/07, C-409/07 & C-410/07); **FR**: Zeturf (C-212/08); **NL**: Sporting Exchange/Betfair (C-203/08), Ladbrokes (C-258/08); **PT**: Liga Portuguesa de Futebol (C-42/07), opinion of Advocate General Bot delivered on 14.10.2008, and **SE**: Gerdin & Sjöberg (Joined cases C-447/08 C-448/08).

- Austria, concerning **inspection services for boilers and pressure tanks** ('*Kesselprüfstelle*')<sup>277</sup>, and **private inspection bodies of organically farmed products**<sup>278</sup> - Germany, on private inspection bodies of organically-farmed products<sup>279</sup> and establishment of vehicles inspection centres<sup>280</sup>.

The Commission decided to refer Portugal to the Court of Justice<sup>281</sup> for restrictions on the **establishment of vehicles inspection centres**, notably the granting of licenses depending on the public interest, the limitation of the company's purpose, the obligation of a share capital of 100,000 EUR and the incompatibilities for partners, managers and administrators.

Germany repealed its restrictions on freedom of establishment and free movement of services of **artificial insemination** of bovine animals and the Commission decided to close the infringement proceedings<sup>282</sup>. The Court of Justice in its Judgment of 17 July 2008<sup>283</sup> declared that by allowing only authorised artificial insemination centres, with exclusive rights over determined geographical areas, and persons holding an inseminator's licence, the issue of which is subject to the conclusion of an agreement with one of those centres, to provide the service of artificial insemination of bovine animals, the French Republic has failed to fulfil its obligations under Articles 43 EC and 49 EC.

In the field of **hydroelectric concessions**, the Commission decided to close the infringement proceedings against Spain and France, following removal of the preference for the outgoing concession holder<sup>284</sup>. The Commission also decided to close the infringement proceedings against France regarding the **ban on cross-promotion of commercial television programmes** in France, following compliance of the national legislation.

A letter of formal notice was sent to Cyprus on restrictions to **estate agents' activity**<sup>285</sup>, regarding the qualification and the obligation to collaborate with a local agent for the provision of services.

The Commission decided to send reasoned opinions to the Czech Republic and Hungary regarding obstacles to the freedom of establishment and the freedom to provide services for the activity of **collecting management of rights**<sup>286</sup>.

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<sup>277</sup> Judgment of the Court of 14 December 2006<sup>277</sup>, which ruled incompatible with Article 49 EC Treaty the obligation of establishment within the national territory in order to be able to provide

<sup>278</sup> Case C-393/05, *Commission v Austria*, Judgment of the Court of 29 November 2007<sup>278</sup>, which ruled that the requirement of establishment in Austria for **private inspection bodies of organically farmed products** was incompatible with Article 49 EC Treaty; IP/08/1793.

<sup>279</sup> Case C-404/05, *Commission v Germany*. The Court of Justice on 29 November 2007 declared that Germany was in breach of Article 49 EC Treaty, by requiring that **private inspection bodies of organically-farmed products** approved in another Member State maintain an establishment in Germany in order to be able to provide inspection services there.

<sup>280</sup> The Commission decided to withdraw from Case C-369/08, *Commission v Germany*, and to close the infringement proceedings against Germany relating to restrictions on the establishment of vehicles inspection centres in Germany, notably the compulsory and exclusive affiliation on a full-time basis of at least 60 independent experts and the employment of at most 30 experts as inspection engineers, following the amendment of the German legislation in September 2008 which repealed the restrictions.

<sup>281</sup> Case C-438/08, *Commission v Portugal*.

<sup>282</sup> IP/08/1793.

<sup>283</sup> Case C-389/05, *Commission v France*.

<sup>284</sup> IP/08/1793.

<sup>285</sup> IP/08/689.

<sup>286</sup> IP/08/1786.

The Commission sent a reasoned opinion to France in September 2008<sup>287</sup> relating to restrictions on opticians (obligation of registration in one department only) and distance selling of lenses via the Internet, which are considered incompatible with Articles 43 and 49 EC, as well as Article 3(2) of the e-commerce Directive. France replied in December 2008.

In the area of *postal services*, 2008 was a very important year for the accomplishment of the Internal Market for postal services, as the 3<sup>rd</sup> Postal Directive was adopted<sup>288</sup>. The Directive is the decisive step towards the realisation of an Internal Market for postal services which represent in excess of one percent of EU GDP and contribute to the attainment of the broad reform objectives of the Lisbon Agenda.

A Transposition Plan which was prepared upon the adoption of the 3<sup>rd</sup> Postal Directive, assesses in detail the risks of incomplete, deficient or late implementation of Directive 2008/06/EC by Member States and envisages a series of specific actions to ensure real market opening, fair competition and a level playing field. To ensure timely and correct transposition of the Directive, the Commission has been heavily engaged throughout 2008 in proactive assistance with Member States, including bilateral meetings, while continuing its active role in monitoring and reporting on market developments. These activities included letters from Commissioner McCreevy to all Member States thanking them for their constructive spirit and addressing existing and/or emerging barriers to entry in postal sectors in Member States; and a High level Kick-off Conference, which was hosted by Commissioners McCreevy.

Work on a wide range of transposition issues was taken forward in the framework of Working Groups convened under the auspices of the Postal Directive Committee and chaired by the Commission.

A 4<sup>th</sup> Application Report on the application of the postal *acquis* and the functioning of the EU postal market was adopted on 23 December 2008<sup>289, 290</sup>. The Report provides detailed economic data and background information and identifies some shortcomings in the implementation of the current postal *acquis*, which need to be addressed further.

#### 10.2.1.2. Evaluation based on the current position

The *implementation of the Services Directive* is a particularly complex and demanding exercise for Member States as well as for the Commission. It is not just a list of legal provisions which simply need to be reflected, in an appropriate manner, by Member States in national legislation. Indeed, Member States are required to carry out several large scale projects, such as the implementation of "points of single contact", an extensive review of national legislation and the setting up of an electronic system for administrative cooperation between Member States'

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<sup>287</sup> IP/08/1354.

<sup>288</sup> Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, *OJ L 52*, 27.2.2008, p. 3–20.

<sup>289</sup> Report from the Commission to the Council and the European Parliament on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC), COM(2008) 884 final [available online at: [http://ec.europa.eu/internal\\_market/post/doc/reports/report\\_en.pdf](http://ec.europa.eu/internal_market/post/doc/reports/report_en.pdf)].

<sup>290</sup> Commission Staff Working Document accompanying document to the Report from the Commission to the Council and the European Parliament on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC), COM(2008) 884 final, SEC(2008) 3076 [available online at: [http://ec.europa.eu/internal\\_market/post/doc/reports/annex\\_en.pdf](http://ec.europa.eu/internal_market/post/doc/reports/annex_en.pdf)].

administrations. Implementation therefore involves intensive coordination and organisational efforts.

Any delay or deficiency will have important consequences. The timely review of national legislation and the necessary modifications to be made to national law are important in order to assure a level playing field for services providers all over Europe. The setting up and the practical functioning of the points of single contact will be one of the important and most visible results of the Directive for businesses and any malfunctioning will be immediately detected. Finally, the effects of the Directive will also suffer if the required level of administrative cooperation between Member States is not achieved.

It seems clear that without the approach taken by the Commission to work in close partnership with Member States (and to devote the required resources and efforts to do this) the implementation of the Services Directive would have been an even more challenging exercise. This approach has proven to be essential to ensure a common understanding amongst Member States and to put pressure and help those where the process accumulates delays. In an EU with 27 Member States (plus the three EEA) emphasis on this type of work should increase if we want to ensure the effective application of Internal Market rules on the ground and hence the functioning of the Internal Market in practice.

In the area of *postal services* transposition assistance, conformity assessment and market monitoring work will provide the main focus for the coming years. It is essential, for a proper functioning of the Internal Market for postal services that there is no delay in the implementation and that Member States establish sound and efficient regulatory frameworks that will provide incentives for the provision of postal services and will not constitute a market entry barrier.

To ensure that the objectives of EU postal reform and the accurate implementation of the 3<sup>rd</sup> Postal Directive (in a manner which is faithful to its content and spirit), are achieved, and the Postal Internal Market is accomplished, further measures will be taken as appropriate to address barriers to entry or other protectionist measures which may undermine the achievement of these objectives, including the pursuit of infringement proceedings against Member States for violation of Articles 43 and 49 in this sector.

#### 10.2.1.3. Evaluation results

##### (1) Priorities

A considerable amount of work has been undertaken by both the Member States and the Commission on the implementation of the Services Directive, but a lot still remains to be done. While Member States will have to translate the result of the technical work of the past two years into practice, the Commission has to start preparing for work to be done after the end of the implementation period (28 December 2009). Therefore, the main priority remains the timely and correct implementation of the Services Directive. This implies a continuing and efficient cooperation with Member States in order to be able to monitor the implementation process throughout 2009.

At the same time work is being undertaken for all actions the Directive requires the Commission to take (e.g. functioning of administrative cooperation and preparation of the system for reporting by Member States of the results of their screening of national legislation). Work has also started to prepare the "mutual evaluation process" foreseen by the Services Directive in 2010. This process, which is one of the novelties of the Services

Directive, can be compared to a peer review and will allow for a structured dialogue between both the Member States and the Commission. Ultimately this process will also involve the European Parliament and stakeholders as the Commission will have to present a summary report to the European Parliament and to the Council accompanied where appropriate by proposals for additional initiatives.

Enforcement of the Treaty rules on the freedom to provide services and the freedom of establishment will focus in particular on those areas which are not covered by the Services Directive, such as health services, as well on all restrictions caused by the failure to distinguish between those two fundamental freedoms. Clear discrimination or cases concerning entire categories of service providers will also continue to be treated as priority.

A considerable amount of work and a variety of activities have also been undertaken regarding the implementation of the 3<sup>rd</sup> Postal Directive by the Commission and Member States.

In order for the Internal Postal Market to become a reality, it is essential that initiatives directed towards full market opening are continued, and where necessary further developed and strengthened. In relation to the application of the postal *acquis*, two main challenges have been identified: (i) ensuring coherent implementation of the 3<sup>rd</sup> Postal Directive coupled with the establishment of a sound and efficient regulatory framework and (ii) ensuring that any remaining barriers to entry are tackled and removed.

## (2) Planned actions (2009 and beyond)

The well established cooperation with Member States on the *implementation of the Services Directive* will continue. Efforts to communicate with stakeholders as to the benefits and opportunities created by the Services Directive, now that the implementation deadline approaches, will be stepped up. Several actions to start for the preparations of the mutual evaluation exercise in 2010 will be taken (both internally in the Commission and vis à vis Member States and stake-holders).

*Infringement proceedings* and enquiries will be managed according to set priorities, making use of alternative problem solutions mechanisms such as SOLVIT or EU-PILOT. Given the vast variety of possible restrictions concerning the Internal Market, resources will have to be deployed efficiently.

There is a full commitment to pursuing and safeguarding the objectives of EU postal reform in a proactive manner. The Commission services will continue to deliver its broad and comprehensive assistance activities to Member States.

A broad range of regulatory issues will be tackled in the framework of Working Groups of the *Postal Directive* Committee and bilateral and/or multilateral meetings with stakeholders.

In addition, the Commission services plan to organize a high level Postal "Mid-term Review Conference" which is planned for 24-25 September 2009 with Member States, national regulatory authorities, key stakeholders and consumer representatives.

The Commission services will also continue to commission further sector studies (as in 2009, on the role of national regulatory authorities in a liberalised postal market and on the effects of the EU postal reform in the period 1997-2008), assist work on the studies in a series of interactive Workshops and eventually publish the results.



In parallel to the implementation assistance which will be provided to Member States, the services will continue with active and comprehensive market monitoring, which will enable the Commission to act against any protectionism in the postal sector and to assess whether there is a need for further initiatives to strengthen the regulatory framework.

## 10.2.2. Financial Services

### 10.2.2.1. Current position

#### (1) General introduction

The financial services sector includes three major areas for which similar European policies apply: **banking**<sup>291</sup>, **insurance**<sup>292</sup> and **securities**<sup>293</sup>. The objective of the Community secondary legislation is to facilitate the establishment and the cross border provision of services for financial institutions on the basis of the home country control principle. In addition to these main areas, financial services legislation covers **occupational pensions**<sup>294</sup> and **payment services**<sup>295</sup>.

#### (2) Report of work done in 2008

In the **banking sector**, the Commission mainly dealt with non-communication cases. As regards the transposition of banking Directives 2006/48/EC and 2006/49/EC (the so called 'Capital Requirement Directive', CRD)<sup>296</sup>, 4 infringement cases against Hungary and Spain due to non-communication of the national transposition measures before the deadline of 31 December 2006 were still pending at the beginning of 2008. In the course of 2008, it was possible to close one of these cases, while three cases had to be referred to the ECJ. Out of the cases referred to the Court, the case against Spain for non-transposition of Directive 2006/48/EC was settled further to the complete implementation of the Directive; the case against Spain for non-transposition of Directive 2006/49/EC resulted in a Court's judgment establishing Spain's failure to transpose this Directive in December 2008. The case against Hungary for non-transposition of Directive 2006/48/EC was still pending before the Court at the end of 2008.

Infringement proceedings were pending against 8 Member States for non-communication of the implementing measures of Directive 2007/18/EC which amended technical provisions of the CRD<sup>297</sup>. All of these proceedings were terminated in 2008, following to the notification of the implementing measures by the Member States concerned.

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<sup>291</sup> [http://ec.europa.eu/internal\\_market/bank/legislation/index\\_en.htm](http://ec.europa.eu/internal_market/bank/legislation/index_en.htm)

<sup>292</sup> [http://ec.europa.eu/internal\\_market/insurance/legis-inforce\\_en.htm](http://ec.europa.eu/internal_market/insurance/legis-inforce_en.htm)

<sup>293</sup> [http://ec.europa.eu/internal\\_market/securities/index\\_en.htm](http://ec.europa.eu/internal_market/securities/index_en.htm)

<sup>294</sup> [http://ec.europa.eu/internal\\_market/pensions/directive\\_en.htm](http://ec.europa.eu/internal_market/pensions/directive_en.htm)

<sup>295</sup> [http://ec.europa.eu/internal\\_market/payments/legislation\\_en.htm](http://ec.europa.eu/internal_market/payments/legislation_en.htm)

<sup>296</sup> Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1) and Directive 2006/49/EC on the capital adequacy of investment firms and credit institutions (OJ L 177, 30.6.2006, p. 201).

<sup>297</sup> OJ L 87, 28.3.2007, p. 9

A pending infringement case against France concerning the follow-up of the Court's preliminary ruling on the prohibition to pay interest on current accounts was closed in 2008<sup>298</sup>.

In 2008, the working group set up by the Commission in order to ensure a consistent implementation of the CRD (CRDTG - Capital Requirements Directive Transposition Group), continued its work of interpretation and clarification of the CRD provisions<sup>299</sup>. The CRDTG found that certain provisions were unclear or did not achieve their objective in practice. This prompted the Commission to propose some technical amendments to the CRD through two comitology directives<sup>300</sup>. The adoption of these directives is envisaged in 2009.

In addition, a more extensive revision of the CRD was proposed in 2008<sup>301</sup> in order to refine and update certain provisions. Also this revision is expected to be adopted in 2009.

Good progress has been made in 2008 in the report on the conformity of the national measures implementing the CRD.

As far as the *insurance* sector in 2008 is concerned, the Court of Justice ruled on a case referred in 2007 with regard to Irish legislation on compensation for victims of an accident caused by an uninsured motor vehicle<sup>302</sup>. The Court of Justice followed the Commission's line of reasoning entirely and found Ireland to be in breach of Article 1(4) of Directive 84/5/EEC (the 2<sup>nd</sup> Motor Insurance Directive, OJ L 8/1984, p. 17). Ireland took the necessary measures to comply with this ruling by the end of 2008.

Furthermore, a case against the Czech Republic for wrong transposition of Directive 2003/41/EC of 3.6.2003 on pension funds (OJ L 235 of 23.9.2003) was referred to the Court of Justice during 2008 (case C-343/2008).

As regards the transposition of Directives by the Member States, non-communication cases had to be launched in the insurance sector against several Member States with regard to the failure to transpose Directive 2005/68/EC (the reinsurance Directive<sup>303</sup>) by 10 December 2007. By the end of 2008 Belgium, Czech Republic, Greece, Poland and Portugal were referred to the Court of Justice. Some infringements were also launched concerning Directive 2002/92/EC (the insurance mediation Directive<sup>304</sup>), namely against Austria (case filed in late 2008), Greece and Italy, and as concerns Directive 87/344/EEC of 22.6.1987 on legal expenses insurance (OJ L 185, 4.7.1987), against France.

In total 40 complaints and infringement cases were handled in 2008, a high number of them being for non-communication of the transposition measures concerning Directive 2005/68/EC. 5 cases were referred to the new EU Pilot tool and no cases were referred to the

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<sup>298</sup> Judgment of 5 October 2004, Case C-442/02, *Caixa-Bank France v Ministère de l'Économie, des Finances et de l'Industrie*

<sup>299</sup> [http://ec.europa.eu/internal\\_market/bank/regcapital/transposition\\_en.htm](http://ec.europa.eu/internal_market/bank/regcapital/transposition_en.htm)

<sup>300</sup> [http://ec.europa.eu/internal\\_market/bank/docs/regcapital/comitology\\_crd%202006-48\\_en.pdf](http://ec.europa.eu/internal_market/bank/docs/regcapital/comitology_crd%202006-48_en.pdf) and

[http://ec.europa.eu/internal\\_market/bank/docs/regcapital/comitology\\_crd%202006-49\\_en.pdf](http://ec.europa.eu/internal_market/bank/docs/regcapital/comitology_crd%202006-49_en.pdf)

<sup>301</sup> [http://ec.europa.eu/internal\\_market/bank/docs/regcapital/crd\\_proposal\\_en.pdf](http://ec.europa.eu/internal_market/bank/docs/regcapital/crd_proposal_en.pdf)

<sup>302</sup> Judgment of 21 February 2008, Commission versus Ireland, Case C-2007/211

<sup>303</sup> Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC, 88/357/EEC as well as Directives 98/78/EC and 2002/83/EC (OJ L 323, 09.12.2005, p. 1)

<sup>304</sup> Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ L 9, 15.1.2003, p. 3)

SOLVIT tool. 14 cases were closed (around 35% of the total of cases handled) and only 1 was referred to the ECJ (2.5% of the total approximately). Bilateral contacts were held with the Member either through package meetings or in the relevant sector committees. Package meetings sometimes led to the closing of the infringement case within 6 to 9 months of being held.

As regards petitions a total of 16 petitions were handled on insurance and pensions. They dealt inter alia with motor insurance, life assurance (the Equitable Life case and similar/parallel ones) and pension funds. Of course, petitions that show a breach of EU law have their facts "converted" in to infringements. About 160 queries of other nature concerned the insurance sector.

The key change and challenge ahead is the proposal for a directive called "Solvency II" Directive which was tabled in 2007 and re-tabled (amended proposal) in 2008<sup>305</sup>. The proposal is currently under discussion in Council and Parliament. Formal adoption is expected in 2009 and transposition by late 2012. The Directive will provide for a transposition period of about 3 and a half years so that implementing measures needed to make the new framework completely operational are adopted beforehand. Intensive work intended to prepare its transposition and proper application will start in 2009. . It is intended to modernise the evaluation and calculation of risks and therefore will provide for a new, prospective, economic and risk based approach putting much greater emphasis on sound risk management and robust internal controls by insurance undertakings. In addition it will also profoundly influence the way in which supervision is carried out by the competent supervisory authorities. It also contains a new approach as regards insurance groups. It is far too early to anticipate what will be the effects and consequences of the new Directive.

In addition to this work, conformity check of Directives transposed remains a key challenge. In the insurance sector, the non-communication phase affords the opportunity to press home the need for a comprehensive and updated concordance table and then to check the substantive conformity of the transposition. This has been the approach followed for all Directives adopted since 2000 and also the initial/1<sup>st</sup> stage approach as regards the conformity assessment of Directive 2005/68/EC on reinsurance.

The implementation of the Directive on *Reinsurance* (2005/68/EEC) was due by 10.12.2007, but not all Member States had completed their transposition process by that date. In 2009 and 2010 work will have to continue the focus on pursuing infringements for those countries which have not yet transposed at all (Belgium being now the sole case in this instance) or which have transposed in an incorrect way the Directive in question.

In the area of *securities markets*, the Commission services finalised in 2008 the completeness check for the transposition of the Markets in Financial Instruments Directive (MiFID)<sup>306</sup> and its implementing Directive<sup>307</sup> whose transposition had been delayed in most Member States.

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<sup>305</sup> Reference: COM (2007) 361 of 10.7.07, and COM (2008) 119 of 26.2.2008.

<sup>306</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1)

<sup>307</sup> Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p. 26)

Out of 47 non-communication infringement cases opened in 2007, 37 were closed between 2007 and 2008. 5 cases were referred to the ECJ in 2008, but 4 were closed in 2008 following notification to the Commission of transposition measures by relevant Member States. One case (PL implementing Directive) is still pending in front of the ECJ.

The quality check for the transposition of MiFID started in 2008 on a risk-based assessment. The Commission services organised in November 2008 a conference in order to gather evidence from the market on the functioning of MiFID one year after its implementation. Furthermore, the Commission services launched in 2008 two calls for evidence on the transposition of MiFID, one for Member States, the other for industry. Problematic issues raised in the contributions to the calls for evidence were addressed by Commission services in bilateral contacts with the respective Member States. For some Member States, the analysis is still underway in order to determine whether MiFID is correctly transposed and applied.

Furthermore, the questions and answers database on MiFID, launched by the Commission services in 2007, continued to be operated in 2008 to help provide all stakeholders with the possibility to clarify interpretational issues concerning MiFID. The quality check of transposition for MAD continued. The check of 7 Member States was finalised in 2008. A conference was organised in November 2008 on the review of the Market Abuse Directive (MAD). The outcomes of this conference allowed to finalise a draft call for evidence, which is the first step concerning the review of the MAD directives.

The Commission services have received many complaints in 2008 on the application of the Investor Compensation Scheme Directive. Work continued in 2008 on a petition on the transposition of ICSD in Austria that had been addressed to the EP in 2007. As a result of these numerous complaints, and in the light of the changes to the Deposit Guarantee Schemes Directive, the Commission services have prepared a call for evidence on ICSD to be launched in 2009; its results will allow to determine the scope of the review of the directive.

An amendment to the Prospectus Regulation was approved on 12 December 2008 through Commission Regulation 1289/2008<sup>308</sup>.

As one of the measures to address the financial crisis, the Commission adopted a proposal for a Regulation on *Credit Rating Agencies* on 12 November 2008, which is now under the co-decision legislative procedure in the Council and the EP. The proposal lays down conditions for the issuance of credit ratings which are needed to restore market confidence and increase investor protection. It introduces a registration procedure for credit rating agencies to enable European supervisors to supervise the activities of rating agencies whose ratings are used within the Community.

In the area of **asset management** the Commission continued the verification of the transposition of the Directive 2007/16/EC<sup>309</sup> (Eligible Assets Directive) by Member States (MS). Despite the fact that responses from Member States to the questionnaire sent in 2007

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<sup>308</sup> Commission Regulation (EC) No 1289/2008 of 12 December 2008 amending Commission Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards elements related to prospectuses and advertisements (*OJ L 340, 19.12.2008, p. 17–19*)

<sup>309</sup> Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions (*OJ L 79, 20.03.2007, p. 11*)

did not indicate major problems that its transposition may cause only 12 MS implemented the Directive by the foreseen deadline (23 March 2008).

On 23 May 2008 the Commission sent letters of formal notice to 15 MS which failed to communicate their transposition measures. Vast majority of them subsequently notified the relevant legislative acts implementing the provisions of the Eligible Assets Directive. In 4 cases (the Czech Republic, Italy, Greece and Portugal) where either there was no reply to the letter of formal notice or the reply was too vague and did not give sufficient assurances that the measure would be adopted in the foreseeable future the Commission sent reasoned opinions.

The desire to counter the negative effects of the financial crisis prompted certain MS to develop techniques or to introduce certain flexibility into the UCITS' national regulations which may raise doubts as to the compliance of these measures with the UCITS Directive.<sup>310</sup> The Commission services initiated considerations, in cooperation with CESR, on these issues in the late 2008. They will continue analysing them in the course of 2009 in a view of devising the effective response to any practices resulting from the improper interpretation of the Directive.

2008 was marked by the launching of the recast of the UCITS Directive as the proposal was put forward on 16 July 2008. It had two objectives: one was to codify the successive changes introduced to the UCITS Directive since 1985. The other aimed at enhancing the working of existing provisions and introducing new Single Market freedoms by creating a framework for fund mergers and asset pooling.

Ahead of the transposition deadline for the **Payment Services Directive (PSD)**<sup>311</sup> set on 1 November 2009, a *Payment Services Directive Transposition Group (PSDTG)* was set up end 2007 to discuss and prepare the transposition of the Payment Services Directive 2007/64/EC (hereby referred to as "*the PSD*"). The main action identified consisted in organising transposition workshops with Member States to discuss and solve all transposition issues, comparing approaches and choices made by Member States in order to ensure a better and consistent understanding of the PSD provisions. The Group met seven times during 2008 and national representatives discussed various interpretation issues. The Group collected around 300 questions from Member States concerning the 96 Articles of the PSD and provided written observations which served as a basis for reaching a common understanding. **15 bilateral meetings** with Member States were held in 2008 in order to support their legislative efforts, to closely monitor the implementation process and to spread best practice among Member States.

Furthermore, the **Interactive Web-Page**<sup>312</sup>, operated through a question and answers approach and open to everyone interested in the transposition process of the PSD, has received and answered 174 questions in 2008. This web-page also contains the full text of the Directive and information on transposition-related issues including up-dated information on

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<sup>310</sup> Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 375, 31.12.1985, P. 3), as amended

<sup>311</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L319, 5.12.2007, p. 1)

<sup>312</sup> [http://ec.europa.eu/internal\\_market/payments/framework/transposition\\_en.htm](http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm)

Member States' transposition plans with references to the forecasts for adoption of national measures implementing the PSD and the expected dates for entry into force of such measures.

When necessary, political pressure was increased by preventive measures such as informal talks in the margins of the PSDTG meetings or sending letters to Member States pointing out particular aspects of the draft legislations which were considered not to be in line with the provisions of the PSD.

In the field of payments, the number of petitions, questions and complaints remained constant in comparison with previous years. Most of the enquiries (around 120) concerned cross-border payment services and the application of the Regulation 2560/2001, probably due to the fact that knowledge of this Regulation and of its scope is often limited, incomplete or inaccurate. Only in a very low number of cases the Commission services decided to raise the issue with the Member State concerned. However, no infringement proceeding was launched during this period.

In parallel, the review process of two other main pieces of legislation in this area (the Regulation (EC) No 2560/2001 on cross-border payments and the E-Money Directive 2000/46/EC) led to the adoption in October 2008 of two Commission proposals<sup>313</sup>.

#### 10.2.2.2. Evaluation based on the current position

In the **banking sector**, the complete implementation of the CRD by practically all Member States was achieved in 2008. The CRDGT has proved to be a successful form for ensuring consistent implementation through cooperation with Member States. The GRDTG has also facilitated the preparation of an appropriate legislative response (through comitology measures) where it was considered necessary to clarify or complete technical provisions.

The finalization of the report on the implementation of the CRD was slightly delayed. This delay is due partially to the volume and complexity of the legislation to be examined (several thousands of pages) and partially to the belated transposition of the Directives in certain Member States. In addition, certain Member States were late in providing the necessary information to the contractor performing the study. The report will be finalized in the first quarter of 2009.

The impact of **insurance** cases is in general considerable in economic terms or in terms of functioning of the relevant market. The already mentioned ECJ case against the Czech Republic on occupational pension funds prevents such funds from being (internally) set-up in the Czech Republic and in Poland. In other countries the legislation has a significant impact on the level playing field because it either limits the possibilities of competitors to stay on the market or allows national companies to offer services without fulfilling the obligations imposed by EC legislation.

Workload on complaints and infringements is likely to increase in 2009-2010. This does not derive, however, from any persistent or structural problem but rather from the ever greater awareness of citizens of their rights, the increase in legislation and in the number of Member States. This implies a likely increase in flow of work and the corresponding need to define

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<sup>313</sup> COM(2008)627 of 9 October 2008, with regard to the revision of the E-Money Directive and COM(2008)640 of 14 October 2008 concerning the review of the Regulation on cross-border payments in the Community..

and establish priorities. The current economic/financial crisis is also likely to have repercussions on the work load which should not be underestimated. Priority will be given infringements for non-communication of transposition measures, non-respect of an ECJ judgment and cases that show a breach of a fundamental freedom or principle of the EC Treaty or a breach of a Directive which is blatant.

The main structural problems (apart from the accession of new MS or political/economic crisis) are given by the complexity of the legislation adopted sometimes in several steps according to the Lamfalussy process. To tackle this problem seminars explaining the legislation have already been organised and regular contact with Member States is maintained via the relevant Committees (mainly the European Insurance and Occupational Pensions one) and their working groups and also by using the package meetings. For the Solvency II proposed Directive a longer transposition period (of around 3 years) is planned (with the so called "level 2" measures under the Lamfalussy process adopted around 1 year before the final implementation date). The same complexity creates problems in transposition which may also be of substance (problems of interpretation, for instance, or of misapplication, either in general or in specific individual cases).

As already mentioned, the first phase of the checking of the implementation of recently to be transposed Directives (2005/14/EC and 2005/68/EC), which is the completeness of the communication of transposition measures, is nearing its completion and the situation can be deemed to be globally satisfactory. In overall terms the same can be said on the implementation of the *acquis* by the Member States.

As for **securities' legislation**, MiFID transposition took place very late in most Member States. Twenty-five Member States had not transposed by the deadline for transposition -31 January 2007-, eleven had not transposed the Directive by the deferred date of application -1<sup>st</sup> November 2007- and thirteen had not transposed the implementing Directive by 13 November 2007.

One Member State (PL) has still not completely implemented MiFID and an infringement case for non communication of the implementing Directive is currently pending in front of the ECJ. The Committee of European Securities Regulators helped to find a practical transitional solution in 2007 to ensure business continuity for firms from Member States that were late in transposing MiFID. However, late transposition could potentially cause problems for PL firms to adapt to the new provisions and to operate in other Member States on the basis of the mechanisms of free provision of services and establishment of branches provided for under MiFID. In any case, firms passporting into PL cannot be refused passports on the grounds that PL has not transposed MiFID. The Commission services are closely monitoring the situation in PL. There is also a possible economic impact of late transposition, mainly related to the postponement of the long term benefits of the Directive, such as competition among various firms from different Member States and investor protection.

CESR is constantly working in the perspective of improving coordination among securities regulators and promoting supervisory convergence in the day-to-day application of MiFID in the Member States.

While the answers received from stakeholders on the call for evidence may indicate that the quality of transposition of MiFID is in general good, the Commission services are further analysing the quality of transposition and of application for MiFID and will address any issues coming up through the proper tools. Areas subject to in-depth analysis relate, among

others, to specific aspects of outsourcing and clearing and settlement. Particular attention has been and continues to be devoted to the observation and analysis of MiFID on securities markets, with the aim of assessing, in the perspective of the forthcoming review, aspects such as availability of data, fragmentation, and regulatory framework applicable to different venues.

Globally satisfactory is the situation concerning other secondary legislation; a call for evidence was launched to help determine possible loopholes in the directive leading in some Member States to problems in the functioning of their compensation mechanisms. On the Prospectus Directive, no big problems were identified in the transposition check. However, some concerns were raised by plaintiffs regarding the way in which certain Member States implement additional requirements outside the PD. The transposition of MAD proved globally satisfactory; however, it is still subject to further evaluation in about one third of Member States. Contacts with Member States have already been made on those issues where the Commission services considered that there was a problem of compatibility with the MAD and its implementing measures.

In terms of the application of **asset management** Community law the priorities set out for 2008 were broadly reached. The infringement procedure concerning non-transposition of the 2007/16/EC Directive was initiated against all Member States who did not transpose the Directive on time. Only 4 reasoned opinions were sent out of 15 letters of formal notice which is rather a positive result reflecting also good bilateral cooperation between the Commission services and concerned Member States. The end of 2008 brought few open questions with regard to the possible scope of interpretation of the UCITS Directive by Member States in the context of the financial crisis, e.g. introduction of side pockets, the liability of depositaries, waivers of certain UCITS obligations. The complexity of these issues necessitates careful and comprehensive analysis also in cooperation with CESR.

The current financial crisis has highlighted the crucial importance of an effective legal framework for **retail financial services**, both in ensuring a sustainable balance in the credit markets, and in restoring mutual confidence between consumers and financial institutions.

In the coming years, citizens and small businesses will have to be reassured that financial institutions and intermediaries are adequately capitalised, properly supervised and will be fair in their treatment of their customers. Equally, the sound and proper functioning of the economy will require lenders to regain confidence in the creditworthiness of their retail clients.

The actions covered by the PSD Transposition Plan have been praised by most of the Member States as being very helpful for ensuring a quick and consistent implementation. At this stage, the majority of Member States (26 of 27) have indicated they expect to transpose the directive on time. Furthermore, all Member States have agreed on the 1<sup>st</sup> November 2009 as a common date for the entry into force of their respective domestic laws implementing the PSD. This common date addresses concerns with regard to asymmetric transposition and should allow the payments industry to have sufficient time to adapt to the new legal rules. With regard to the 25 options contained in the PSD, Member States were generally willing to share the information available on the use of options with the members of the group, in some few cases, Member States have refused to provide any indication about the use of the options until a final bill is submitted before the national parliament

One of the external risks which could delay a successful transposition is the impact of the current financial crisis on the setting-up of priorities at national level and allocation of



resources in accordance with these new priorities. It is not yet clear whether this risk could lead to a delay for submitting draft legislation to the national Parliament in accordance with the announced timetable. Late transposition of the PSD would be particularly problematic since it may jeopardize the timely launch of SEPA products and, in particular, SEPA Direct Debit. Moreover, delayed implementation might create further difficulties for the banking sector in terms of costs related to different rules in force in Member States. Last but not least, while most of the provisions on disclosure requirements and right and obligations of payment service providers and payment service users could be invoked directly by citizens before national courts, it is not the same for the provisions regarding a positive action from Member States (e.g., setting of registers, designation of competent authorities, etc.) so being late in the transposition of those provisions would expose Member States to the risk of actions for compensation of losses related to the Member State's failure to implement the Directive in time.

#### 10.2.2.3. Evaluation results

##### (1) Priorities

The Commission response to the recent financial crisis represents a major priority in the financial services area.

Work has already started, also under the framework of the Commission Communication of 4 March 2009 on "Driving European Recovery", on the review of the Market Abuse Directive, the review of the Prospectus Directive and of the Investor-Compensation Schemes Directive.

Solvency II, which will revolutionise the way the insurance and reinsurance business is conducted in the EU, will also provide for a much more effective and ex-ante response to financial crisis, thus being an important instrument in the context of the current financial crisis.

The Commission services will also continue the examination of national measures enacted or administrative practice executed as an aftermath of the financial crisis and which may have impact on existing legislation.

In the **banking area** some legislative proposals are under preparation. In addition focus is maintained on co-operation with Member States to ensure a coherent implementation of the law, through Committee and working groups discussions, including further work of the CRDTG, Committee guidelines, and, if necessary, transposition workshops.

In **the insurance area** to efficient co-operation with the Member states is added to the need for an efficient management of infringement procedures so as to ensure timely and effective problem solving. As for specific points, apart from piloting the approval/adoption of the solvency II proposed directive as well as the ongoing work on the "level 2" measures as regards the same Solvency II the main priority will be to keep assessing the conformity of the transposition of the Reinsurance Directive (item already mentioned previously).

In the area of **securities**, priority will be given to a thorough, risk-based assessment of the quality of transposition of relevant directives (for MiFID and MAD).

The MiFID report is due in 2010. It will cover a broad range of issues coming from the application of transparency provisions to non-equity markets to, as mentioned in the previous sections, the functioning of MiFID provisions in the dynamic evolution of regulated markets

and multilateral trading facilities. Further work will cover aspects such as the telephone recording option, the application of the gold-plating rule (Article 4 of the Implementing Directive) and other issues. In its work the Commission will involve CESR, ESC and ESME but will also consider stakeholders views coming from various sources.

The Commission services will furthermore intensify enforcement action in 2009 with respect to the Prospectus Directive; notably in those cases where host Member States impose additional requirements.

Priorities in the field of **payment services** will not change substantially in 2009. The Commission services will endeavour to keep their efforts to follow-up the transposition process and support Member States' work with the aim to ensure quick and consistent implementation. As from 1<sup>st</sup> November 2009, if need be, they will closely follow up non-communication cases and start conformity assessment of national transposition measures.

## (2) Planned actions (2009 and beyond)

If the final report on the transposition of the **CRD** shows failures, the Commission will take the necessary actions. Priority will be given to areas in which a coherent implementation is critical to maintain a level-playing field between credit institutions across the EU.

In addition, substantial legislative work is envisaged in 2009 in the banking area as a response to the current financial crisis. This work, which is part of the wider reform of the European financial system outlined in the Commission communication of 4 March 2009<sup>314</sup>, will focus on improving the protection of bank depositors, getting the incentives right in securitisation markets and reinforcing the solidity and supervision of banks.

As for **insurance legislation**, a substantial and detailed checking of the substance of the transposition of Directive 2005/68/EC by the Member States will be carried out by the Commission services.

The package meetings with Member States, as well as the referral of cases to the EU Pilot tool, will be continued. This is of the utmost importance even more so in the framework of the current financial crisis.

Guidance on the transposition of Solvency II will be started in close co-operation with the Member States. Failure to implement the reinsurance Directive prevents the creation of a level playing field and could conceivably affect reinsurance undertakings and the reinsurance market in a negative way, as was already previously stated.

For **securities** the Commission services are also working intensively on reports on the different directives already in place. The revision of the MAD will probably be finalised in 2009. It will focus on simplification and on increasing efficiency of the existing provisions. The MiFID report is due in 2010. Work has already started, also under the framework of the Commission Communication of 4 March 2009 on "Driving European Recovery", on the review of the Market Abuse Directive, the review of the Prospectus Directive and of the Investor-Compensation Schemes Directive.

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<sup>314</sup> [http://ec.europa.eu/commission\\_barroso/president/pdf/press\\_20090304\\_en.pdf](http://ec.europa.eu/commission_barroso/president/pdf/press_20090304_en.pdf)

The Commission services will furthermore intensify enforcement action in 2009 with respect to the Prospectus Directive; notably in those cases where host Member States impose additional requirements. A series of infringements will be launched in 2009 for the Prospectus Directive on issues that have emerged from the quality check.

The EU-wide transposition of the 2007/16/EC Directive will be the priority for 2009 in the **asset management** area. It means that the Commission will continue exerting pressure on those Member States which failed to fully transpose the Directive by the end of 2008 including the referral to the European Court of Justice, if considered necessary.

The recast of the UCITS Directive contains delegations for over 20 level 2 measures. It is expected that most of them if not all will be adopted in 2010. This will have to be translated into very intensive legislative work for the Commission services in 2009 and 2010.

Most of the preventive actions included in the *Transposition Plan of the PSD* have proved effective. Therefore, they will continue to be applied. Information on state of play will also be systematically asked also in written procedure and before the expiration of transposition deadline. Concerning the publicity of Member States' plans for transposition, the graphic in the web-page will be improved so the information is presented by month and not by quarter. If need be, non-communication cases will have to be launched. Bilateral meetings, press releases and political pressure via letters addressed to Member States will be used as well.

To restore confidence of payment services beneficiaries, the Commission will reflect on how to ensure responsible lending and borrowing, including a reliable framework on credit intermediation. A public hearing on responsible lending and borrowing will be organised in July 2009. Follow-up measures will be presented by autumn 2009. It will also envisage a proposal on providing direct funding to facilitate the capacity-building of investor stakeholders to represent their interests in financial services policies at EU level, through training, research and information. Thorough analysis will finally concern foreclosure procedures, to prevent citizens from losing their homes. A report setting out best practices in this area will be published by the end of 2009.

#### 10.2.2.4. Summary by sector

Secondary legislation is in permanent development in the *financial services area*, although the main pillars have been already established following the Financial Services Action Plan launched in 1999.

The new *acquis* requires a continuous and close monitoring of national measures to ensure timely and proper transposition. Further, some directives require the Commission to report on a number of key provisions that will allow to better evaluate their impact and to determine possible problems that need to be addressed. In this area the permanent dialogue within the various sectoral committees – including the committees of the supervisors<sup>315</sup> – contributes to avoid significant deviations in the application of relevant EC law. Convergence in the supervisory practices is also one of the key objectives in this area.

The Commission response to the recent financial crisis represents a major priority in the financial services area. This will trigger substantial legislative and quasi legislative measures. Work has already started, also under the framework of the Commission Communication of 4

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<sup>315</sup> CEBS in the banking sector, CEIOPS in the insurance sector and CESR in the securities sector

March 2009 on "Driving European Recovery", on the review of some directives. At the same time, a close monitoring of measures taken by member States in the context of the crisis is needed in order to avoid that they jeopardise the objectives of Treaty principles and of the existing legislation.

### 10.2.3. Free movement of capital (Articles 56 et seq. EC)

#### 10.2.3.1. Current position

##### 1. General Introduction

The relevant Treaty provisions governing the freedom of capital movements are enshrined in Articles 56 EC to 60 EC. In particular, Article 56 EC provides that 'all restrictions on the movement of capital between Member States shall be prohibited'. A list of transactions that are to be considered as capital movements can be found in Annex I of Directive 88/361/EEC.<sup>316</sup> The legal framework governing this Treaty freedom can be found on the Internet.<sup>317</sup>

##### 2. Report of work done in 2008

Work done in 2008 was fully based on the priorities set in 2007, namely a pro-active approach by way of reinforced and systematic monitoring permitting to concentrate on the most important infringement cases, to diversify the range of restrictions to the free movement of capital which are being dealt with and to address these restrictions at an early stage. Strategic foreign investment control required further attention in 2008. The ECJ delivered two rulings against Spain<sup>318</sup> on the issue of screening investment in the energy sector and confirmed that the system of prior authorisation as established by Spain is incompatible with the EC Treaty. A reasoned opinion has been sent to Greece related to legal restrictions on investment in companies of strategic importance.

The majority of the other infringement cases related to different kinds of special rights that governments maintain in private or privatised companies on the basis of framework laws governing privatisation or other laws applicable to particular companies or sectors. As regards the electricity sector: Portugal has been referred to Court for its special rights in the main electricity company; and several new cases have been opened. Not related to the energy sector, a 228-reasoned opinion has been sent to Germany for not taking all necessary measures to implement the Volkswagen-ruling.<sup>319</sup>

As regards the financial services sector, reasoned opinions were sent to Poland and Slovakia concerning their legislation that restricts foreign investment by pension funds. A first complaint has been registered regarding measures taken by governments as a response to the financial crisis. Two of the registered cases concern restrictions on acquisition of agricultural real estate.

Following amendment or clarification by the MS of the incriminating provisions, closure has been possible for the Italian cases related to the right of direct appointment to the board of privatised companies and to the renewal of motorway concessions, as well as for the Austrian

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<sup>316</sup> OJ No L178, 8.7.1988

<sup>317</sup> [http://ec.europa.eu/internal\\_market/capital/framework/index\\_en.htm](http://ec.europa.eu/internal_market/capital/framework/index_en.htm)

<sup>318</sup> In cases C-274/06 and C-207/07, both *Commission v Spain*.

<sup>319</sup> In case C-112/05, *Commission v Germany*

case related to provisions in foreign exchange law and the requirement that certain credit institutions maintain liquidity reserves with a central body.

In 2008, replies have been prepared for two petitions related to the acquisition of immovable property-permit required for EU citizens prior to buying a secondary residence in Malta and to the prohibition for EU citizens who own holiday houses in Malta to rent their properties out.

#### 10.2.3.2. Evaluation based on the current position

Enforcement of EU rules on the free movement of capital takes on a new dimension in the context of the current crisis. Unilateral reactions and policies resulting in repeated breaches of Internal Market rules and disruptions in the functioning of the Internal Market could have a devastating impact on the EU. In this context, the necessary and continued monitoring activities related to strategic foreign investment control by MS as well as to specific measures in the financial sector have taken a more political dimension. Recent experience with cases, or potential cases related to restrictions on foreign direct investment learn that, in general, they require a more intensive dialogue with the Member State. Moreover, when solutions are found or modifications are proposed, they take often a lot of time to be enacted in national law and close follow up of the communicated agenda is needed. On specific measures taken in the financial sector, a forum for exchange of information and dialogue could facilitate the task.

As part of the enforcement action in the energy sector, the Commission has found that Member States introduce measures in order to protect the security of supply, measures which are often contrary to the free movement of capital. The handling of these cases revealed that some Member States are rather reluctant to make a shift towards solutions which could secure their legitimate interest and that are compatible with the Treaty. Or that such possible shift takes place only after delivery of an ECJ-judgment or additional steps made in the Art. 228 proceedings.

#### 10.2.3.3. Evaluation results

##### 1. Priorities

The pro-active approach by way of reinforced and systematic monitoring will be continued as it permits to concentrate on the more important cases, to diversify the range of restrictions to the free movement of capital which are being dealt with and to address these restrictions at an early stage. Priorities for 2009-2010 are: close follow up of possible restrictions in the financial sector, including those related to crisis measures; follow up of measures taken by Member States on the basis of national security and involving restrictions on foreign direct investment; follow up on enlargement and privatisation processes in EU-12; follow up on the significant restrictions in the energy sector. Finally, activity related to the 3<sup>rd</sup> country dimension of the free movement of capital is expected to increase following a ruling by the ECJ (2009) on three cases related to MS' bilateral investment treaties.

##### 2. Planned action (2009 and beyond)

As regards foreign investment, the Commission will cooperate actively with Member States that have updated or are in the process of updating their legislation to cater for perfectly legitimate objectives as foreseen in EU law.

Further follow up will be done on investment restrictions in sensitive sectors (energy, critical infrastructure, financial services) on the basis of national security issues and on investment restrictions in pension funds which appear not to enter into the scope of secondary legislation.

For the two newest Member States, investment questionnaires were sent and several potential issues will be followed up actively, especially in the energy sector. In the area of investment in agricultural real estate, a study will be carried out to prepare the report to the Council on a possible review of the transition periods for Bulgaria and Romania.

To improve understanding of market trends and developments, a study will be carried out focussing on the impact of the economic crisis on capital flows.

#### 10.2.3.4. Summary by sector

In the area of free movement of capital the priorities will remain enforcement action in the energy sector, as well as close and permanent monitoring activities related to strategic foreign investment control by MS and to the specific measures taken in the financial sector. Increased activity related to MS' bilateral investment treaties is also expected to be required.

#### 10.2.4. *Public procurement*

##### 10.2.4.1. Current position

###### **(1) General introduction**

European public procurement provisions are based on the fundamental principles of the EC-Treaty, particularly the right of establishment and the freedom to provide services stemming from Articles 43 and 49 EC-Treaty. The secondary legislation in this field is twofold:

First, there are two Directives on the coordination of procedures for the award of public works, supply and service contracts, Directives 2004/17/EC and 2004/18/EC adopted in April 2004 replacing the previous Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC. Directive 2004/18/EC concerns most major award procedures carried out by public contracting authorities. Directive 2004/17/EC covers contract awards by entities operating in specific sectors (water, energy, transport, postal services).

Secondly, there are two Directives concerning the legal protection of bidders participating in public procurement procedures, Directives 89/665/EEC and 92/13/EEC. These Directives have been recently modified by Directive 2007/66/EC which has been adopted in December 2007 and is currently in the process of transposition until December 2009.

Recently, the legislative process for the adoption of a new special Directive for Defence and Sensitive Security procurement was carried out following the Commission proposal for such a Directive adopted in December 2007. The adoption and entry into force of this Directive is scheduled for the first half of 2009.

###### **(2) Report on the work done in 2008**

###### **(a) Management of the acquis through committees and expert groups**

Exchange with the Member States on the public procurement legal framework is well established. The Commission regularly convenes two Committees. First, the Advisory Committee on Public Contracts (ACPC), which consists of representatives from the Governments of the Member States, met 3 times in 2008. Specialised working groups of the

ACPC also met in 2008, i.e. 2 meetings of the Working Groups on E-Procurement and 2 meetings of the Economic and Statistical Working Group. Second, the Commission also organises meetings of the Advisory Committee on the opening up of Public Procurement (CCO), a technical expert Committee which consists of public procurement experts and other technical experts. The CCO met once in 2008.

In the context of the described Committees, the following topics were subject of specific discussions:

- Transposition of the new 'Remedies' Directive 2007/66/EC (i.e. national time-schedules, problems met) and actions of the Commission in the transposition context (i.e. preparation of the standard forms, bilateral meetings with Member States, etc).
- Experiences and practices in the Member States intended to make the access by SMEs to public works contracts easier, and, implementation of the European Code of best practices in this area;
- Implementation of Article 45 of Directive 2004/18/EC concerning the exclusion of bidders;
- Public procurement and antitrust legislation.
- National recovery plans to overcome the economic crisis, following the demand of a Member State. The Commission subsequently published a press release recognising that the exceptional nature of the current economic situation can justify the use of the accelerated procedure throughout 2009 and 2010 for all major public projects.

Bilaterally, package meetings are regularly held with Member States to discuss the most pertinent issues of the application of procurement law in the respective Member State. In 2008, 73% could be solved.

#### **(b) Enquiries, problems and complaints management**

Enquiries and complaints in the field of public procurement have been increasingly treated within the new EU-Pilot system since its introduction in April 2008. In the public procurement sector, this new system has already been used in its first year of existence in a very proactive way. So far, as we can measure at present, there is a significantly higher use of EU Pilot in the field of procurement than in other areas. Public procurement EU-Pilot cases accounted for more than 50% of all the EU-Pilot cases in Internal market and services area. Commission-wide, a quarter of all EU-Pilot cases in five Member States (Austria, Germany, Italy, Netherlands and Lithuania) concerned public procurement, for one Member State (Slovenia) even 50% of all Commission EU-Pilot cases occurred in the field of public procurement.

#### **(c) Management of infringements**

In 2008, 333 public procurement infringement files have been handled in 2008 (-3% compared to 2007). Of these, 163 cases (49%) could be closed (+15% compared to the 142 cases in 2007); only 8 (approx. 2.4%) had to be referred to the ECJ (-33% compared to the 12 cases in 2007). Around 190 of those 333 files were infringement cases (-5% compared to the 200 cases in 2007).

#### **(d) Petitions**

In 2008 the sector of public procurement accounted for around 45% of all the Commission's replies to petitions in the field of "Internal Market and Services" as a whole. Again, most of them were about town planning issues in Spain. In particular, some of the questions raised by the petitioners are the subject of infringement proceedings in respect of the legislation of the Valencia region (Spain) that the Commission regards as being in breach of the Community rules on public procurement (45 answers provided; see also C- 306/08 Commission vs Spain).

**(e) New legislation**

Following the presentation of the so-called "defence package", a proposal for a sector specific procurement Directive for defence and security, by the Commission in December 2007, the legislative procedure for this Directive was going on throughout the year 2008. The informal trilogue between the two legislative bodies and the Commission took place end of November and early December 2008 and achieved a compromise which was then approved by COREPER end of December 2008.

**(f) Preventive measures in relation to recently adopted new legislation**

Following the entry into force of Directive 2007/66/EC in December 2007, considerable time was dedicated to the transposition of this Directive in 2008. The Commission devised a transposition plan and held transposition workshops with individual Member States. Issues related to this transposition have been discussed at the ACPC throughout the year 2008. Despite the fact that the transposition period only started in 2008 and will run until the end of 2009, it was possible to address several important issues stemming from this new Directive, in particular: the introduction of a mandatory standstill period between the award decision and the conclusion of a public contract; the combating of illegal direct awards of public contracts; the ineffectiveness sanction and the imposition of alternative penalties.

10.2.4.2. Evaluation based on the current position

In 2008, the caseload of public procurement infringement cases could be reduced for two reasons. First, due to an effective system of prioritisation of cases and of speeding up the infringement procedures particularly for priority cases, such cases have been treated faster than in the past and thus have been solved quicker than in previous years. Secondly, due to the shift of new cases to the EU-Pilot rather than registering them as infringement cases, the number of registered cases has also been reduced.

As already announced in the last report, the new EU-Pilot has been used in cases where clarification was needed or where it was considered possible to close the case before launching an infringement procedure. So far as we can measure at present, there is a significantly higher use of EU Pilot in the field of procurement than in other areas.

Political agreement on the text of the Directive for Defence and Sensitive Security procurement was achieved in December 2008. This will allow the smooth adoption and entry into force of the Directive and the start of its transposition in the first half of 2009.

Useful assistance and guidance has been offered to Member States in the context of the transposition of the new remedies directive for which the first half of its transposition phase occurred in 2008.



#### 10.2.4.3. Evaluation results

##### 1. Priorities

- The transition of an increasing part of the caseload to the EU-Pilot will remain a priority in 2009. In this context it will be necessary to ensure cooperation of the Member States and to improve the technical and administrative support side of the EU-Pilot. The services are ready to share their experience with the EU-Pilot in order to contribute to such vital improvement of this new system.
- Ensuring smooth transposition of Directive 2007/66/EC in all Member States until transposition deadline (December 2009).
- Ensuring adoption of Defence Directive in early 2009. Draw up transposition plan and start assisting Member States with the transposition of that Directive.
- Assistance to Member States seeking to overcome the economic crisis in their economies by measures simplifying their public procurement legal systems. Such assistance will depend on the length of this crisis but is likely to continue throughout 2009.

##### 2. Planned actions (2009 and beyond)

- Further prioritisation of cases and continued reference of a considerable share of complaints to the EU-Pilot. This action depends on the level of cooperation of Member States and on the technical and administrative improvements of the EU-Pilot following its revision throughout the year 2009. Thus, no specific estimations can currently be made.
- Continued execution of the transposition plan for the remedies directive: bilateral meetings with Member States, discussion at the level of ACPC, informal contacts with relevant business associations, national judges and members of independent review bodies, assessment reports, etc.
- Establishing and start of execution of a transposition plan for the defence directive: identify liaison contacts, provide Member States with a "concordance table" template, send questionnaires to Member States about their planning and time frame for transposition, start organising bilateral meetings and make use of ACPC meetings to discuss transposition matters, etc.

#### 10.2.4.4. Summary by sector

The two main areas of operation in the field of control of application of public procurement law are the adaptation of enforcement and the transposition of new Directives. In the field of enforcement, the shift of part of the caseload to the EU-Pilot will continue in 2009 but largely depends on the central Commission support measures and the Member State commitment. Transposition activities as regards the remedies Directive should be finished by the end of 2009 whereas the transposition activities related to the Directive for Defence and Sensitive Security procurement will continue until early 2011.

#### 10.2.4.5. List of acts

[http://ec.europa.eu/internal\\_market/publicprocurement/legislation\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm)

### 10.2.5. Regulated professions (qualifications)

#### 10.2.5.1. Current position

##### (1) General introduction

This sector deals with Member States' requirements for professional qualifications which lead to barriers to the free movement of qualified professionals in the Single market. To alleviate these barriers, Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications<sup>320</sup> implements Articles 39, 43 and 49 of the EC Treaty for all regulated professions. Beneficiaries are all EU citizens holding a professional qualification. For lawyers, additional specific rules have been laid down at EU level (Directive 77/249/EC on the free provision of services of lawyers<sup>321</sup> and Directive 98/5/EC on the freedom of establishment of lawyers<sup>322</sup>).

##### (2) Report of work done in 2008

The work carried out in 2008 concentrated on the transposition, implementation and accompanying measures to Directive 2005/36/EC with a view to enabling citizens to make use of the new rights offered by the legislation (in particular the free provision of services and the mutual recognition under the so-called general system for cases which were previously only covered by the Treaty). The Commission also dealt with all kind of difficulties reported by citizens when applying for recognition, such as undue delays for decision taking, compensatory measures required by the host Member State, negative decisions and requests for supplementary documentation, using all available means and in particular the network of national coordinators for Directive 2005/36/EC, the EU PILOT and SOLVIT according to the nature of the problem, to find appropriate and EU law compliant solutions.

##### *(a) Management of the acquis through committees and expert groups*

The Commission held 7 meetings of its expert group composed of the national coordinators for the application of Directive 2005/36/EC. Its main tasks have been on the one hand to develop and to agree on best administrative practices that national competent authorities would then apply when processing applications. The other main task has been to examine the compliance with Directive 2005/36/EC of new diplomas in architecture notified by Member States with a view to their insertion in the annex to the Directive, granting the right to automatic recognition to the holders of these diplomas. In total, 28 diplomas were examined. This work has allowed the achievement of a good level of mutual trust between Member States avoiding subsequent problems of bad application.

In addition the regulatory committee of Directive 2005/36/EC met 3 times and voted on a Commission regulation amending Annex II to the Directive which was adopted by the Commission on 31 July 2008. This is the second time an amendment to the Directive is introduced by a regulation avoiding transposition delays. These meetings also allowed for peer pressure to accelerate the transposition of Directive 2005/36/EC for which a large number of MS were late.

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<sup>320</sup> OJ L 255, 30.9.2005, p. 22

<sup>321</sup> OJ L 78, 26.3.1977, p. 17

<sup>322</sup> OJ L 77, 14.3.1998, p. 36

In both instances questions of interpretation and application were discussed and explanatory papers circulated by the Commission also available on the Commission's website in the form of frequently asked questions. This has been in particular the case for the new rights offered by directive 2005/36/EC (see supra).

*(b) Enquiries, problems and complaints management:*

Due to the large number of beneficiaries (all EU citizens holding a professional qualification and who wish to work in another MS even temporarily), a large number of enquiries is received which do not necessarily reveal a problem of application of EU law. In those cases the Commission refers citizens who wish to enquire about the situation in MS to the national contact points under Directive 2005/36/EC whose task it is to give all information about regulated professions in their territory but also about procedural steps to be taken. In addition the Commission has set up a network of national contact points to improve the flow of information to the benefit of citizens.

When enquiries reveal a potential problem of application of EU law the Commission mostly refer citizens to the SOLVIT network and/or insert their cases into the system with the citizen's agreement. As a result the number of cases in SOLVIT has increased by 43% to reach a total of 206 cases. Out of these 206 cases, 173 were solved (84%) (see SOLVIT 2008 report). A large number of SOLVIT cases are found in Spain, but fortunately the Spanish SOLVIT Center managed to solve 85% of them. It remains that there is a particular problem with implementing EU law in this sector in particular undue delays for processing applications. 64 new complaints were registered in 2008 which represents a decrease compared to previous year (74 new cases in 2007). This is mainly to be attributed to the increased use of SOLVIT.

In addition the new rights conferred on citizens by directive 2005/36/EC raised difficulties either because the directive was still not transposed (cases in Spain and Greece when migrants wish to provide services temporarily and are being denied any right due to the lack of transposition measure), or because the transposition measures went beyond what was provided for in the Directive (cases in Italy).

*(c) Management of infringements*

The volume of complaints and infringements concerning restrictions in breach of Articles 39, 43 and 49 of the EC Treaty and the directives on the mutual recognition of professional qualifications which were dealt with, remained broadly stable in 2008. Approximately 100 decisions (to proceed or to close a case) were taken.

Concerning the infringement proceedings opened against Member States *for non-communication of national implementing measures*, the situation is the following:

- For Directive 2006/100/EC providing for technical adaptations to the Directives on professional qualifications further to the *accession of Bulgaria and Romania to the European Union*<sup>323</sup>, the Commission decided to refer 9 Member States (Belgium, Cyprus, Greece, Spain, France, Ireland, Luxembourg, Portugal and the United Kingdom) to the Court of Justice. The Court of Justice already held that

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<sup>323</sup> OJ L 363, 20.12.2006, p. 141

Belgium<sup>324</sup> and Luxembourg<sup>325</sup> had failed to fulfil their obligations under this directive. The proceedings opened against 13 Member States (the Czech Republic, Germany, Denmark, Estonia, Hungary, Italy, Latvia, Malta, Austria, Poland, Romania, Slovakia and Sweden) have been closed.

- For Directive 2005/36/EC on the *recognition of professional qualifications*<sup>326</sup>, the Commission decided to refer 17 Member States (Belgium, Cyprus, Germany, Greece, Estonia, Spain, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Austria, Poland, Portugal, Sweden and the United Kingdom) to the Court and to send a reasoned opinion to Denmark. The proceedings opened against 8 Member States (Bulgaria, the Czech Republic, Malta, Romania, Italy, Slovakia, Slovenia and Finland) could be closed as they completed transposition. .

The Commission decided to send to Germany a letter of formal notice under Article 228 of the EC Treaty, concerning the measures envisaged to comply with the Court of Justice's judgment<sup>327</sup> in case C-456/05 regarding *transitional provisions allowing psychotherapists* who fulfilled certain conditions to obtain authorisation to practise under the German statutory sickness insurance schemes.

The Commission decided to send to Spain a letter of formal notice under Article 228 of the EC Treaty, requesting information on the measures taken to comply with the Court of Justice's judgment<sup>328</sup> in case C-39/07 regarding recognition of professional qualifications of *hospital pharmacists*<sup>329</sup>.

The infringements cases opened against Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia because of the *nationality condition for notaries* did not progress in 2008. This is due to the fact that almost all the Member States concerned decided to support the Member States already referred to the Court of Justice (Germany, Austria, Belgium, France, Greece and Luxembourg). In these circumstances, it was considered necessary to examine and take into account all new arguments which might be brought forward by these Member States before moving to the next step in the concerned infringement proceedings. Estonia has abolished the condition of nationality and the Netherlands are still in the process of abolishing it. The Commission also decided to send Portugal a letter of formal notice on the same issue, because even though Portugal formally abolished the nationality condition previously in force for notaries, this condition thereafter appeared to still be applied.

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<sup>324</sup> Judgment of 11.12.2008, Case C-239/08 *Commission v. Belgium*

<sup>325</sup> Judgment of 4.12.2008, Case C-224/08 *Commission v. Luxembourg*

<sup>326</sup> OJ L 255, 30.9.2005, p. 22

<sup>327</sup> Judgment of 6.12.2007, Case C-456/05 *Commission v. Germany*; The Court confirmed the Commission's position by *holding* that the transitional provisions in question are not compatible with EU law, inasmuch as they take no account of immigrant psychotherapists' similar professional experience with the social security systems of other Member States.

<sup>328</sup> Judgment of 8 May 2008, Case C-39/07 *Commission v. Spain*

<sup>329</sup> The Court confirmed that, even though the basic diploma of pharmacist benefits from automatic recognition under Directive 85/433/EEC on the mutual recognition of diplomas in pharmacy, OJ L 253, 24.9.1985, p. 37, the recognition of a pharmacist's specialist title falls under the general system of recognition of diplomas laid down by Directive 89/48/EEC<sup>329</sup>, which then needs to be transposed for the speciality concerned. It has to be noted that, in the meantime, this Directive has been replaced by Directive 2005/36/EC, which entered into force on 20 October 2007 and which confirms and takes over the legal framework appropriate to this issue under Directive 89/48/EEC)

Finally, the Commission decided to refer France to the Court of Justice for its breach of Articles 39, 43 and 49 of the EC Treaty and Directive 92/51/EEC on the general system for the recognition of diplomas by refusing to allow *snowboard instructors* from other Member States to pursue their specific professional activities in France on the grounds that these activities can only be practised by other professionals in France (i.e. ski instructors)<sup>330</sup>.

*(d) Petitions*

In 2008, 24 petitions have been dealt with. These petitions did not reveal any new horizontal issue; they reflected the issues raised in enquiries and complaints which the Commission receives. Most cases concern complex individual situations for which the petitioners cannot benefit from the recognition.

*(e) Preventive measures being taken in relation to recently adopted new legislation-conformity assessment of national transposition, transposition package meetings, development of guidelines, initiation of networking systems to manage the new legislation, etc*

In order to monitor the appropriate and smooth application of this Directive, the work on the Code of Good Conduct which specifies the good national administrative practices competent authorities should follow when processing applications, was started and progressed well with the Group of Coordinators of Directive 2005/36/EC.

In addition, the database on regulated professions<sup>331</sup> which provides useful information on each regulated profession (contact points, competent authorities, statistics, etc.) was totally reviewed and reorganized in order to take into account Directive 2005/36/EC and to better guide competent authorities as well as citizens seeking information.

To ensure legal certainty for professions benefiting from automatic recognition, whose corresponding national titles are listed in Annex V to Directive 2005/36/EC, the Commission published twice<sup>332</sup> the new titles and changes to existing titles notified by Member States on the basis of Article 21 (7) of Directive 2005/36/EC. These publications facilitate free movement as they give the right to the holders of the qualifications concerned to benefit from automatic recognition.

#### 10.2.5.2. Evaluation based on the current position

Contrary to the legal obligations which Member States had to transpose by 20.10.2007, Directive 2005/36/EC had not been transposed by a majority of Member States (only 9 Member States had completed transposition on 31.12.2008). For Directive 2006/100/EC, by end 2008 it was implemented by the majority of Member States (all except 9). However, due to the fact that Directive 2005/36/EC replaced 15 directives while maintaining their basic mechanisms of recognition, the non-transposition in due time by all Member States did not

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<sup>330</sup> On the basis of the judgment of the Court of Justice in case C-330/03 Judgment of 19 January 2006, *Colegio de Ingenieros de Caminos, Canales y Puertos v. Administración del Estado* and taking into account the fact that the differences between the fields of activity are so great that in reality the compensatory measures required from the migrant amount to a full programme of education and training, the Commission considers that France has to allow partial taking-up of the professions concerned.

<sup>331</sup> [http://ec.europa.eu/internal\\_market/qualifications/regprof/index](http://ec.europa.eu/internal_market/qualifications/regprof/index)

<sup>332</sup> Communication of 4 June 2008, OJ C 137 of 4.6.2008, p. 8 and Communication of 17 December 2008, OJ C 322 of 17.12.2008, p.3

have a major negative impact on free movement and free establishment. In the large majority of cases, recognition of qualifications still took place on the basis of the national implementing measures adopted on the basis of the now repealed directives.

The non-implementation of Directive 2005/36/EC has however revealed problems for citizens concerning precisely its new aspects, i.e. the free provision of services for professions which do not benefit from automatic recognition (such as engineers) and the subsidiary application of the general system of recognition of diplomas (mainly health professions such as nurses responsible for general care). The situation tends to improve as soon as transposition measures come into force.

Due to the non-communication proceedings, the analysis of the national measures transposing Directive 2005/36/EC in order to assess their conformity with Community law has not been started yet. As stressed in the previous report, the main challenge related to this directive is represented by the enormous number of national measures needed to transpose it (hundreds of texts). By the end of 2008, around 700 measures had already been notified.

The absence of concordance tables for many Member States, despite repeated requests, will make the examination even more difficult.

Issues raised by citizens differ according to the regime of recognition their professions enjoy. When the profession is under the automatic recognition regime (for 7 professions out of which 5 health professions) the difficulties encountered mostly relate to the situation of applicants from new member States (in particular RO and BG) who were trained before Accession and do not necessarily enjoy so called acquired rights to automatic recognition or cannot demonstrate that they meet the necessary number of years of professional experience. Host MS (mostly UK, DE, IE, FR) do not always apply the mutual recognition scheme when automatic recognition cannot be granted.

For professions under the mutual recognition regime (so called "general system") such as engineers, teachers, physiotherapists, accountants, sport instructors... the main difficulties relate to the compensatory measures required by the host MS. As it is particularly difficult for the Commission to judge whether there are effectively substantial differences between the migrants qualifications and the host MS requirements these cases are best dealt with, when home and host MS can discuss the issue through the SOLVIT network. Engineers have particular difficulties to be recognised in Greece, Cyprus and Spain, tourist guides in Italy and Spain, sport instructors in France.

A key role for a smooth implementation is the IMI System; it allows competent authorities from the host and home MS to exchange information linked with an application for recognition where doubts are raised in relation to the professional. The pilot phase of the system for four professions (doctors, pharmacists, physiotherapists, and accountants) revealed to be a success and hence it was extended by the end of 2008 to seven other professions including the main health professions. In 2008, the system allowed 375 exchanges of information.

#### 10.2.5.3. Evaluation results

##### (1) Priorities

As long as not all MS have achieved transposition there still will be the need to put pressure on them to complete their work. For some Member States, due to their structure, around 100

texts need to be adopted. However, in parallel, the priority is shifted to the conformity check based on a risk based approach identifying key issues to be checked, as well as on individual cases lodged by plaintiffs.

For the time being, the following are being identified as key issues: the new regime for providing services for professions falling under the general system of recognition because there was no specific regime for the provision services for all the professions falling under the previous Directives 89/48/EEC and 92/51/EEC on the general system; the subsidiary application of the general regime, which did not exist either (recognition then fell under the Treaty) as well as principle questions under the Treaty such as partial access to a given profession.

## (2) Planned action (2009 and beyond)

Directive 2005/36/EC is expected to be transposed by a majority of Member States by mid 2009.

The main priority in this area remains, after the closure of all non-communication infringement proceedings, the *analysis of the national measures* transposing Directive 2005/36/EC in order to assess their conformity with Community law. A complete translation of the notified texts is the first step, which may take some time in view of the enormous number of national measures needed to transpose (see above). A first evaluation of the transposition should be available by end 2009.

The following issues will be targeted for priority action in 2009-2010: the *new regime for providing services* and the subsidiary application of the general regime as well as principle questions under the Treaty such as partial access, and significant issues such as a same profession affected in several Member States such as tourist guides, or several professions in one Member State (in Spain and Greece in particular).

After the adoption of the *Code of Conduct* (early 2009), a "user's guide" will be established in order to allow a better understanding by the citizens of their rights under Directive 2005/36/EC. The IMI system will be extended to all regulated professions.

In addition the emphasis will be put on making the regime on provision of services working, in particular with regard to the documentation which may be requested. The group of coordinators for Directive 2005/36/EC will be the forum for such an agreement. This will be of particular help to professions such as tourists' guides who do encounter difficulties to provide services due to the fact that the documents they currently provide are not accepted in certain Member States.

Work will also be continued in order to overcome difficulties encountered by a significant number of nurses from Bulgaria and Romania in particular, who should be recognised under the general system as they do not fulfil the conditions to enjoy automatic recognition (see above, "subsidiary application of the general system"). However these nurses cannot undergo the compensatory measures (i.e. adaptation period) which are being required, as no posts is offered in the host Member State, who should organize for it. This seems to be the case in Spain and the United Kingdom.

#### 10.2.5.4. Summary by sector

The transposition of Directive 2005/36/EC has progressed, in particular further to several infringement proceedings for non-communication. This allows for starting the control of conformity. Implementation was enhanced by the cooperation with Member States in the coordinators group and by the IMI system of electronic cooperation between Member States.

#### 10.2.6. *The business environment*

##### 10.2.6.1. Current position

###### (1) General introduction

The rules governing the four freedoms of movement – for goods, services, people and capital – are not, by themselves, sufficient to create a favourable climate for business to grow across borders. Firms need to be confident that they can compete on a level playing field and that appropriate legal structures exist to allow all businesses, whatever their size, to operate effectively across the EU.

Harmonisation of the rules relating to **company law and corporate governance**, as well as to **accounting** and **auditing**, is a key element of this policy. This harmonisation aims at reducing red tape by helping companies to operate throughout the EU on the basis of a single set of rules and a unified management and reporting system. This system, in its turn, aims to increase transparency and confidence in corporate governance, enhancing the protection of investors, employees and the public against corporate cheating, fraud and mismanagement.

###### (2) Report of work done in 2008

In the field of ***company law and anti-money laundering*** the transposition deadline has passed in case of seven Directives in 2007-2008: Directives 2004/109/EC, 2005/56/EC, 2005/60/EC, 2006/70/EC, 2007/14/EC, 2006/68/EC and 2007/63/EC.

In the absence of national transposition measures more than 110<sup>333</sup> infringement procedures were handled in 2008, but monitoring the transposition measures requires particular efforts as well. A high volume of national transposition measures will have to be checked in 2009 and 2010, which will have significant implications in terms of resources as many times complex legal instruments (for example Commercial Codes) are communicated as national transposition measures. The absence of concordance tables is another issue as regards conformity checks as they are essential to facilitate the check of completeness, but Member States are often reluctant to communicate concordance tables.

In order to overcome difficulties related to the high number of non-communication cases, conformity checks and the need for translation of thousands of pages of national transposition measures an Action Plan has been established in 2008. A wide range of preventive measures has been put in place: The Commission kept up pressure on Member States through experts' meetings<sup>334</sup> by asking details on transposition from Member States not having transposed directives, bilateral discussion in the margins of these meetings, strengthening cooperation

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<sup>333</sup> in the field of company law and anti-money laundering only 0.7% of the cases were non-conformity cases

<sup>334</sup> (Company Law Expert Group and Committee on the Prevention of Money Laundering and Terrorist Financing)



with national authorities and efficient management of infringement cases. Scoreboards on state of play of transposition are published every month since January 2008. Package meetings were used to raise the issue of transposition, and, when necessary, political pressure was increased by sending letters to Member States urging transposition. Without prejudice to the assessments driven by specific complaints, at a first stage, the conformity checks are done on the basis of a risk-based approach. The risk is assessed taking into account both the nature of the directives, and, within each directive, of the provisions concerned. Also in the context of *anti-money laundering*, the implementation of Regulation 1781/2006 leaves to Member States the introduction of an appropriate regime of sanctions. In the absence of notified measures, 15 infringements procedures were opened at the beginning of 2008 out of which 13 have already been closed.

As regards external enquiries in the filed of company law and anti-money laundering there was a relatively low number of petitions, questions, complaints, the majority of which fell outside of the scope of Community law or did not constitute an infringement.

The transposition deadline in case of directive 2007/36/EC will expire on 3 August 2009. The Commission has already organised a transposition workshop and is ready to provide further assistance in case it is necessary in relation to Directive 2007/36/EC. Member States are always reminded to the importance of timely transposition at the relevant committee meetings and systematically asked to provide information on state of play.

The proposal for the Statute of European Private Company was adopted on 25 June 2008<sup>335</sup>, and Simplification of existing Company Law Directives (Third –Sixth, First-Eleventh) will be continued in 2009.

In the field of **auditing**, the Commission worked on preparing a correct and timely implementation of the Directive 2006/43/EC<sup>336</sup> on statutory audits of annual accounts and consolidated accounts, whose transposition deadline was 29 June 2008. Potential problems have been discussed at the meetings of the Audit Regulatory Committee and, on an individual basis, during bilateral meetings organized with Member States. Nineteen bilateral meetings were held with Member States in order to discuss specific individual issues faced by the Member States and to provide them with the information needed to avoid bad transposition of the Directive 2006/43/EC. Moreover, one transposition workshop was organized in 2008 to assist Member States. A transposition scoreboard was drafted and has been updated regularly and published on the Commission's website since 1 July 2008.

Reasoned opinions were sent to Austria, Belgium, Cyprus, Czech Republic, Germany, Estonia, France, Ireland, Italy, Latvia, Luxemburg, Malta, Poland, Spain, Sweden and the United Kingdom (regarding the territory of Gibraltar) for non-communication of their national transposition measures. Since then, it was proposed to close the infringement cases against Belgium and France which have communicated their national transposition measures.

To facilitate the establishment of auditor public oversight bodies in Member States, as required by the Statutory Audit Directive and to help the existing ones become operational,

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<sup>335</sup> Currently discussed in the Council and the Parliament. Simplification of existing Company Law Directives (Third –Sixth, First-Eleventh)

<sup>336</sup> OJ L 157, 9.6.2006, p.87.

the expert group "European Group of Auditors' Oversight Bodies" (EGAOB) continued its work on exchanging good practice concerning the establishment of those systems<sup>337</sup>.

In the area of statutory audit, several legislative instruments were adopted in 2008 to allow a good implementation of the provisions of the Directive 2006/43/EC.

The comitology powers of the Commission under Directive 2006/43/EC have changed following the adoption by the European Parliament and the Council of Directive 2008/30/EC of 11 March 2008 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, as regards the implementing powers conferred on the Commission<sup>338</sup>. New powers might be used by the Commission in 2009/2010 to adopt international auditing standards and common standards for audit reports for annual or consolidated accounts. The regulatory procedure with scrutiny will apply to the cases in which the Commission will make use of these powers.

The Commission adopted the Decision 2008/627/EC concerning a transitional period for audit activities of certain third country auditors and audit firms<sup>339</sup> on 29 July 2008. On 6 May 2008, the Commission adopted the Recommendation 2008/362/EC on external quality assurance for statutory auditors and audit firms auditing public interest entities<sup>340</sup>. The Member States were invited to implement the provisions of the Recommendation and to inform the Commission about the measures taken on its basis by 6 May 2009. On 5 June 2008, the Commission adopted the Recommendation 2008/473/EC concerning the limitation of the civil liability of statutory auditors and audit firms<sup>341</sup> pursuant to Article 31 of Directive 2006/43/EC.

In the field of **accounting**, the transposition deadline of Directive 2006/46/EC amending in particular some provisions of the 4<sup>th</sup> and the 7<sup>th</sup> Company Law Directives expired on 5 September 2008. The Commission services controlled the application of the relevant Community law by the means of infringement procedures and discussions in meetings with the Member States.

The majority of infringement cases stems from the non-communication of national transposing measures. In December 2008, the Commission sent Letters of Formal Notice to 15 Member States on the basis of not having communicated the transposition of Directive 2006/46/EC. The Commission services keep the pressure on Member States for encouraging the swift transposition mainly via the Accounting Regulatory Committee. As a result, by March 2009, 3 cases could be closed. Thus, it is expected that the transposition deficit will be considerably reduced by the end of 2009.

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<sup>337</sup> Four meetings were organized in 2008. A sub-group held five meetings in 2008 at which it discussed issues related to the transposition of Articles 45, 46 and 47 of the Directive 2006/43/EC in Member States

<sup>338</sup> OJ L 81, 20.3.2008, p.53.

<sup>339</sup> OJ L 202, 31.7.2009, p. 70. The transitory period allows to certain third country auditors and audit firms to continue their audit activities in the EU without being registered, provided that certain conditions are met. To implement the provisions of Article 46 (2) of the Directive 2006/43/EC which requires the Commission to assess the equivalence of third country auditor oversight, quality assurance and investigation and penalties systems in cooperation with Member States and make a determination on it.

<sup>340</sup> OJ L 120, 7.5.2008, p. 20.

<sup>341</sup> OJ L 162, 21.6.2008, p. 39. The goal of this Recommendation is to ensure a good functioning of a competitive market for audit services in which there is a sufficient choice of audit firms capable of conducting and willing to conduct statutory audits of companies the securities of which are admitted to trading on a regulated market of a Member State. The implementation is foreseen in 2010.

In April 2008 the Commission adopted a fast-track proposal to amend the 4<sup>th</sup> and 7<sup>th</sup> Company Law Directives in order to simplify financial reporting for small and medium-sized companies; in February 2009 the Commission adopted another simplification proposal to amend the 4<sup>th</sup> Company Law Directive establishing a Member State option to relieve so-called micro entities from the obligation to prepare annual accounts. Currently, the Commission services are working on a larger simplification and modernisation proposal to amend the 4<sup>th</sup> and 7<sup>th</sup> Company Law Directives.

#### 10.2.6.2. Evaluation based on the current position

In the field of **company law and anti-money laundering** the deadlines for transposition of Directives 2004/109/EC, 2005/56/EC, 2005/60/EC, 2006/70/EC, 2007/14/EC, 2006/68/EC and 2007/63/EC have recently passed. The deadline for the transposition of Directives 2007/36/EC will expire on 3 August 2009.

Although transposition was late in several member states and for many of these directives, the complementary initiatives covered by the Action Plan had very positive results: by February 2009, 82 cases (75%) were closed due to notifications of complete transposition from Member States and 25 cases (22%) were referred to the Court. The situation has clearly improved but given the importance of the different directives in the fields of company law and anti-money laundering, pressure should be kept up on Member States until full transposition is ensured.

There seems to be a more systematic problem in some Member States who are consistently late with implementation. It is not clear whether this is due primarily to difficulties with Parliamentary procedures or that draft legislation is not submitted in a timely manner. This needs to be explored further with those Member States who have the greatest problems. Better involvement of national Parliaments during the negotiations of directives may possibly accelerate the process of transposition.

The highest transposition deficit can be identified in case of anti-money laundering directives (7 Member States are late) and the directive on cross-border mergers (6 Member States are late). It should, however, be noted that thanks to the efforts of the Commission the transposition deficit has been reduced by more than 50% in case of anti-money laundering and by more than 40% as regards the cross-border mergers directive in 2008.

Late transposition of **anti-money laundering** directives is particularly problematic since it may jeopardize fight against money laundering and terrorist financing as well as stability and reputation of the financial sector and the single market. Moreover, delayed implementation might create difficulties for the banking sector in terms of costs related to different rules in force in Member States.

In the field of **company law** the cross-border mergers directive aims at facilitating mergers of limited-liability companies on a cross-border basis, without winding up of the acquired company. However, late transposition might have direct effect on companies of Member States which transposed the directive on time, but wish to merge with companies of a Member State in delay. In the absence of national rules providing for compliance with the directive, cross-border mergers might have significant cost implications and administrative burden for companies concerned. Delay in transposition in relation to transparency directives could jeopardize investor protection, weaken investor confidence and create barriers to cross-border investment. Similarly, inconsistency between national legislation as regards transposition of

simplification directives could result in additional costs for companies operating in Member States not having reduced administrative burdens. Moreover, in the context of the financial crisis full transposition of the second company law directive is crucial in term of facilitating the raising of capital, the restructuring of capital ownership in public limited liability companies, but it also provides for harmonised safeguards for protection of creditors and minority shareholders.

There have been serious concerns in 2008 for 6 Member States in particular. Spain<sup>342</sup> has been late with the transposition of 5 directives the transposition deadline of which has already expired, but also Belgium<sup>343</sup> was due to transpose 4, France<sup>344</sup>, Luxembourg<sup>345</sup>, Portugal<sup>346</sup> and Sweden<sup>347</sup> 3 directives each in 2008. The situation can be potentially problematic in case of the Czech Republic<sup>348</sup>, Greece<sup>349</sup>, Ireland<sup>350</sup> and Italy<sup>351</sup> which Member States have been each late with the transposition of 2 directives. Cyprus<sup>352</sup>, Hungary<sup>353</sup> and Poland<sup>354</sup> have not transposed 1 directive. By April 2009, Spain has notified national transposition measures implementing 3 Directives and the Czech Republic and Portugal also have transposed a Directive.

Concerning **auditing**, the obligation for Member States to establish independent competent authorities to ensure a public oversight, external quality assurance, investigations and penalties of statutory auditors and audit firms raised a high number of issues in many Member States and slowed down the transposition process.

In the field of accounting, the Commission Services were able to close the majority of the non-communication cases regarding the Directive 2006/46/EC, but still have to pursue some cases, including the non-transposition of the measures in the UK - territory of Gibraltar.

Furthermore, the fast-track proposal to amend the 4<sup>th</sup> and 7<sup>th</sup> Company Law Directives in order to simplify financial reporting for small and medium-sized companies adopted by the Commission in April 2008 was successfully adopted by the EP and the Council in 2009 and published in the Official Journal (Directive 2009/49/EC). The Member States shall transpose the provisions of this directive before 1 January 2011.

In the **auditing** sector, the work carried out by the Commission to prepare a timely and correct transposition of the Directive gave results, as more than half of the Member States

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<sup>342</sup> Cross-border merger, anti-money laundering and simplification directives (Directives 2005/56/EC, 2005/60/EC, 2006/70/EC, 2006/68/EC and 2007/63/EC)

<sup>343</sup> Cross-border merger, anti-money laundering and simplification directive (Directives 2005/56/EC, 2005/60/EC, 2006/70/EC and 2007/63/EC)

<sup>344</sup> Transparency directive and anti-money laundering (Directives 2007/14/EC, 2005/60/EC and 2006/70/EC)

<sup>345</sup> Cross-border merger and simplification directives (Directives 2005/56/EC, 2006/68/EC and 2007/63/EC)

<sup>346</sup> Cross-border merger and simplification directives (Directives 2005/56/EC, 2006/68/EC and 2007/63/EC)

<sup>347</sup> Cross-border merger and anti-money laundering (Directives 2005/56/EC, 2005/60/EC and 2006/70/EC)

<sup>348</sup> Transparency directives (Directives 2004/109/EC and 2007/14/EC)

<sup>349</sup> Cross-border merger and simplification directives (Directives 2005/56/EC and 2007/63/EC)

<sup>350</sup> Anti-money laundering Directives 2005/60/EC and 2006/70/EC

<sup>351</sup> Transparency and simplification directive (Directives 2007/14/EC and 2007/63/EC)

<sup>352</sup> Simplification Directive 2007/63/EC

<sup>353</sup> Simplification Directive 2007/63/EC

<sup>354</sup> Anti-money laundering Directive 2005/60/EC

which did not transpose the Directive in 2008 committed to do so in 2009. It is therefore expected that more Member States will have established public oversight bodies and that the public oversight bodies that were already established will become operational in 2009.

#### 10.2.6.3. Evaluation results

##### (1) Priorities

Priorities in the field of **company law and money laundering** will not change substantially in 2009. The commission will endeavour to reduce further transposition deficit, follow up closely non-communication cases and complete conformity assessment of national transposition measures.

Timely transposition and efficient cooperation with member States in the transposition process as well as in the implementation and application phase are also the key objectives in auditing and accounting areas. Another priority for the audit sector is to ensure that auditor public oversight bodies pursuant to the Directive 2006/43/EC are set up and are operational in the Member States.

##### (2) Planned actions

In the field of **company law and anti-money laundering** risk based conformity checks will be continued and first phase conformity assessment will most probably be outsourced under a framework contract in order to overcome problems of resources related to conformity checks.

As complementary instruments included in the Action Plan resulted to be effective in reducing transposition deficit in the fields of company law and anti-money laundering they will continue to be applied. Concerning non-communication cases Member States will be requested to provide detailed information on state of play of transposition at relevant committee meetings. A scoreboard in the field of company law and anti-money laundering will be published in each month and in case of the need package meetings, press releases and political pressure via letters addressed to Member States will be used as well.

Non communication and eventual partial communication cases will be followed up closely and in the absence of national transposition measures will be referred to the Court as soon as possible. The Commission has already organised a transposition workshop and is ready to provide further assistance in case it is necessary in relation to Directive 2007/36/EC.

In **auditing** area the Commission will examine measures transposing directive 2006/43/EC. Where necessary, package and bilateral meetings will continue with the Member States concerned to discuss the transposition process and the quality of the transposition. Also, it will be examined whether Member States had set up auditor public oversight bodies according to the Directive and that these bodies are operational. The transposition scoreboard will continue to be updated regularly and to be published on the Commission website.

The expert group "European Group of Auditors' Oversight Bodies" (EGAOB) and the existing subgroups will also continue their work on facilitating co-operation between public oversight bodies established by the Member States pursuant to Directive 2006/43/EC.

Finally, it is intended to launch a study on the evaluation of the functioning of the Directive by the end of 2009.

In the case of the **accounting**, the Commission Services will vigorously pursue infringement cases regarding Directive 2006/46/EC whose transposition deadline expired. In the case of newly adopted Directives, the Commission services will increasingly use complementary measures such as possible transposition workshops, bilateral meetings and discussions within the Accounting Regulatory Committee.

As regards the planned overhaul of the 4<sup>th</sup> and 7<sup>th</sup> Company Law Directives, the Commission services are pursuing public consultation, meetings with stakeholders, study on administrative costs stemming from the requirements of the 4<sup>th</sup> and 7<sup>th</sup> Company Law Directives and targeted questionnaires in order to be able to present the amending proposal accompanied by a corresponding Impact Assessment.

#### 10.2.6.4. Summary by sector

In the field of *company law and anti-money laundering due to the high number of Directives* the transposition deadline of which has passed recently the main issues remains unchanged in 2009: reducing further transposition deficit and complete conformity checks. Due to the Action Plan established in 2008, 97 % of the infringements were either closed (75%) or referred to the Court (22%). Consequently, actions and instruments identified in the Action Plan will be applied in 2009 as well and the Commission expects to reduce further transposition deficit. In order to overcome difficulties related to conformity checks, risk-based assessments will be continued and first phase conformity checks will most probably be outsourced. Infringements will be followed up strictly and political pressure will be kept up on Member States which are late with transposition.

#### 10.2.7. Protection of rights

##### 10.2.7.1. General introduction

Intellectual property encompasses two specific areas where Community legislation provides for common rules: **industrial property**, which includes inventions, trademarks, industrial design, and geographical indications of source; and **copyright**, which includes literary and artistic works such as novels, films, musical works, paintings, photographs, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs. Community law in this area also contributes to fight against piracy and counterfeiting.

##### 10.2.7.2. Report of work done in 2008

In the area of **industrial property**, further monitoring on Member States' obligation to designate Community design courts pursuant to Art. 80 of the Regulation (EC) 6/2002 on Community *designs* was carried out. Following the referral to the European Court of Justice under Art. 226 EC over failure to do so, France brought its legislation in compliance with the court judgment.

In the *trade mark* area, further work on alleged infringements by Member States was done based on private complaints. Moreover, the Commission started evaluating the overall functioning of the EU trade mark system as a whole, by carrying out an EPTB survey on trade marks.

The Communication "*An Industrial Property Rights Strategy for Europe*" was adopted in July 2008. It reflects the need expressed by European right holders to obtain an effective industrial property protection through a cross-cutting policy for industrial property rights. This Communication represents a useful tool for developing in the upcoming years a clear legal framework in this field in order to further improve the level of protection. It sets out to support inventors in making informed choices on the protection of their industrial property rights and calls for robust enforcement against counterfeiting and piracy..

In relation to *compulsory licensing of patents* relating to pharmaceutical products (Regulation 816/2006 of 17 May 2006) Member States notified the Commission the designated competent authority.

In the field of design protection of *spare parts*, no agreement has been yet reached by Member States on the Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of designs. The Parliament already adopted the proposal with compromise amendments end of 2008. Further work needs to be done at Council level in order to overcome the problems that lead to fragmentation of the internal market for design protection of spare parts.

End of 2008 the Commission worked to amend Regulation (EC) No 2869/95 on the *fees* payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) and Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community *trademark*. The proposal also aims at reducing fees and administrative burdens on both the OHIM and its users by simplifying the existing fee structure. The Commission will adopt on 31 March 2009 the draft Regulation. Publication will take place on 30 April 2009 to have the new fees applicable as from 1 May 2009.

Following requests from some EU Member States to better substantiate the compelling reasons for the creation of the *Community patent* and a *Unified Patent Litigation System (UPLS)*, Commission contracted in 2008 two studies on the economic cost-benefits of (i) the Community patent and (ii) the Unified Patent Litigation System. For the first time, all available sources and data on these topics have been brought together and analysed in a systematic way, and Member States and stakeholders now have a much better picture not only of the shortcomings of the present patent system but also of the expected benefits from a Community patent and a unified court system.

In the area of the enforcement, the Commission monitored the transposition of Directive 2004/48/EC<sup>355</sup>. The Directive had to be implemented by Member States by 29 April 2006. The ECJ took three decisions against Germany, Luxembourg and Sweden for failure of transposition of the Directive according to Art. 226 EC. Germany notified its national measures in July. At the end of 2008, infringement procedures against 2 Member States (Sweden and Luxembourg) were still open.

The Commission in July 2008 adopted a Communication on an *Industrial Property Rights Strategy for Europe* where a specific chapter was dedicated to the enforcement of intellectual property rights. Subsequently the Council in September adopted a Resolution on a comprehensive European anti-counterfeiting and anti-piracy plan.

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<sup>355</sup> Add reference

### 10.2.7.3. Evaluation based on the current position

Within the framework of assessing the *trade mark system* and further to the EBTP survey the Commission intends to further study the overall functioning of the Community and national trademark systems. The aim of this assessment is to identify potential areas for improvement, strengthening and future development of this overall system to the benefit of users. The results shall serve as a basis for the future review of the Community trade mark system and enhanced cooperation between the OHIM and national offices. On their basis, a proposal for a review of the Community Trademark Regulation is planned right away.

In the *patents* area, the absence of a protection at Community level has an impact on the single market and hampers the free movement of knowledge to be a reality. This issue has been raised several times by the users and recent developments in the area are revitalising the debate on the patent system in Europe and set out a way forward to a Community patent and improved patent jurisdiction system for the EU. Moreover, the fragmentation of the patent system within the EU has also an impact on the application of the regulation on *Supplementary Protection Certificates* (SPCs).

In the field of *geographical indications*, EU right holders stressed the lack of protection at Community level for non-agricultural products. This issue has been raised as well in the context of multilateral negotiations within the World Trade Organisation (WTO) and bilateral negotiations with third countries (Free Trade Agreements: FTAs). For this reason, the Commission is reflecting on, so as to bring benefits to European and third countries' procedure. In this framework, the Commission will carry out an assessment on the feasibility of geographical indication protection to non-agricultural products.

In the context of a highly political area and due to the complex nature of the Directive 2004/48/EC, the main problem encountered by the Commission was the late transposition ~~in~~ by some Member States. The monitoring was done through a constant dialogue with the Member States not having transposed the Directive yet. Two Member States adopted the transposition measures during this year. Subsequent proceedings according to Art. 228 EC continued against the two last Member States.

### 10.2.7.4. Evaluation results

#### *Planned actions*

In 2009, Member States shall submit to the Commission a report on the implementation of Intellectual property rights Directive 2004/48/EC. On the basis of national reports, the Commission will prepare a report on the conformity of the national measures with the provisions of the Directive. It is also expected that the last two member States (LU and SE) will notify their national measures during 2009.

Following the Council Resolution of September 2008, the Commission will create a European Counterfeiting and Piracy Observatory. Its launch is expected to be announced on 02/04/2009 during the High Level Conference on Counterfeiting and Piracy organised by the Commission.

In addition the Commission is planning to promote administrative cooperation, including the exchange of information on the enforcement of intellectual property rights, among Member States and between Member States and the Commission through an Expert Group made of national correspondents. The Commission will also study how to set up an information system



for the rapid exchange of information on counterfeiting and piracy. Those and other measures will be presented by the Commission in a Communication that will be adopted during the first half of 2009.

## 11. REGIONAL POLICY

### 11.1. Current situation

#### 11.1.1. General introduction

Based on Article 158 of the Treaty, European regional policy aims to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions by actions supported by the Structural Funds<sup>356</sup> (the European Regional Development Fund<sup>357</sup>, ERDF, and the European Social Fund<sup>358</sup>, ESF) and the Cohesion Fund<sup>359</sup> (CF). ERDF and CF are under the responsibility of the Commission services in charge of "Regional Policy", ESF is under the responsibility of the Commission services in charge of "Employment, Social Affairs and Equal Opportunities". These Funds are managed by means of operational programmes (ERDF and ESF) or projects (CF) by the Commission and the Member States under shared management arrangements, as are similar programmes under the European Agricultural Fund for Rural Development<sup>360</sup> and the fisheries sector<sup>361</sup>. New rules covering the programming period 2007 to 2013 were adopted in 2006; most of the 316 operational programmes financed by the ERDF and CF were negotiated in partnership and (with few exceptions) adopted by the Commission in 2007. The new programmes overlap with those of the period 2000-2006 for which the final date for expenditures was the end of 2008 (in February 2009, 385 of the 555 Cohesion Policy programmes were extended in order to add another six months to cope with delays due to the international financial crisis). In addition, certain programmes under the 1994 to 1999 programming period still required final closure or the settlement of post-closure audits.

In accordance with Community law<sup>362</sup>, assistance under the Funds is provided according to an approach of complementarity and partnership between the Commission and the Member States, with due regard to their respective powers. In this context, implementation on the ground is the responsibility of the Member States, meaning in particular that the Commission is normally not responsible for the selection of individual projects (exceptions being the approval of CF projects and of major projects within ERDF programmes), as this comes under the competence of the national authorities.

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<sup>356</sup> Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, p. 25).

<sup>357</sup> Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 laying on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999 (OJ L 210, 31.7.2006, p. 1).

<sup>358</sup> Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 laying on the European Social Fund and repealing Regulation (EC) No 1784/1999 (OJ L 210, 31.7.2006, p. 12).

<sup>359</sup> Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 laying on the Cohesion Fund and repealing Regulation (EC) No 1164/94 (OJ L 210, 31.7.2006, p. 79).

<sup>360</sup> Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (OJ L 277, 21.10.2005, p. 1).

<sup>361</sup> Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund; (OJ L 223, 15.8.2006, p. 1).

<sup>362</sup> Article 9 of Regulation (EC) No 1083/2006.

To be eligible for co-financing from the EU budget projects must be selected and implemented in accordance with the principles laid down in the programming documents adopted by the Commission, and must comply with the specific legislation governing Cohesion Policy expenditure and generally applicable rules on public procurement, state aid, the environment, etc, and also with relevant national rules. The control system put in place by the Member States seeks to ensure the regularity of all expenditure and the Commission supervises its effective functioning. When the rules are found to have been breached making expenditure ineligible, the irregular expenditure has to be excluded by means of "financial corrections". If the Member States fail to correct irregular expenditure or to remedy deficiencies in the management and control system, the Commission itself may impose financial corrections or require improvements in the control system. In the event of serious deficiencies, the Commission can suspend its interim payments to a programme until the weaknesses are corrected.

Most complaints tend to arise when an operator or member of the public considers that individual projects do not (fully) respect relevant Community and/or national rules and prefers to address the complaint to the Commission rather than to his/her national authorities. Such complaints can only be resolved with considerable support from the national authorities. From one year to another, the number of complaints dealt with by the Commission services in this area is relatively stable (below 50) and does not normally lead to infringement procedures, but the complaints are resolved by application of the normal control and financial correction provisions proper to Cohesion Policy by the national authorities or by the Commission.

#### *11.1.2. Report of work done in 2008*

##### 11.1.2.1. Complaints and infringements

In 2008, one infringement procedure was opened against Germany<sup>363</sup> for failure to respect its obligation to submit to the Commission the annual summary due under the Financial Regulation<sup>364</sup> (letter of formal notice sent on 23 September 2008).

Two complaints were officially opened during 2008 in the NIF system, whereas two cases could be closed after the parallel financial correction procedure had been closed. Adding two other complaints already opened before 2008, as of 31 December 2008, five complaints in the NIF system concern the Regional Policy area.

Seven complaints were introduced into the EU PILOT system. The great majority of complaints concerning Regional Policy do not lead to an infringement procedure.

A first category of complaints concerns the selection process of individual projects under the different programmes. The principal motivation for complaints was the rejection of the complainant's application for financial support. As indicated above, under shared management such complaints are examined by the competent national administrative or judicial authorities. A second category of complaints concerns alleged non-compliance of individual projects with Community law, mostly relating to environment or public procurement policies and rules. A third category of complaints concerns the alleged defects in selected projects (examples

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<sup>363</sup> NIF 2008/2127.

<sup>364</sup> Article 53b(3) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1).

include allegations that a particular infrastructure project is not in the right place (e.g. roads), does not work properly (water sewage treatment plants) or constitutes poor value for the European tax-payer's money). In such cases, there is generally no specific allegation of a breach of Community law.

For all categories, the Commission services in the sector of Regional Policy use the EU-PILOT System, as the Commission in most cases can only react in substance after having consulted the national authorities primarily responsible for the programme implementation. Where the examination of the allegations leads to the conclusion that Community law has been breached, this may lead to the opening of a financial correction procedure.

As indicated in the 2007 report<sup>365</sup>, concerning the new Council Regulation on a European Grouping of Territorial Cooperation (EGTC)<sup>366</sup>, which entered into force on 1 August 2006, Member States have been required to make provisions to ensure the effective application of the Regulation and to inform the Commission of these provisions. By the beginning of 2008, only six Member States had adopted national rules, against a regulatory deadline of 1 August 2007. By the end of 2008 the Commission was officially informed of national rules adopted in another nine Member States. By the end of 2008, national rules and rules in all or most of the federal entities were adopted in Germany and Belgium, leaving nine Member States still to adopt them. These results were achieved through political dialogue and cooperation with the national authorities without recourse to infringement procedures.

#### 11.1.2.2. Financial corrections

Financial corrections by the Member States themselves<sup>367</sup> and by the Commission<sup>368</sup> are applied where expenditure for a project is irregular or where there are serious deficiencies in the management and control system of the operational programme (under the Member States' responsibility) which has put at risk the Community contribution paid to the programme at stake. In 2008 total financial corrections (ERDF and CF; periods 1994-1999 and 2000-2006) amounted to EUR 1 billion (plus EUR 518 million for the ESF). This amount is a marked increase on the EUR 288 million corrected in 2007<sup>369</sup> due to the completion of the follow-up of previous audit work and an acceleration of financial correction procedures under the "Action plan to strengthen the Commission's supervisory role under shared management of structural actions"<sup>370</sup> (hereinafter referred to as "Action Plan").

#### 11.1.2.3. Compliance assessment

In order to improve the management and control of the 316 programmes for the 2007-2013 period, the Member State authorities have to undertake an assessment of the description of the

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<sup>365</sup> Section 10.2.2 on p. 191 of the Commission Staff Working Document (SEC(2008)2854 of 18 November 2008).

<sup>366</sup> Regulation (EC) No 1082/2006 of the European Parliament and of the Council on a European Grouping of territorial cooperation (OJ L 210, 31.7.2006, p. 19).

<sup>367</sup> Article 23 of Regulation (EEC) No 4253/88 for the 1994-1999 period; Article 39(1) of Regulation (EC) No 1260/1999 for the 2000-2006 period; Article 98 of Regulation (EC) No 1083/2006 for the 2007-2013 period.

<sup>368</sup> Article 24 of Regulation (EEC) No 4253/88 for the 1994-1999 period; Article 39(3) of Regulation (EC) No 1260/1999 for the 2000-2006 period; Articles 99 to 100 of Regulation (EC) No 1083/2006 for the 2007-2013 period.

<sup>369</sup> See Report on the implementation of the action plan; COM(2009)42 of 3 February 2009.

<sup>370</sup> COM(2008)97 of 19 February 2008.

national management and control system per programme accompanied by an independent report giving an opinion on their compliance with the regulatory requirements, submitted before the first intermediate payment can be made. This compliance assessment is a new element<sup>371</sup> seeking to ensure that the set up of management and control systems is in conformity with applicable rules. By end of 2008, 210 compliance assessment reports regarding national systems had been received (66% of the total due) by the Commission, of which 77 (37% of those received) were judged acceptable as of 31 December 2008.

#### 11.1.2.4. Audits

In 2008 the Commission carried out 64 on-the-spot audits concerning ERDF and Cohesion Fund in 24 Member States focusing on management authorities not yet audited and the review of bodies responsible for the closure of the 2000-2006 programmes. Deficiencies uncovered typically concerned organisational problems in the systems themselves or breaches in public procurement or eligibility rules. The outcome of these audits may take the form of action plans to improve performance, and possibly also suspension of payments or the launch of financial corrections procedures.

#### 11.1.2.5. Simplification

Simplification of existing legislation is in itself an additional means to promote a reduction in errors and irregularities while reducing administrative burdens. In 2008, a simplification was introduced for certain revenue-generating projects<sup>372</sup> waiving, on grounds of *de minimis*, the obligation to apply the detailed provisions to all ESF projects and to those ERDF projects the total cost of which stays below EUR 1 million.

#### 11.1.2.6. Comitology and cooperation with Member States

In 2008, twelve documents providing technical guidance in order to facilitate the implementation of operational programmes and to encourage good practice(s) were prepared by the Commission and then presented, discussed and finalised during the monthly meetings of the Committee for the Coordination of the Funds (COCOF)<sup>373</sup>, although this Committee was formally only informed about these documents.

In addition, the Commission took the initiative to organise a seminar entitled "Control of structural actions – meeting the challenge" in Brussels in June 2008<sup>374</sup>, where 500 experts from the Member States participated.

## 11.2. Evaluation based on the current situation

### 11.2.1. Satisfactory or problematic nature of the current situation

In January 2005, the Commission made it a strategic objective to strive for a positive statement of assurance (DAS) from the European Court of Auditors<sup>375</sup>. To make progress

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<sup>371</sup> Articles 71 and 72 of Regulation (EC) No 1083/2006.

<sup>372</sup> Council Regulation (EC) No 1341/2008 of 18 December 2008 amending Regulation (EC) No 1083/2006 (...), in respect of certain revenue-generating projects (OJ L 348, 24.12.2008, p. 19).

<sup>373</sup> Article 103 of Regulation (EC) No 1083/2006.

<sup>374</sup> Organised together with Directorate General Employment, Social Affairs and Equal Opportunities; see section 5.1 of the "Report on the implementation of the action plan" (COM(2009)42 of 3 February 2009).

towards this goal it introduced an Action Plan towards an Integrated Internal Control Framework<sup>376</sup> and in 2008 adopted a specific Action Plan to strengthen its supervision in the structural actions area. The structural actions Action Plan addresses both the causes and effects of the high rate of error found by the European Court of Auditors in structural actions expenditure. The Commission's focus is on increasing the effectiveness of the controls undertaken by the Member States and the audits of the Commission, in order to ensure that by the time the 2000 to 2006 programmes and projects are closed, the residual risk of error is as low as possible. For the 2007 to 2013 period, the preventive actions will ensure that the Member States' systems function effectively from the beginning of the programme implementation or, failing this, that deficiencies are detected as early as possible.

Against the background of a budget of EUR 38 billion p.a. for the period 2000 to 2006 (ca. 33% of the EU budget) and currently EUR 50 billion p.a. (ca. 36% of the EU budget), the amount of financial corrections that have had to be made is relatively limited.

On the other hand, concerning the EGTC Regulation, the fact that national rules were still not adopted in nine Member States at 31 December 2008, is regarded as unsatisfactory.

#### *11.2.2. Importance of the impact of the identified problems on the objectives of the acquis*

Achieving the aims of cohesion policy in reducing geographical disparities of the programmes depends on effective implementation and requires that projects are selected and implemented correctly. Moreover, the image of this policy is negatively affected by high error rates, especially when the public's attention is drawn to such errors when the yearly DAS is published and discussed in the media. Reduction of error rates is paramount and the planned actions set out below contribute to this overall priority.

#### *11.2.3. Responsibility for the problems and their correction*

Under shared management, the Commission is responsible for the execution of the Community budget, but the Member States are responsible for the implementation of the individual projects. Errors and irregularities (which in practice contain very few cases of fraudulent behaviour) concerning the projects are matters outside the direct control of the Commission. Member States are responsible at first instance to correct these errors (mainly by financial corrections on project level). The Commission makes sure, through its supervisory role, that the systems set up by the Member States function correctly and, in cases where the systems are dysfunctional or where the corrections undertaken by Member States are not sufficient, applies financial corrections on programme or - in the case of CF – project level.

#### *11.2.4. Nature, urgency and scale of the corrective action required*

From the different actions realised in 2008, it is evident that the respect of the regional policy *acquis* requires actions of different nature: corrective (financial corrections, action plans, infringement and complaints procedures), preventive (simplification of the *acquis*, compliance assessment, audits and controls, guidance notes, seminars) and informal/political (comitology, direct dialogue).

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<sup>375</sup> See section 1 of the "Action Plan" (COM(2008)97 of 19 February 2008).

<sup>376</sup> COM(2006) 9 and SEC(2006) 49.

The implementation of the Action Plan focussing on measures to strengthen the supervision of the correct implementation of the programmes and projects, further simplification and the finalizing of the compliance assessment are the key elements in order to reduce as far as possible errors linked to the closure of the 2000 to 2006 programmes and to avoid as far as possible errors under the new programming exercise.

Key actors linked to the Action Plan are the some 90 staff (out of a total of 800) in the service for Audit which is part of Commission services for Regional Policy (i.e more than 10%). Financial corrections and infringement/complaints proceedings involve of course a lot of other staff in the Resources Directorate, the "Legal advice, procedures" unit and in the operational units. Consequently, an important part of Regional Policy's staff is involved in the respect of the Regional Policy *acquis* in a broad sense compared to the few number of staff dealing with infringement and complaints procedures *strictu sensu*.

### **11.3. Evaluation results**

#### *11.3.1. Priorities*

The first two priorities identified<sup>377</sup> is to ensure that the Community cohesion policy is efficiently and effectively implemented on the ground and to provide support for the Member States in their efforts to deal with the impact of the financial and economic crisis. To this end, the Commission in the area of Regional Policy will seek to ensure through regular monitoring that Member States and regions have established the appropriate structures for management and control and will advise on measures to tackle weaknesses in administrative capacity for delivery, as well as provide appropriate support for setting up a sufficient stock of projects.

#### *11.3.2. Planned action (2009 and beyond)*

##### 11.3.2.1. Complaints and infringements

The Commission services in the area of Regional Policy will continue to apply the EU PILOT system and to follow similar procedures with those Member States not participating in EU PILOT. Involving national authorities in a very early stage of a complaint is important in this respect in a system of shared management of Community Funds.

##### 11.3.2.2. Financial corrections

The current estimate of potential financial corrections likely to result from the financial correction procedures underway at the end of 2008 is approximately EUR 2.2 billion.

##### 11.3.2.3. Compliance assessment

Concerning the 2007-2013 period, the compliance assessment exercise will be completed as fast as possible, provided the Member States submit the first documents and revised documents in due time.

##### 11.3.2.4. Audits

In terms of audit and control activities, the Commission services will ensure the full implementation of the actions carried over from the Action Plan to strengthen the

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<sup>377</sup> See section 3.2.

Commission's supervisory role under shared management of structural actions, adopted in February 2008, including any updated actions decided in January 2009. Overall, it will continue to seek to make progress towards a positive declaration of assurance (DAS) on expenditure under Cohesion policy through preventive and corrective measures focused on the closure of the programmes for 2000-2006, and the start up of the programmes for the 2007-2013 period. Concerning the 2000-2006 period, the follow-up of action plans and financial corrections as well as the completion of the review of bodies responsible for the closure of the 2000-2006 programmes will be the priorities of the audit Directorate. Concerning the 2007-2013 period, audits will be focused on the work of the audit authorities to obtain assurance on the reliability of their work, and a representative sample of projects will be audited to verify the functioning of the systems.

#### 11.3.2.5.Simplification

The Commission services in the area of Regional Policy will also follow-up and contribute to the "European Action Programme on the reduction of administrative burdens" adopted in January 2007 as part of the Better Regulation programme. The global target is to cut red tape for businesses by 25% by 2012 in the different policy areas. The Commission intends to make a number of concrete proposals before the summer of 2009. Further possibilities for simplification were examined with Member States during the second semester of 2008 introducing further simplification concerning the financial management of the Funds<sup>378</sup>, in the context of efforts to provide more support in face of the international financial crisis and to improve the effectiveness of the delivery system of cohesion policy. One example is the simplification of eligibility rules to allow flat-rate reimbursements for overheads, an area where in the past there have been an important number of errors. Further simplification is planned later on in 2009.

#### 11.3.2.6.Comitology and cooperation with Member States

In order to help the national and regional authorities with implementation a number of guidance notes were presented in 2007 and 2008. A small number, less than ten, will be presented to the Committee for the Coordination of the Funds (COCOF) in 2009. Due to the amendments to the legislation adopted in 2008 and early 2009, four guidance notes will have to be revised accordingly.

Concerning the national rules on the EGTC Regulation, political dialogue and cooperation with the national authorities will be continued as this approach has lead up to now to positive results.

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<sup>378</sup> Council Regulation (EC) No 284/2009 of 7 April 2009 amending Regulation (EC) No 1083/2006 (...) concerning certain provisions relating to financial management (OJ L 94, 8.4.2009, p. 10).

## 12. TAXATION AND CUSTOMS SERVICES

### 12.1. Situation in the sector of CUSTOMS

#### 12.1.1. Current position

##### 12.1.1.1. General introduction

In the area of **customs**, in line with the Communication<sup>379</sup> on a strategic review of better regulation in the European Union, and obviously of Communication<sup>380</sup> on a better monitoring of the application of Community law, the attention is devoted to a better and simplified legal environment. As the Commission of the European Communities is responsible for ensuring that Community law is correctly applied, measures have been taken aiming at enhancing the correct and uniform application of the customs community legislation.

Considering that a clear commitment from Member States to apply Community rules in this way, as well as a closer cooperation between the Commission and the Member States are key elements of the process, the priority has been put on a preventive approach in order make all parties concerned working together. The result consisted in the set up of a new tool enabling a better monitoring of a correct and uniform application of Community Customs law, namely the multi-annual programme of monitoring the compliance of Customs legislation in different Member States.

*Existing measures in force: see Annex I*

##### 12.1.1.2. Report of work done in 2008

In 2008 the Court of Justice delivered 13 judgments related to **customs**, which represents a small increase from 2007 (9).

Most of the Court's judgments in this area concerned *references for preliminary rulings*.

The following cases were of particular relevance:

In Case *Staatssecretaris van Financiën v Heuschen & Schrouff Oriëntal Foods Trading BV*<sup>381</sup> the Court ruled that where an application for remission of import duties has been submitted to the Commission and the Commission has already adopted a decision containing assessments of fact and law in a particular case concerning import transactions, such assessments bind all the authorities of the Member State to which that decision was addressed, in accordance with Article 249 EC, including the courts which have to assess that case under Article 220 of the Code. The Court also held that, if the importer has, within the period prescribed in the fifth paragraph of Article 230 EC, brought an action for annulment of a decision of the Commission in respect of an application for remission of import duties pursuant to Article 239 of the Code, it is for the national court to decide whether to stay the proceedings until a definitive decision has been given in the action for annulment or to refer itself a question to the Court for a preliminary ruling as to validity.

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<sup>379</sup> COM(2006)689 of 14.11.2006

<sup>380</sup> COM(2002)725 of 16.05.2003

<sup>381</sup> Judgment of 20.11.2008, case C-375/07



In Case *Militzer & Münch GmbH v Ministero delle Finanze*<sup>382</sup> the Court ruled that it is not contrary to the principle of proportionality to hold a customs clearance agent, in his capacity as principal, liable for a customs debt.

In the case *KIP*<sup>383</sup> on tariff classification of multifunction apparatus combining the functions of laser printer and a digital electronic scanner module, with a copier function. This case is relevant because of the possible impact of the judgment by the European Court of Justice on the EC's defence before the WTO in the context of the Dispute Settlement case launched by the US, Japan and Taiwan against the European Communities.

*Volume of enquiries, complaints, infringements work and petitions, and prioritization among them*

Regarding the petitions treated in the customs area, none has been registered.

As regards **customs**, the Commission services opened its own investigations regarding presumed infringements. This resulted in a number of 8 presumed infringements and 9 identified ones. Two reasoned opinion (art 226) have been sent. Thus, the total number of infringement cases (17) is a little bit less than in 2007 and is less for reasoned opinions (11 in 2007).

During 2008, 12 opened infringement cases were filed after the Member States concerned modified their legislation or administrative practice to comply with Community Law.

Most of enquiries and complaints in this area relate to the application of Customs legislation in general. Priority has been given to those cases which reveal clear and serious infringements of Community legislation. In particular, emphasis was put on cases in which Member States had allegedly created taxes having equivalent effect to Customs duties, such taxes being prohibited by Article 23 of the EC Treaty.

#### *12.1.2. Evaluation based on the current situation*

- The Modernised Community Customs Code (MCCC) was adopted on 23 April 2008.

Regulation (EC) No 450/2008 of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) and entered into force on 24 June 2008.

However, it should be noticed that its application is linked to the adoption of the related Implementing provisions, foreseen to be enacted no later than 24 June 2013.

Implementing the MCCC constitutes a comprehensive exercise, going beyond the drafting and adoption of implementing provisions, and includes in particular the development of the necessary IT applications within the framework of the e-Customs Decision.

- Decision No 70/2008/EEC of 15 January 2008 on a paperless environment for customs and trade (the so-called 'e-Customs Decision'). The e-Customs Decision entered into force on 15 February 2008. It covers electronic customs systems to be set up and operated by the Commission and the Member States, in particular but not only with a view to supporting

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<sup>382</sup> Judgment of 03.04.2008, cases C-230/06

<sup>383</sup> Judgment of 11.12.2008, cases C-362/07 and C-363/07

the implementation of both the current Community Customs Code and the Modernised Customs Code.

- Commission Regulation (EC) No 1192/2008 of 17 November 2008 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.

This regulation reinforces the harmonization of Simplified procedures in setting up a system of single authorisations for the simplified procedures.

### *12.1.3. Evaluation results*

#### 12.1.3.1. Priorities

As far as Customs are concerned, the situation has not significantly changed regarding infringements and references to the Court, therefore, priorities set for 2008 remain unchanged for 2009. Considering that the global volume of infringements and complaints remains relatively stable with previous years, and that this trend is likely to be stable in 2009, no specific action regarding prioritization should be envisaged.

#### 12.1.3.2. Planned action (2009 and beyond)

Given the evaluation of the current situation, a specific planning is not required. Nevertheless, it should be considered that the fact that volume has not increased does not necessarily mean that the situation is satisfactory and that legislation is evenly correctly applied. For instance, Economic operators or citizens might face problems when measures are implemented at the last moment, but, for various reasons, they do not report to our services. In this view, a proactive and horizontal approach has been adopted.

In order to be in line with the Commission's Communication. A strategic review of Better Regulation in the European Union<sup>384</sup>, the focus is put on ensuring that Member States orientate their efforts towards a correct and uniform application of Community customs legislation. The adopted strategy is based on a closer cooperation with Member States and the outlook is oriented towards the set up of new tools enabling a better monitoring of the application of Community Customs law. With this end in view, a multi-annual programme of monitoring the compliance of Customs legislations in the whole community territory has been set up and developed in 2008.

Another way of improving the correct application of the customs legislation is the increased use of IT. Thus, in the recent years, customs have developed electronic tools referred to usually as 'e-Customs'. The impact of the computerisation requires indeed both a harmonisation and a standardisation of procedures that could ultimately contribute to a better application.

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<sup>384</sup> COM(2006) 689 of 14.11.2006

## 12.2. Situation in the sector of INDIRECT TAXATION

### 12.2.1. Current position

#### 12.2.1.1. General introduction

Establishing an internal market supposes the application in Member States of legislation on indirect taxation that does not distort competition neither free movement of goods and services.

Therefore it is necessary to achieve harmonisation of legislation in line with the changes in our economy by means of proposals for new directives although that achievement is often compromised by the rule of unanimity.

*Main existing measures in force (situation on 31/12/2008) : see Annex I for a complete overview*

#### 12.2.1.2. Report of the work done in 2008

##### *Management of the acquis through committees and expert groups*

- The VAT Committee, an advisory committee set up by Article 398 of the VAT Directive 2006/112/EC of 28 November 2006, has competence to examine questions raised by the Commission or the representatives of the Member States, which concern the application of Community provisions on VAT. At least twice a year, the VAT Committee examines questions raised on the interpretation of the existing VAT legislation. When an agreement can be reached on a common interpretation of a provision concerning VAT, the Council can adopt unanimously, on a proposal from the Commission, the necessary implementing measures which are required.

- In the field of administrative cooperation in the field of VAT, several expert groups, funded through the Fiscalis 2013 budget, discussed specific problems that are either related to specific fraud problems or targeted at exchanging best practises or enhancing cross border administrative cooperation. These groups dealt with multilateral controls, e-auditing, second hand cars, importation fraud, risk management, etc.

- In addition, the anti tax fraud strategy (ATFS) expert group, created in 2007, discussed possible solutions to fight VAT fraud more efficiently. These discussions have paved the way for legislative initiatives from the Commission presented in 2008 as well as for those planned for 2009.

##### *Enquiries, problems and complaints management, management of infringements, petitions*

- Within the area of **indirect taxation**, the criteria of prioritisation were fixed in line with the Communication of the Commission of 2002 on the improvement of the control of the application of the Community legislation. The Commission has increased its efforts to ensure alignment of Member States' indirect tax legislation with the requirements of primary and secondary Community law, by intensifying its infringement action following the adoption of new Directives and by pursuing a more targeted infringement approach in support of ongoing policy initiatives such as the Commission's initiative on tax policy coordination. Infringement procedures affecting the Community own resources and specific infringement procedures related to VAT on postal services, travel agents and reduced VAT rates were launched in this context.

In the Commission Communication 'A Europe of results-Applying Community law'<sup>385</sup>, the Commission decided on the introduction of an arrangement for monthly decision-taking to allow for the quicker progress of infringement cases. The results of this new decisional method were particularly significant within this domain where considerable efforts were made in order to carry out the objective laid down by the Commission.

Another important element of the Commission Communication was the starting up of a pilot project to test and improve working methods between Commission services and Member States on information exchange and problem solving.

Although the management of cases within this area might not be as representative and relevant for the overall functioning of the EUPILLOT, we already noticed that so far some Member States seemed to be complying/ responding quickly, others needed to be stimulated several times before undertaking any action, although it has to be stressed that (factual) indirect taxation issues are often very complex and in many factual cases we have to refer the applicant to the national Court.

Factual cross-frontier disputes on the other hand were in most cases successfully referred to the SOLVIT system as value added network for problem solving.

Within the area of indirect taxation, 2008 was another successive year with an increasing number of infringement cases, closed after bringing their legislation into conformity with Community Law by the Member States during the different steps of the 226-procedure, and a considerable input related to new Court cases. The following cases merit extra attention :

In the judgments in the cases *Commission v. Italy*<sup>386</sup>, the Court censures as unlawful the general and indiscriminate waiver of verification of transactions taxable for VAT purposes effected in a series of tax years, by which the Italian Republic has failed its obligations under the Sixth VAT Directive and the general principle of cooperation in good faith.

In the case *Commission v. Portugal*<sup>387</sup>, the Court considered that in the context of infringement proceedings against a Member State, that State cannot validly plead 'res judicata' in the light of an earlier judgment where the subject-matter of case in question and that of the earlier case are different. In this particular case it cannot be authorised to reintroduce a reduced rate of value added tax applicable to road tolls for a crossing.

In the case *Isle of Wight Council a.o.*<sup>388</sup>, the Court declared that regarding the harmonisation of the laws of the Member States relating to turnover taxes (VAT), the uniform basis of assessment is to be interpreted as meaning that the significant distortions of competition, to which treatment as non-taxable persons of bodies governed by private law acting as public authorities would lead, must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular.

Finally some cases *Koninklijke Ahold NV* and *Royal Bank of Scotland Group plc*<sup>389</sup> regard the rules and methods of rounding amounts of value added tax, to be in line with the principles of fiscal neutrality and proportionality .

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<sup>385</sup> COM(2007)502

<sup>386</sup> Judgments of 17.07.2008 and 11.12.2008, cases C-132/06 and C-174/07

<sup>387</sup> Judgment of 12.06.2008, case C-462/05

<sup>388</sup> Judgment of 16.09.2008, case C-288/07

<sup>389</sup> Judgments of 10.07.2008 and 18.12.2008, cases C-484/06 and C-488/07

- Regarding the **petitions** treated in the area of indirect taxation, the most recurrent issues concerned various aspects of taxation of cars.

*New legislation in preparation or already proposed and in the course of being adopted, impact assessments and implementation plans being developed in connection with new proposals, etc.*

### ***Value added tax (VAT)***

The Commission adopted in 2008 a proposal for a directive amending Directive 2006/112/EC as regards reduced rates of value added tax, so as to provide Member States with the flexibility to apply reduced VAT rates for some specific services on a permanent basis. The Commission proposal covers areas where there is sufficient evidence that reduced rates do not create problems for the proper functioning of the Internal Market. The sectors concerned are mainly so called labour-intensive services and locally supplied services, including restaurant services. A political agreement was reached in the Council on 10 March 2009 and the final text of the directive will soon enter into force.

A new Council Directive 2008/117/EC amending Directive 2006/112/EC on the common system of value added tax to combat tax evasion connected with intra-Community transactions and Council and a Council Regulation 37/2009 amending Regulation (EC) No 1798/2003 on administrative cooperation in the field of value added tax, in order to combat tax evasion connected with intra-Community transactions were adopted on 16 December 2008. As a consequence both the reporting period for the recapitulative statement and the period for the exchange of the information between Member States are shortened from 3 months to 1 month.

On 1 December 2008 the Commission also adopted a proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards tax evasion linked to import and other cross-border transactions, proposing to introduce new rules on cross border joint and several liability (COM(2008)805 final).

### ***Excise duties***

In the area of excise duties, Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC was adopted. Its Article 48 provides that Member States shall adopt and publish, not later than 1 January 2010, the laws, regulations and administrative provisions necessary to comply with this Directive with effect from 1 April 2010. As a consequence, the control of the transposition of the Directive into national legislation will have to take place in 2010.

The Commission has presented on 16 July 2008 a report and a proposal for a new Council's Directive amending Council directive 95/59/EC, 92/79/EEC and 92/80/EEC on the structure and the rates of excise duty applied to manufactured tobacco (COM(2008) 459 final - 2008/0150 (CNS)). The objectives of the proposal are to improve the functioning of the Internal Market, contribute to a high level of health protection and modernise the current arrangements.

### ***Energy taxation***

In line with its 2008 Legislative and Work Programme<sup>390</sup> and with the invitation by the 2008 Spring European Council<sup>391</sup>, the Commission has been preparing a revision of Directive 2003/96/EC ("the Energy Taxation Directive") to better combine fiscal and environmental goals. The Commission will present the proposal in 2009. In the course of 2008, the negotiations continued on the 2007 proposal revising certain elements of Article 7 of Council Directive 2003/96/EC (the so called "commercial diesel proposal")<sup>392</sup>, both in the Council working group<sup>393</sup> and in the European Parliament.

The European Parliament delivered positive opinion on the Proposal on 13 March 2008<sup>394</sup>.

### ***Tax exemption to permanent introduction of the personal property of individuals***

A proposal for a Council Directive on tax exemption applicable to permanent introduction from a Member State of the personal property of individuals (Codified version of Directive 83/183/EEC) has been adopted by the Commission (COM(2008) 376), and has been discussed in the Council 's Working Party on codification of legislation. The text was finalised in October 2008 and was sent to all Member State Delegations for final approval. After its approval by Member States the text needed to be finalised by lawyer-linguists and this was not possible to be completed by end of 2008. Therefore, the codified version of the Directive is to be adopted by COREPER and the Council in the course of 2009.

### ***Recovery of taxes***

In 2008, the Commission prepared a proposal for a new Directive concerning mutual assistance for the recovery of taxes and other duties. (The proposal was not yet adopted in 2008).

*Preventive measures being taken in relation to recently adopted new legislation – conformity assessment of national transposition, transposition package meetings, development of guidelines, initiation of networking systems to manage the new legislation, etc.*

### ***Value added tax (VAT)***

- Directive 2008/8/EC amending Directive 2006/112/EC as regards the place of supply of services, adopted on 12 February 2008, has been discussed in the VAT Committee which is chaired by the Commission. The Commission also organised a seminar under the Fiscalis Programme to examine together with participants from all Member States certain aspects of the new rules.

- Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State has also been discussed in the VAT Committee. Furthermore, a Fiscalis seminar was organised in Stockholm to prepare the implementation of the Directive from a legal, organisational and IT

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<sup>390</sup> COM (2007) 640 of 23 October 2007

<sup>391</sup> European Council 13/14 March 2008, Presidency conclusions (7652/08)

<sup>392</sup> COM (2007) 52

<sup>393</sup> The last meeting of the Council working group was during the French Presidency on 16 June 2008

<sup>394</sup> The rapporteur was Mr. Schmidt (ALDE-SE)

point of view. The functional and technical specifications of this, entirely electronic, system have been discussed and agreed via the organisation of several Fiscalis workshops.

### ***Traveller allowances***

Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries entered into force on 29 December 2007. Member States brought into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 15 of this Directive with effect from 1 December 2008.

### ***Excise duties***

In the area of excise duties, it is foreseen to present the main changes brought about by Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC to the Committee on Excise Duties at its next meeting in May 2009. Furthermore, Member States will be asked at that meeting to inform the Commission of the use they intend to make of optional provisions relating to the EMCS (Excise Movement and Control System), for which the Directive provides a legal basis. Further discussions in the Committee or in a Working Group on the transposition of the Directive can be envisaged, prior to the entry into application of the Directive, if required by the Member States.

#### *12.2.2. Evaluation based on the current situation*

It is important to recall that unanimity is and will remain the rule for the adoption (and thus the adjustment) of the texts towards harmonization **in the field of taxation**. This situation undeniable makes harmonization by the legislative way more complex and often leads to the granting of options to Member States that are badly defined.

In this respect, the proposal for a Directive of 5 July 2005<sup>395</sup> which, inter alia, includes the abolition of registration taxes and would consequently bring to an end the current obligation, for the European citizens, to pay again a registration tax for their vehicle when they change residence, could not be adopted.

Hence, the infringement policy constitutes a major instrument to contribute in a non-negligible way to uniform application and thus towards harmonization simplifying the situation for taxpayers.

The overall situation in the **area of indirect taxation** is changing as infringement action and references to the Court have steadily increased in recent years – partly due to the enlargement of the EU - and this trend is still likely to continue. The key challenges will be to manage this increase in activity with the available resources and to achieve correct application of Community law in this area within acceptable deadlines. The position needs to be monitored continuously.

A number of measures have already been taken to improve the situation and to rationalize action. This includes a more strategic approach to infringement action by focusing on specific priorities and adopting a more horizontal approach to similar infringements in different Member States. In addition, a lot of emphasis is put on prevention by better co-ordinating the preparation of national legislation translating Community legislation into national law.

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<sup>395</sup> COM (2005) 2641 final

Finally, it is welcomed that during 2008, 51 infringement cases have been closed because the Member States concerned decided to bring their legislation into conformity with Community Law without any referral to the Court of Justice. These figures reveal clearly that the alignment of Member States' legislation with Community law is being achieved through the work done by the Commission and Member States in the context of infringement proceedings following the adoption of new directives. As stated in its 2007 Communication, the Commission has started to work with Member States to try to ensure quicker results without recourse to infringement proceedings always being necessary.

### *12.2.3. Evaluation results*

#### *12.2.3.1. Priorities*

Although the good figures for notification regarding the transposition of the existing secondary Community Law, our existing pro-active infringement policy and prioritisation of specific issues should be maintained and further developed as a strategy in order to persuade Member States to approve ongoing legislative proposals and mostly to try to push back the increasing number of complaints year after year.

On the control of the implementation of Directives, the implementing national provisions have been checked routinely by the officials responsible for the follow-up of national legislation. However, the introduction of an obligation for the Member States to provide systematically, for each directive, correlation tables to the Commission services would increase transparency and user-friendliness of national legislation, would facilitate the dialogue with the Commission on transposition of single market directives and could represent a useful tool for both administrations and stakeholders.

A second priority concerns the Community own resources. Those resources within the area of indirect taxation are to include those accruing from VAT and are obtained through the application of a uniform rate of tax to bases of assessment determined in a uniform manner and in accordance with Community rules. Infringements with a possible impact on own resources are mostly initiated by cases detected through own investigation. Their purpose is to take care of the equal treatment of the Member States vis-a-vis their contribution to the Community own resources.

A third pillar regarding the prioritisation policy within the domain of indirect taxation, is that the Commission has increased its efforts to ensure alignment of Member States' indirect tax legislation with the requirements of primary and secondary Community law, by intensifying its infringement action following the adoption of new Directives and by pursuing a more targeted infringement approach in support of ongoing policy initiatives.

Lastly, in the field of car taxation, object of many complaints and petitions, the Commission uses article 90 of the EC Treaty as interpreted by the Jurisprudence of the Court of justice, to take care that the Member States do not tax in a discriminatory way, at the time of registration, the second-hand vehicles bought in the other Member States.

For **indirect taxation** issues, the Commission opened 211 new infringement cases 134 of which related to VAT, 35 related to excise duties and 42 regarding car, energy and environmental taxation.



During 2008, 51 opened infringement cases were closed after Member States modified their legislation and therefore complied with Community Law; most of the time we had to refer the case to the Court of Justice before compliance was achieved.

Both the enlargement and the strategic objectives adopted by the Commission for the period 2005-2009, were thus for another successive year reflected both in a considerable number of infringement cases and a considerable input related to new Court cases. During the year 2008, the Court of justice has delivered 29 judgments related to indirect taxation (26 in the domain of VAT and 3 regarding other indirect tax issues), mostly judgments in consequence of a preliminary question in pursuance of which the Commission has given its advice.

The volume of petitions in the different sectors falling within the competences of the Commission services in this area is relatively moderate and stable (28 new petitions have been introduced in 2008).

#### 12.2.3.2.Planned action (2009 and beyond)

One of the specific objectives planned for the mid-term is to create a simpler and transparent tax environment for individuals, SME's and other businesses in cross-border transactions through the control of the application of Community law, modernisation, better coordination and harmonisation of tax systems in the Internal Market.

Since VAT has been identified as causing a high level of administrative burden for business, the Commission is seeking to book results in simplifying and rationalising the VAT legislation. The 'production' of legislative proposals are likely to reduce the administrative burden.

In order to ensure Member States' compliance with EU law, and as a result of targeted monitoring, the number of infringement procedures that could be closed in 2008, should be kept as a reference for the year 2009 and beyond. If the number of infringements remains stable, an increase in the number of closed cases is envisaged.

### 12.3. Situation in the sector of DIRECT TAXATION

#### 12.3.1. Current position

##### 12.3.1.1.Existing measures in force

*See Annex I*

##### 12.3.1.2.Report of work done in 2008

*Volume of enquiries, complaints, infringements work and petitions, and prioritization among them*

In the area of **direct taxation**, the objectives adopted by the Commission for the period 2005 - 2009, were yet again reflected in an increasing number of infringement cases (almost 35% more than in 2007) and increased input into new Court cases. As in previous years, the main focus in 2008 was on breaches of Community law, in particular those concerning the application of the Treaty freedoms in respect of differential treatment of domestic and cross-border situations. In addition, infringement action was targeted at those areas where the Commission sees scope for co-ordination of Member States' direct tax systems, as highlighted in the 2006 Communication on Co-ordinating Member States' direct tax systems in the

Internal Market. In this respect, priority was in particular given to infringement cases in respect of exit tax rules on individuals and companies (7 new cases opened in 2008) and discriminatory tax treatment of foreign charities (12 new cases in 2008).

In 2008 the Court of Justice delivered 25 judgments related to direct taxation. Most of the Court's judgments in this area (21) concerned references for preliminary rulings. The following cases were of particular relevance:

In *Lidl Belgium GmbH & Co KG*<sup>396</sup>, the Court held that the non-deductibility of losses incurred by a permanent establishment in another Member State constitutes a restriction on the freedom of establishment, but that such a restriction may be justified by the need to prevent a double deduction of losses. With reference to its judgment in *Marks & Spencer* (C-446/03), the Court stressed that a measure which restricts the freedom of establishment goes beyond what is necessary to attain the objectives pursued where a non-resident subsidiary has exhausted all possibilities to offset, carry forward or carry back the losses incurred in the Member State where it is situated.

In *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*<sup>397</sup> the Court ruled that a Member State which grants relief for losses incurred by a permanent establishment in another Member State may provide for a rule to recapture such relief when that permanent establishment generates profits in subsequent years. The Court held that the German rule in issue was justified by the need to ensure the coherence of the German tax system, since there was a direct and personal link between the deduction of the losses and the recapture in subsequent tax years.

In *Eckelkamp*<sup>398</sup> and *Arens-Sikken*<sup>399</sup> the Court held that inheritance tax rules which provided for a less favourable treatment of cross-border inheritances, as a result of the non-deductibility of related debts for the purpose of determining the assessment base for taxation, constituted a restriction on the free movement of capital.

In *Société Papillon*<sup>400</sup> the Court held that the French rules, under which a resident company could not consolidate with its French lower-tier subsidiaries held through a non-resident intermediary company, resulted in a different treatment of cross-border and purely domestic situations. The Court held that this constituted a restriction on the freedom of establishment which could not be justified by the need to ensure a *balanced allocation of taxing powers*, as the case concerned the taking into account of losses within a single Member State, or by the need to safeguard the coherence of the French tax system.

Regarding the **petitions** in the direct tax area, most petitions relate to possible infringements of Treaty freedoms and instances of double taxation due to the simultaneous application of different Member State tax laws.

As regards **direct taxation**, 143 new infringement cases have been opened in 2008, a marked increase from 2007 (almost 35%).

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<sup>396</sup> Judgment of 15.05.2008, case C-414/06

<sup>397</sup> Judgment of 23.10.2008, case C-157/07

<sup>398</sup> Judgment of 11.09.2008, case C-11/07

<sup>399</sup> Judgment of 11.09.2008, case C-43/07

<sup>400</sup> Judgment of 27.11.2008, case C-418/07

During 2008, 34 opened infringement cases were closed after the Member States concerned modified their legislation to comply with Community Law.

- In view of the lack of secondary Community legislation in the direct tax area, the majority of enquiries and complaints in this area (a total volume of 303 in 2008) relate to the application of the fundamental Treaty freedoms in respect of differential treatment of domestic and cross-border situations. They therefore fall mainly into the second priority category of the Communication COM(2007) 502 concerning 'breaches of Community law, raising issues of principle or having particularly far-reaching negative impact for citizens, such as those concerning the application of Treaty principles (...)'.  
• Judging from the ever increasing number of enquiries, complaints and references for preliminary rulings in the direct tax area, the external interest in this area is substantial and growing. Given the lack of progress toward positive integration, which is at least partly due to the unanimity requirement in tax matters, this trend is likely to continue and intensify over the coming years.  
• Priority is given to those cases which reveal clear and serious infringements of Community law that prevent EU citizens and enterprises from making use of their rights to establish themselves or invest in other Member States. Moreover, particular attention is paid to those areas where the Commission sees scope for co-ordination of MS' direct tax systems, as highlighted in the 2006 Communication on Co-ordinating Member States' direct tax systems in the Internal Market (COM(2006)823 of 19.12.2006) and the subsequent specific communications on cross-border losses, exit taxes and anti-abuse rules. In addition, work on the current priority areas (including taxation of cross-border dividend payments and cross-border pensions) will continue.

The volume of petitions in the direct tax area is relatively moderate and stable (19 petitions in 2008).

#### *Recently adopted measures requiring additional work*

There are no recently adopted measures in the direct tax area which require additional work.

#### *New measures requiring transposition work*

Regarding direct taxation, no new measures are envisaged for 2009.

#### *12.3.2. Evaluation based on current situation*

The situation in the direct tax area is changing as the infringement action and the number of references to the Court has increased in recent years and this trend is likely to continue. The key challenges are to manage this increase in activity and to achieve correct application of Community law in this largely unharmonised area.

A number of measures have already been taken to try and improve the situation. This includes a more strategic approach to infringement action in this area by focusing on specific priorities and adopting a more horizontal approach to similar infringements in different Member States.

Moreover, the Commission is encouraging Member States to take a more pro-active approach to removing existing tax obstacles by examining the scope for co-ordination of MS' direct tax systems. As outlined in the 2006 Communication on Co-ordinating Member States' direct tax systems in the Internal Market (COM(2006)823 of 19.12.2006), the aim of this initiative is to ensure that national tax systems comply with Community law and interact coherently with each other. The initiative seeks to remove discrimination and double taxation for the benefit

of individuals and business while preventing tax abuse and erosion of the tax base. Coordinated solutions could help to remove discrimination and eliminate remaining tax obstacles to cross-border activity and thus help to reverse the trend of increased litigation by taxpayers in national courts and the ECJ.

### *12.3.3. Evaluation results*

#### 12.3.3.1. Priorities

As far as direct taxation is concerned, the priorities set for 2008 remain unchanged for 2009.

#### 12.3.3.2. Planned action (2009 and beyond)

Given the evaluation of the current situation, continued and intensified infringement action is envisaged in the direct tax area.

### *Common Consolidated Corporate Tax Base (CCCTB)*

In the medium term, adoption by the Council of the planned legislative proposal for a Common Consolidated Corporate Tax Base (CCCTB) would require substantial implementation/ transposition by Member States and conformity assessment by the Commission possibly combined with expert group/ committee meetings to manage the application of the measure. Once adopted and implemented, CCCTB would reduce the scope for cross-border restrictions and thus result in a decrease in infringements in the corporate tax area.

### *Amendment Savings Directive<sup>401</sup>*

The European Commission on 13 November 2008 adopted an amending proposal to the Savings Taxation Directive, with a view to closing existing loopholes and better preventing tax evasion. The Commission proposal seeks to improve the Directive, so as to better ensure the taxation of interest payments which are channelled through intermediate tax-exempted structures. It is also proposed to extend the scope of the Directive to income equivalent to interest obtained through investments in some innovative financial products as well as in certain life insurance products. Adoption by the Council would require substantial implementation by Member States and conformity assessment by the Commission possibly combined with committee meetings to manage the application of the measure.

## **13. EDUCATION AND CULTURE**

### **13.1. Current position**

#### *13.1.1. General introduction*

##### 13.1.1.1. Education and vocational training

The main legal provision applicable is article 12 of the Treaty, establishing the principle of prohibition of any discrimination on grounds of nationality within the scope of application of

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<sup>401</sup> Directive 2003/48/EC on taxation of income from savings (OJ L 157 p 38 of 26.06.2003)

the Treaty<sup>402</sup>. Taken together, the Court's case law, based on Articles 12, 17, 18, 149 and 150 EC can be considered to underpin the free movement of students as a self-standing area of Community law. On that basis, a student who moves from his Member State of origin to another to carry out all or part of his/her studies, is protected not only against discrimination on grounds of nationality in the second Member State, but also against prejudicial treatment in his/her Member State of origin on grounds (directly or indirectly) related to the fact that s/he has studied abroad. This new standard finds its application, e.g., when a student asks his/her own Member State for the portability of a grant or scholarship in order to continue studying in another Member State<sup>403</sup>.

In secondary legislation, there are no specific binding Community acts in the field of education, in the light of Article 149, paragraph 4, of the Treaty:

«In order to contribute to the achievement of the objectives referred to in this Article, the Council, acting in accordance with the procedure referred to in Article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States.»

Article 150, paragraph 4, of the Treaty, related to vocational training contains a similar provision.

Nevertheless, secondary legislation adopted on the basis of other articles of the Treaty includes provisions concerning students. An important example is Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Students are an important category of citizens moving between Member States and the Directive contains key provisions related to students on, for example, rights of residence for students legally enrolled for education or vocational training, and on equal treatment of EU citizens with specific rules on social assistance and maintenance grants. Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications is also important for the recognition of academic qualifications, given that academic qualifications are very often used directly for professional purposes.

#### 13.1.1.2.Sport

In the area of amateur sport, the Commission considers amateur sport to be a social advantage in the context of the free movement of workers. According to Article 7(2) of Regulation (EEC) 1612/68<sup>404</sup>, migrant workers have to be treated equally with nationals of the host country concerning access to employment, as well as working conditions and social advantages. The Court has held that these cover non financial advantages, in particular those which would facilitate their integration into the host Member State.

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<sup>402</sup> The Court of Justice has held that the field of education is among those included in the scope of the Treaty under Article 12. Inter alia, see the judgment of 11 July 2002 in the case C-224/98, *D'Hoop*, grounds 29 to 32; judgment of 15 March 2005 in the case C-209/03, *Bidar*, operative part. Article 12 must be read in conjunction with the provisions of the Treaty on citizenship of the Union, i.e. articles 17 and 18.

<sup>403</sup> Judgment of the Court of 23 October 2007 in the joint cases C-11/06 and C-12/06, *Morgan and Bucher*.

<sup>404</sup> Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

Additionally, the Commission takes into account the recent ECJ case law<sup>405</sup> which considers that Union citizenship is destined to be the fundamental status of nationals of the Member States. In that regard, the Commission considers that the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to practice sport as amateurs in principle on the same footing as its nationals. Consequently, in exercising that right in another Member State, persons are in principle entitled, pursuant to Article 12 of the Treaty, to treatment no less favourable than that accorded to nationals of the host State.

The exceptions to this principle of equal treatment may only be accepted in duly justified cases, in particular where they result from the specific characteristics of sport, as explained in the White Paper on sport<sup>406</sup>.

### **13.2. Report of work done in 2008**

The Commission based its work for the application of Community law in 2008 on the above legal provisions and case law.

In the area of education and training, activities can be divided into four specific categories:

Access to educational institutions in a Member State for students from other Member States. The principle of non discrimination (12 CE) is the main rule there. Among seven cases handled by Commission services in this sector in 2008, the cases against Austria and Belgium concerning access to their universities, principally for medical and related studies, by candidates from Germany and France respectively, remain suspended for five years. The Commission is closely monitoring the impact of the conditions imposed by those Member States, requiring them to submit to the Commission statistical data<sup>407</sup> which will enable a judgment to be drawn on whether the measures are necessary and proportionate. Moreover, the preliminary case C-73/08, Bressol, submitted to the Court of Justice in 2008, deals with the same issues and may impact on the handling of these cases.

The conditions for awarding grants, either to cover tuition and registration fees, or to cover living expenses. This issue is examined both in connection with the host country, concerning students from other Member States, and in relation to the country of departure, which, under certain conditions (Case C-11-06, Morgan), is obliged to award grants to students who decide to go to another country for all or part of their studies.

Other rights of students in the host country during their studies, in order to ensure an equal treatment with domestic students. To this category belongs the issue of reductions on transport tariffs, for all regular students in a Member State, to the same extent as for the national students. This issue, with four cases in 2008, has been taken up with the three Member States concerned.

The academic recognition of diplomas. The Commission receives a lot of correspondence on this issue, relating particularly to excessive delays in recognising diplomas or periods of study, exceeding a reasonable cost for such recognition, not permitting appeals against negative decisions or not presenting justifications for such decisions.

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<sup>405</sup> See Cases C-184/99 *Grzelczyk*, paragraphs 31 to 33; C-85/96, *Martinez Sala*, paragraph 63; C-158/07 *Förster*, paragraphs 37 to 43.

<sup>406</sup> White paper on sport, 11 July 2007, COM (2007) 391 final.

<sup>407</sup> The first set of statistics was provided by Austria on December 2008. Belgium is expected to provide its first statistics by spring 2009.

In dealing with this issue, the role of "soft law", consisting principally of Recommendations of the European Parliament and of the Council, is particularly important in providing a framework in which the difficulties encountered by citizens can be resolved<sup>408</sup>. In this context, the European Qualifications Framework will have a significant impact. Valuable services are also offered in this area by the NARIC network (National Academic Recognition Information Centre)<sup>409</sup>. The Commission has contributed to the establishment of this network and our services often advise the interested persons to address their demands to NARIC.

As regards the tools for the application of Community law, the Commission has also started using the EUPilot scheme with those Member States that participate and has the intention to use it more systematically.

As for Member States which have not joined the EUPilot system, the Commission uses the traditional means of correspondence with national authorities through the Permanent Representation. The results of such communications are satisfactory. To cite one example, after contacts with the French authorities in a matter of conditions of access to further medical studies for French nationals who had completed their initial studies abroad, the authorities have indicated their intention to amend their legislation accordingly.

In the area of sport, the Commission received in 2008 an increasing number of complaints concerning cases of discrimination on grounds of nationality. These cases mainly concerned access to both individual and collective competitions in various sports such as football, baseball, volleyball, squash and shooting. At the same time, the Commission continued to monitor infringement procedure n° 2007/4126 related to access to individual judo competitions for non nationals in Belgium. The Commission also continued its dialogue with sport associations as foreseen in the White Paper on sport. In this framework, the Commission analysed the UEFA "Home-grown players" rule and its compliance with Community law and disapproved the FIFA "6+5" rule which constitutes direct discrimination on grounds of nationality forbidden by article 39 of the Treaty.

### **13.3. Evaluation results**

#### *13.3.1. Priorities*

An area requiring attention is the mobility of students within the European Union. We wish to strengthen the confidence of students in the European Union, with faster and more dynamic handling of cases involving their mobility, in order to ensure that the positive results obtained by mobility will not be contradicted by negative treatment either by the host Member State or Member State of origin.

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<sup>408</sup> We mention some recent and important recommendations: Recommendation of the European Parliament and of the Council of 10 July 2001 on mobility within the Community for students, persons undergoing training, volunteers, teachers and trainers (Official Journal L 215 , 09/08/2001 P. 0030 – 0037); Recommendation of the European Parliament and of the Council on the establishment of the European Qualifications Framework (EQF) for lifelong learning; Recommendation on the establishment of the European Credit system for Vocational Education and Training (ECVET); European Quality Assurance Register (EQAR); European Quality Assurance Reference Framework (EQARF). The list is not exhaustive.

<sup>409</sup> Website <http://www.enic-naric.net/>

### 13.3.2. *Planned action*

Noting that the area of education is a separate chapter of the *acquis communautaire*, it is intended to support its implementation by:

- Opening formal proceedings in cases which, in the Commission's view, represent clear infringements of Community law particularly where other potentially more efficient methods of resolving the issues do not seem feasible;
- Participation in significant preliminary references to the Court, when matters relating to education and sport are involved.
- Increasing use of the EUPilot tool in cases which appear to involve one-off misapplications of principles which are otherwise accepted by the Member State concerned;
- The provision of guidance, in a form to be determined, to support Member State administrations, students and other stakeholders, with a clear description of the implications of the state of the law, jurisprudence and practice in the field of education and amateur sport.

## **14. HEALTH AND CONSUMERS**

### **14.1. Introduction**

The activity of the Commission in this area concern three main sector - consumer affairs, public health, and food and feed safety including veterinary and phytosanitary matters. This sector has one of the largest volumes of legislation. That requires considerable effort to monitor, manage and up-date given its inherent technical complexity (see Annex I paragraph VI for a comprehensive listing of the legislative *acquis* for each policy area). The Commission services pay considerable attention to enforcing the application of Community *acquis* in this area. The policies and laws for which the Commission is responsible in this sector affect the daily lives of most European citizens. This *acquis* must be applied and enforced in a way that benefits citizens, empowers consumers and renders the advantages of the internal market a reality.

This part describes how the Commission has evaluated its *acquis* in this area to ensure coherence and stability in achieving the policy goals. While much work has been done to ensure that citizens fully benefit from the safety requirements of our legislation, we continue to explore how to strengthen remedies and enforcement measures to achieve effective implementation. We address late transposition of Directives by swiftly launching infringement proceedings against Member States that have failed to transpose. We do so at a more rapid speed (12 months) than the average processing speed in other departments of the Commission (14 months). In circumstances of inadequate application of legislation, the Commission exploits a combination of methods through its "tool-box" to achieve compliance.

We know that despite efforts to accelerate processing, infringements continue to achieve results in a gradual way. Prevention of infringements through strong partnerships with Member States may often resolve an enforcement issue more effectively. Often Member States are not fully aware of the scope and nature of their legal obligations. Guidance documents on complex pieces of legislation have been particularly conducive to enhancing



better application of the acquis on the ground. Other times, Member States fail to put in place adequate human and institutional capacity (e.g. Greece's veterinary control system) to properly apply legislation in key food safety sectors.

As regards in particular the food safety acquis (including animal health and plant health), in addition to the efforts made on the legislative front, 2008 was also characterised by an increased attention to improving the efficiency of the Commission services' enforcement action in relation to the existing acquis. The Commission services have re-focused their work to ensure sustained and coordinated attention to all issues related to the implementation of the Community acquis in those areas. There is a particular focus on ensuring that the legislative framework established by Regulation (EC) No 882/2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules is correctly enforced. Official controls (e.g. inspection activities, audits, sampling and analysis) are a key tool to ensure correct enforcement of Community legislation in the areas in question.

#### *14.1.1. Prevention*

Laws cannot be properly applied unless they are fully understood by those that enforce them or apply them to specific circumstances in order to comply with its provisions.

The Commission has issued implementation guidelines on the correct application of their food safety legislation. In this context, a guidance document on the implementation of specific provisions of the General Food Law under Regulation (EC) No 178/2002 was published. In addition, in the interest of transparency, the Commission has encouraged all parties concerned to openly discuss the implementation and application of the Regulation in forums where Member States can be consulted and where different socio-economic interests can be adequately expressed.

Another example of proactive prevention by the Commission is the publication of a guidance document in relation to Regulation (EC) No 882/2004 concerning microbiological sampling and testing of foodstuffs. This document, which is directed at competent authorities carrying out official controls, aims to advise on how to engage in official sampling, the requirements of official laboratories, analysis methods to be used for official samples and microbiological criteria applied to official samples.

Moreover, since the adoption of the new rules on the hygiene of foodstuffs (Regulations (EC) Nos 852/2004, 853/2004 and 854/2004) and of the rules on official controls (Regulation (EC) No 882/2004), the Commission held a series of meetings with experts from the Member States in order to examine and reach a consensus on a number of implementation issues concerning the new Regulations. As a result a guidance document was issued for the benefit of competent authorities and food businesses in the Member States and in third countries on certain key questions with regard to the implementation of the new food hygiene import requirements and on related subjects.

Also for the implementation and consistent application of Directive 91/414/EEC concerning the placing of plant protection products on the market, the Commission has adopted 38 guidelines. Three additional guidelines were adopted in 2007 and one existing guideline was revised.

The Commission launched in 2006 a training programme "Better Training for Safer Food" aimed at organising a Community training strategy in the areas of food law, feed law, animal

health and animal welfare rules, as well as plant health rules. Training is designed for all staff of competent authorities of Member States involved in official control activities so as to keep them up-to-date with all aspects of Community law in the areas specified above and to ensure that controls are carried out in a more uniform, objective and adequate manner in all Member States.

The initiative comprises training programmes on subjects where needs for improved application of Community law have been identified. The number of programmes and the number of people trained have increased each year since the initiative's launch. Programmes in areas such as food hygiene and controls, plant health and prevention of TSE ran for the first time in 2008 and programmes covering subjects including feed law are to begin in 2009.

Around 4,000 people have been trained in the programmes starting in 2008. The number of participants should in time reach an annual average of 6,000. This should further contribute to increased awareness and application of Community norms and standards on the part of national authorities.

To prevent non-compliance to EU standards of products originating from Africa, the Better Training for Safer Food in Africa programme is planned to begin during 2009-2010. This activity is aimed at better enabling African countries to ensure that their food and agricultural products comply with EU and international SPS standards.

Another type of prevention is provided for in Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations. This Directive obliges Member States to notify to the Commission, before they are adopted, draft acts containing technical standards and regulations. During 2008 the Commission services responsible for health and consumers examined 180 notifications of draft legislations in order to avoid that Member States adopt legislation which would be incompatible with Community law.

Furthermore, the rapid alert system for food and feed (RASFF) is an effective tool to exchange information about national measures taken responding to serious risks detected in relation to food or feed<sup>410</sup>. This is a concrete and visible result of a successful European integrated approach to ensure food safety. It helps Member States to act more rapidly and in a coordinated manner in response to a health threat caused by food or feed. Its effectiveness is ensured by keeping its structure simple: it consists essentially of clearly identified contact points in the Commission and at national level in member countries, exchanging information in a clear and structured way by means of templates.

The Commission together with Member States continues to work hard in further shaping this essential tool that is contributing to high food safety standards in the EU, preventing dangerous food or feed from reaching the consumer and allowing swift action to be taken to remove such products from the market. In 2008, a total of 3099 original notifications were transmitted through the RASFF; 1710 market notifications and 1389 border rejections. 549 market notifications were classified as alerts, and 1161 as information notifications.

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<sup>410</sup> The legal basis of RASFF is Article 50 of Regulation (EC) No 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, p. 1. Regulation as last amended by Commission Regulation (EC) No 202/2008, OJ L 60, 5.3.2008, p. 17.

Discussions with Member States either bi-laterally or multilaterally often identify areas of difficulty in fully appreciating the nature of specific legislative instruments. The Commission services often provide detailed interpretations of specific provisions in order to achieve broad but uniform understanding of specific provisions.

#### *14.1.2. Audits and Inspections*

Another aspect of prevention is the ability of the Commission services to see for themselves the realities of enforcement on the ground. Enforcement of the food safety legislation would be weak if the FVO was not able to examine whether Member States properly apply food and feed safety controls.

Each year the FVO develops an audit and inspection programme identifying priority areas and countries. It carries out around 250 audits and inspections, including both general and specific audits, annually. Following each, a report is issued which sets the actions needed to improve compliance. The large majority of weaknesses in control systems identified by the FVO are normally addressed through specific action plans drawn up by national authorities in response to its recommendations.

In recent years, the FVO has developed overall country profiles for each Member State and for the EU's main trading partners. These profiles bring together and summarise the results of general and specific audits and inspections over time and across all relevant sectors. They can thus help to identify systemic weaknesses in the overall design and application of national control systems. As these results are progressively refined and validated, remedial action can be proposed that addresses the underlying cause of weaknesses that are common to a number of specific sectors, for example, the absence of a system of documentary records of controls or the absence of an effective system of sanctions for non-compliance.

#### *14.1.3. Prioritisation of Infringements*

In the field of Health and Consumer the Commission launched 298 new cases (including the 243 cases for non communication; 50 new complaints, 5 cases on our own initiative). 350 letters of formal notice were sent (333 for non communication, 17 for substantive cases). In total the Commission closed 377 cases (311 for non communication, 66 for substantive cases).

2008 saw the development of a decision tree for purposes of using infringement resources to resolve a problem. This decision tree now helps staff members increase efficiency and accelerate the rate of processing of infringements. The Commission services in the field of Health and Consumer continues to deliver one of the highest numbers of proposals for Commission decisions on infringements.

This can mainly be attributed to the fact that the Commission services in this field have been taking internal measures to improve its processing speed, without recourse to additional resources, through prevention, problem-solving (e.g. EU Pilot project) and prioritisation (e.g. strategy paper and implementation planning).

Although SANCO infringement cases are invariably technical and complex in nature requiring considerable efforts in satisfying the burden of proof on non-compliance, we have referred Member States to the Court of Justice on 13 occasions.

The processing speed for infringements in this domain will always be challenging given that the Commission bears the burden of proof to show systematic and persistent non-compliance

to our *acquis* by Member States. Delays caused by the necessity to gather the necessary body of evidence to achieve successful results before the Court of Justice have been steadily addressed so that by the end of 2008 the number of cases in SANCO's portfolio has been reduced significantly.

The Commission services continue to treat non-communication of national measures transposing Directives or other notification requirements as a top priority. Late notifications in the field of food and feed safety, especially by Portugal and Italy, account for the bulk of the shortfall.

Compliance of transpositions by Member States is facilitated by insisting on the obligation to have a concordance tables to facilitate such verification. The programme of positive action to facilitate the exchange of experience between Member States between the adoption of the new legislation and its transposition will be extended beyond consumer and health policies, to the food safety sector.

Special attention will be given to verifying the transposition of provisions which are crucial to the effectiveness of food safety, animal health and animal welfare, which are in the remit of Member States. Infringements will be launched where appropriate and according to prioritisation.

Finally, for low priority cases, attempts will be made in the first instance to find solutions with the Member State concerned through partnership channels (e.g. increased use of the EU Pilot project).

#### *14.1.4. Future Challenges*

The Commission is at the forefront of evolving challenges inherent in this sector that is prone to changes in technology and innovation in production methods. One challenge is to use the array of our tool-box for better application of EC law in a more results-orientated way so that EU citizens see the real benefits in our efforts to better apply our *acquis*.

Another challenge is to simultaneously reduce the body of Directives through using Regulations and carefully plan to escort Member States through the transposition process of any new Directives.

As indicated above, one of the difficult challenges for the application of EU law is to keep up with developments in innovation and new technology. Current dossiers in the fields of the genetic modification, cloning, nanotechnologies, novel foods and emerging issues of the consumer's right to privacy in a digital market place considerable pressure on us as regulators to strike the balance between evidence and science and public concerns and perceptions.

## **14.2. Public Health**

### *14.2.1. General Introduction*

Health is an important priority for Europeans who expect to be protected against illness and disease. Most competence for action in the field of health is held by Member States, but the EU has the responsibility, set out in the Treaty, to undertake certain actions which complement the work done by Member States (for example in relation to cross border health threats, patient mobility, the reduction of health inequalities) and to develop harmonised legislation in the areas of blood, tissues and cells, and organs.

Article 152(4) constitutes the legal basis for the adoption of legislation in the area of public health. However, some health-related legislation has also been adopted using other legal bases such as Article 95.

The main pieces of legislation in the area of public health concern tobacco control (Directive 2001/37/EC concerning the manufacture, presentation and sale of tobacco products and Directive 2003/33/EC relating to the advertising and sponsorship of tobacco products), blood (Directive 2002/98/EC setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components), tissues and cells (Directive 2004/23/EC on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells), the communicable diseases (Decision 2119/98/EC setting up a network for the epidemiological surveillance and control of communicable diseases in the Community, and Regulation (EC) No 851/2004 establishing a European Centre for Disease Prevention and Control).

With regards to tissues and cells, two implementing Directives complete the legislative framework: Directive 2006/17/EC as regards technical requirements for the donation, procurement and testing of human tissues and cells, and Directive 2006/86/EC as regards traceability requirements for the coding, processing, preservation, storage and distribution of human tissues and cells.

#### *14.2.2. Report of Work Done in 2008*

2008 saw significant developments in relation to the transposition of the EU health acquis. The transposition of the Community legal framework for blood safety was completed by all Member States and thus all cases for non-communication of transposition measures in this sector could be closed. Following contacts between the Commission and Member States Health Attachés, the rate of transposition of the Directives in the tissues and cells sector was significantly advanced. However, by the end of 2008, a few Member States were still lacking transposition measures for Directives 2004/23/EC, 2006/17/EC and 2006/86/EC. Consequently, towards the end of 2008, the Commission decided to take to the European Court of Justice Belgium for failure to transpose Directive 2004/23/EC; Belgium, Italy, and Portugal for failure to transpose Directive 2006/17/EC; as well as Belgium; Italy, Portugal and Sweden for failure to transpose Directive 2006/86/EC. In December 2008, Sweden took the necessary measures to comply with its obligation to transpose Directive 2006/86/EC.

Regarding the implementation in the blood, tissues and cells sectors (Directives 2002/98/EC and 2004/23/EC), the Commission regularly collects information through questionnaires and follow-up meetings with competent authorities of Member States. The main implementation challenges are linked to the vigilance, traceability and inspections systems. A common approach concerning inspections and on traceability systems for tissues and cells is currently being developed. Moreover, in both sectors inconsistencies have been detected concerning how Member States apply the principle of voluntary unpaid donation. These issues will be further addressed in the upcoming reports on the implementation of the two Directives.

Finally, following the completion of transposition, a concordance table addressing the most important aspects of the four Directives was sent to the Member States for completion. The returned tables will allow the Commission to adequately monitor the transposition process.

In the tobacco sector the two existing Directives (Directives 2001/37/EC and 2003/33/EC) are well implemented in Member States. The report on the implementation of the Tobacco Advertising Directive 2003/33/EC, adopted on 28 May 2008 COM (2008) 330 final, concludes that the laws to transpose the Directive are in place and are well implemented. Following the judgment of the European Court of Justice in case C-343/05, condemning Finland for allowing the Åland Islands not to transpose the obligation to prohibit the placing on the market of oral tobacco as provided for in Article 8 of Directive 2001/37/EC, Finland took the necessary measures to comply with the judgment and the case was subsequently closed by the Commission in 2008.

Following the introduction of the EU-wide ban, traditional tobacco brand advertising and direct sponsorship of a cross-border nature has ceased within the European Union. Virtual environment, corporate promotion and the lack of cross-border enforcement co-operation are the biggest challenges. In the above-mentioned report, the Commission invited Member States to designate liaison offices, exchange information, take all necessary enforcement measures to bring about the cessation of any infringement and respond without delay to enforcement requests of other Member States.

Regarding the communicable diseases area, the implementing measures lay down the list of diseases and special health issues together with the criteria for their selection (Commission Decision 2000/96/EC), case definitions (Commission Decision 2002/253/EC), events to be reported within the early warning and response system (EWRS), as well as procedures for information, consultation and cooperation under this system (Commission Decision 2000/57/EC). Substantial revisions which occurred recently (Commission Decisions 2007/875/EC, 2008/351/EC and 2008/426/EC) aimed to up-date the existing EU legislation to scientific developments (in clinical, laboratory and epidemiological investigations), new international commitments (entry into force of the International Health Regulations), and the current epidemiological situation (SARS, Avian Influenza in humans, West Nile virus infection). New categories of communicable diseases have been also added to the basic act (Decision 2119/98/EC), namely vector born diseases, zoonotic diseases, other communicable diseases of public health importance, including diseases caused by deliberate release and communicable diseases which may lead to potential emergencies of international concern.

#### *14.2.3. Evaluation, Priorities & Perspectives*

The framework of public health legislation put in place in this decade has shown that meticulous planning and proactive prevention initiatives are necessary to avoid significantly late transposition of the adopted Directives. This part of the *acquis* can achieve enforcement through infringement proceedings, if used strategically, to obtain Member State compliance to key public health sectors.

The Commission will continue its priority efforts to avoid implementation problems through collaborative partnerships with Member States in order to ensure that policy objectives are fully achieved. The volume of issues brought to the attention of the Commission for inadequate application of the public health legislation is, however, very small. The Commission's work in partnership with Member States will seek to provide a clear and efficient basis for application of the public health legislation.

#### *14.2.4. Summary of Sector*

The challenge in this sector in the near future is to achieve effective transposition of public health legislation through closer partnerships with Member States and to guarantee that harmonised rules are uniformly enforced by competent national authorities.

### **14.3. Consumer Affairs**

#### *14.3.1. General Introduction*

There are now more than 490 million consumers in Europe and their expenditure represents over half of the EU's gross domestic product (GDP). Consumers are essential to economic growth and job creation in a large market of products and services.

The Commission's Consumer Policy supports the aims laid out in Articles 153 and 95 of the Treaty establishing the European Community, which promote the interests, health and safety of European consumers. It is designed to ensure that the internal market is open, fair and transparent, allowing consumers to exercise real choice, excluding rogue traders and helping consumers and businesses take full advantage of the market's potential.

With so many new products and brands and increasingly sophisticated financial services, European consumers are having a hard time getting their bearings. They are not comfortable with the idea of buying something in another country of the European Union: only one out of five people have done so over the past twelve months. Yet, the EU single market offers many possibilities for competition and for buying at a lower price.

#### *14.3.2. Report of Work Done in 2008*

Several important steps were made with regard to the further development of the consumer acquis. The year of 2008 saw, in particular, the adoption by the legislator of two Directives which replace the existing rules in relation to timeshare and consumer credit. As a result of the review of the consumer acquis, ongoing since 2004, the Commission adopted in October 2008 a proposal for a new Directive on consumer rights, which would replace four existing Directives related to consumer contract law.

The Commission's proposal for a new Directive on consumer rights brings together and updates the Distance Selling Directive 97/7/EC, the Doorstep Selling Directive 85/577/EC, the Consumer Sale of Goods Directive 99/44/EC and the Unfair Contract Terms Directive 93/13/EC. The impact assessment preceding this proposal evaluated the existing consumer rights Directives and identified the fragmentation of national consumer protection laws as a significant regulatory barrier preventing consumers and businesses from reaping the full benefits of the internal market. The main cause of the fragmentation is the minimum harmonisation clauses contained in the Directives. Businesses are therefore reluctant to sell cross-border or pass the additional costs incurred to consumers. By harmonising the most important aspects of consumer rights legislation consumers and businesses will be able to benefit from the same rules all over the EU. As a consequence consumers will have more opportunities to buy from traders who were previously reluctant to sell cross-border. The new Directive will upgrade existing consumer protection in key areas where there have been large numbers of complaints in recent years, such as doorstep selling. It also adapts the legislation to new technology and sales methods, for example m-commerce (purchase by mobile phone).

Furthermore, the Council and Parliament reached agreement on the new Timeshare Directive, (Directive [2008/122/EC](#) of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts), which will have to be transposed by February 2011. The purpose of the revision of this Directive is to boost consumer confidence in industry and to eliminate the rogue traders who cause problems for consumers and bring legitimate operators into disrepute. Many consumers had experienced problems with new products that had emerged on the market, in particular, with the so-called discount holiday clubs. These products often require the consumer to pay initial membership fees of several thousand euros in order to get access to discounted holidays. Since no EU legislation applied to these products, consumers who had been pressed to sign up for membership were not able to change their mind and withdraw. With the new legislation, consumers purchasing these products will benefit from extensive pre-contractual information, a right of withdrawal and a ban on advance payments during the withdrawal period. The consumer will also enjoy these rights if he wants resell his timeshare through a resale agent or if he wishes to join an exchange system allowing him to benefit from other holiday destinations in exchange of his timeshare.

In 2008 the Commission adopted a report on the impact of Directive 98/27/EC on injunctions for the protection of consumers' interests. The report describes how the Directive has been transposed by the Member States into their national laws and points out the difficulties (such as the cost and complexity of court proceedings) faced by consumer organisations and consumer public authorities when seeking an injunction for breaches of consumer-protection laws, in particular in cross-border cases. The report concludes that the new consumer enforcement network set up by the Consumer Protection Regulation and the new EU rules on the laws applicable to non-contractual obligations should, at least partially, help to overcome these difficulties. Consequently, it was concluded that the Commission would not propose any changes to the Directive and would continue to monitor its application.

The new Directive 2008/48/EC on consumer credit was adopted on 23 April 2008 and will have to be transposed by June 2010. The Directive represents full harmonisation and has two main objectives: creating an internal market in consumer credit while ensuring a high level of consumer protection. The Directive concentrates on transparency and consumer rights and provides for a comprehensible set of pre-contractual information to be given to consumers in good time before the contract is concluded. In order to enhance the comparability of different offers and to make the information better understandable, this pre-contractual information needs to be supplied in a standardised form (Standard European Consumer Credit Information).

Moreover, by virtue of the Directive, consumers will also receive a harmonised set of contractual information and an Annual Percentage Rate of Charge (APR) harmonised at EU level, representing the cost of the credit. The Directive foresees in addition two essential rights for consumers: the right to withdraw from the credit agreement without giving any reason within a period of 14 days after the conclusion of the contract and the right to repay the credit early at any time, while the creditor can ask for a fair and objectively justified compensation.

The Commission is actively supporting the Member States in the transposition process and a first transposition workshop was held in 2008.

*Transposition and application of Directive 2005/29/EC*



2008 was the first year of enforcement of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market. While many Member States were late in transposing the Directive, which led to infringement proceedings for non-communication initiated by the Commission, most Member States notified their transposition measures in 2008. By the end of that year only two Member States, Spain and Luxembourg, had not yet notified transposition measures and, in the case of Luxembourg, the Court of Justice confirmed the infringement on 5 February 2009.

However, it seems that several Member States have either transposed the Directive inadequately or maintained legal measures which deviate from the Directive. With regards to the latter problem, national courts submitted a number of references for preliminary rulings to the Court of Justice. In one of these cases, Case C-261/07 VTB-VAB v Total, the Advocate General delivered an opinion in which she considered the Belgian provisions which prohibit joint offers (i.e. tying the acquisition of one product or service to another, even if the latter is free) to be incompatible with Directive 2005/65/EC. Further references for preliminary rulings are expected in 2009. In addition to this, the Commission will launch infringement proceedings against some Member States in 2009.

In 2008 the Commission decided that in order to ensure a high level of convergence in the interpretation of the Directive it would be appropriate to issue guidelines aimed at helping national authorities and other stakeholders. These guidelines, which will be updated periodically, will be published in the second half of 2009. In order to obtain information on the Directive's operation and implementation, the Commission sent out a questionnaire to all Member States, European Consumer Centres and other stakeholders asking respondents to identify practices which they have encountered. The feedback will inform the Commission about the most problematic practices. When drafting the guidelines the Commission will suggest a common approach to widespread, pan-European unfair commercial practices.

On 24 February 2009, the Commission organised a conference entitled "The Unfair Commercial Practices Directive - One Year After", which brought together members of national enforcement authorities, stakeholders and academics to discuss national experiences with the application of the Directive. The conference allowed participants to exchange best practices in relation to its implementation and enforcement and to discuss interpretation problems, in particular in relation to emerging unfair practices.

#### *Transposition and application of other consumer protection Directives*

In 2008 the Commission stepped up its efforts in carrying out systematic checks on the quality of transposition in the Member States in relation to several consumer protection Directives. In addition, a number of complaints which identified certain potential transposition problems were dealt with.

This led to the opening of infringement proceedings based on the inadequate transposition of Directive 93/13/EEC on Unfair Terms against a number of Member States. In a few instances Member States provided satisfactory responses and the cases were closed. In some cases the Member States concerned changed their legislation. In several cases infringement proceedings will be continued in 2009.

Transposition checks carried out in relation to Directive 99/44/EC on Sale of Consumer Goods and Guarantees and Directive 2002/65/EC on Distance Marketing of Financial Services can be expected to give rise to the opening of infringement proceedings against a

number of Member States in 2009. In addition, several complaints were received in relation to Directive 99/44/EC.

At the end of 2008, Germany amended its transposition of Directive 99/44/EC as a consequence of the Court's judgment in Case C-404/06 *Quelle* and parallel infringement proceedings. According to the new German rules, sellers may no longer require consumers to pay compensation for the use of defective goods until their replacement with new goods.

Transposition checks in relation to other Directives, including Directive 97/7/EC on Distance Contracts and Directive 98/27/EC on injunctions for the protection of consumers' interest will continue in 2009.

In relation to Directive 90/314/EEC on Package Travel, at the beginning of 2008, Italy submitted a draft amendment to its legislation transposing the Directive. The amendment would finally remove a provision under which consumers lose their entitlement to receive refunds from the guarantee fund for the money paid over and for repatriation in the event of insolvency of the organiser if the request has not been made within three months after the end of the journey. However, since the Commission had not been notified of the adoption of the amendment before the end of 2008, it is likely that the matter will be referred to the Court of Justice in 2009.

Finally, there were a number of new requests for preliminary rulings under Article 234 EC in relation to different consumer protection Directives, including Directive 93/13/EEC on Unfair Terms and Directive 85/577/EEC on Doorstep Selling. The cases on 93/13/EEC relate, in particular, to the power and possibly the obligation of national courts to consider the unfair nature of relevant terms of their own motion<sup>411</sup>. One case relates to Directive 85/577/EEC and concerns the question of whether a national court may, of its motion, declare a contract void where the consumer was not informed of his right of withdrawal and did not invoke it before the court.

Apart from Case C-404/06, which concerns Directive 99/44/EC mentioned above, it is worth mentioning the Court's ruling in Case C-205/07 *Gysbrechts*. This case concerns a Belgian provision which prohibits suppliers engaging in distance selling from requiring advance payments or any payment from consumers before expiry of the withdrawal period and, thereby, goes beyond the minimum protection level of Directive 97/7/EC on Distance Contracts. The Court found that Article 29 EC does not preclude such a rule in cross-border distance selling, but does preclude a prohibition on requesting, before expiry of the withdrawal period, the number of the consumer's payment card.

#### *Implementation of Decision 2006/502/EC on lighters*

On 17 October 2008 the Commission sent a letter of formal notice to Germany. This followed Germany's failure to fulfil its obligations under Decision 2006/502/EC as amended by Decision 2008/322/EC. Decision 2006/502/EC is based on Article 13(4) of Directive 2001/95/EC on general product safety and requires Member States to take measures to ensure that until 11 May 2009 only lighters which are child-resistant are placed on the market and to prohibit the placing on the market of novelty lighters. On 19 December 2008 the Commission

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<sup>411</sup> E.g. Cases C-40/08 *Asturcom Telecomunicaciones*, C-137/08 *VB Pénzügyi Lízing*, [C-243/08 Pannon GSM](#), all pending.

was informed that Germany had adopted legislation complying with the Commission Decisions on lighters, which will allow the Commission to close the case in 2009.

### *EU-Sweeps*

In 2008 the second EU "Sweep" was carried out, involving systematic and simultaneous checks in different Member States to investigate potential breaches of consumer protection rules in a specific sector. This second EU-wide investigation looked into websites offering mobile phone services such as ring-tones and wallpapers. The enquiry, which was carried out on more than 500 websites across the 27 Member States, Norway and Iceland, found that 80% of the sites checked needed to be further investigated for suspected breaches of EU consumer rules. Many of the websites targeted children and young people. Problems found included unclear price information, e.g. prices were incomplete or did not include taxes, or related to the fact that customers were not made aware that they were signing a subscription. Large numbers of websites did not provide some of the required contact information on the trader. Other problems related to misleading information where key information was hidden in very small print, was hard to find on a website, or the word "free" was used in a misleading manner so as to entice consumers into long-term contracts.

An intermediate report on the follow-up of the 2007 Sweep related to websites selling air tickets was published in February 2008. The results of the report showed that 40% of the websites with irregularities were corrected as a result of enforcement measures taken by the Member States. Enforcement procedures were initiated and were still ongoing for the remaining cases. Member States will report on the final results of the enforcement phase in the spring of 2009. All ongoing cases are expected to have come to a conclusion by then.

### *Consumer empowerment*

Through the European Consumer Consultative Group (ECCG), SANCO pursued its dialogue with consumer organisations and consulted them on initiatives having an effect on consumers. ECCG members also shared their views as well as their experiences with consumers regarding the application of EU legislation. We have started a process to improve the work and structure of the ECCG.

In 2008 information campaigns raising awareness of EU-wide consumer rights were executed in Malta, Hungary and Cyprus, launched in Estonia and were under development in Latvia and Lithuania. The campaigns contribute to the better enforcement of consumer law by informing consumers about specific rights they have at home and in other EU countries, and by increasing awareness of associations and institutions that provide further information and advice, such as consumer associations, government institutions and European Consumer Centres.

The campaign messages reached (according to data from the Eurobarometer Flash surveys undertaken to verify campaign impact) at least three quarters of the Maltese citizens, 83 % of Hungarian citizens and 97% of the Cypriot population. In addition, materials from equally successful campaigns conducted in previous years in Slovenia, the Czech Republic and Poland were updated, reproduced and redistributed in 2008.

### *Training*

In 2008 the Commission services carried out a series of training courses designed to help build the capacity of European consumer organisations, aiming at providing a better understanding of the consumer acquis and thereby preventing infringements.

#### *Consumer Protection Cooperation (CPC)*

The Enforcement Network, also referred to as the CPC Network, which was set up in December 2006 to stop intra-community infringements of EU consumer laws in cross-border situations, further developed its activities in 2008.

265 new requests for mutual assistance were registered in the database (compared to 256 in 2007) in 2008, a third of which were closed within one year. Some 95 alerts (71 in 2007) concerning suspected or confirmed intra-community infringements were circulated within the Network. In addition, a second joint market surveillance and enforcement exercise was carried out in the form of a sweep on sites selling ring tones for mobile phones (see above) and the network engaged in a series of common activities co-funded by the Commission.

Whilst the Network's development so far has been positive, the practical experience gathered in this second year of operations and, in particular in the context of the joint sweep exercises, also revealed that the Network has not yet reached its full potential. The pressure on the Network is growing as the average time required to handle cases is increasing. Statistical data extracted from the IT-tool used by the Network also shows that some authorities do not connect to the tool as often as a smooth running of the system would require.

In 2008 the Commission services therefore initiated discussion with the Member States on the above described issues with the objective to identify the underlying factors and elements. The issue was further raised in the Competitiveness Council of 2 December 2008.

As a further step, in 2009, the Commission will carry out the first biennial assessment of the Network's operation as provided for in Regulation (EC) No 2006/2004 on Consumer Protection Cooperation, building on reports from Member States and its own experience. A central element of this report will be to identify the shortcomings that need to be addressed so that the Network reaches its full potential. Other activities planned for 2009 include a workshop with Member States dedicated to making the Network's operation more effective.

Lastly, in the broader context of the Consumer Policy Strategy, which emphasizes the importance of enforcement as one of its pillars, the Commission will adopt a Communication on the Enforcement of the Consumer Acquis. It will take stock on what actions have been taken in the field of consumer enforcement, aim to identify the main challenges that need to be overcome and, where appropriate, address any shortcomings through instruments already available to ensure a more effective enforcement of EU consumer law.

#### *RAPEX*

RAPEX is a Community rapid alert system for dangerous non-food consumer products. It ensures that information about dangerous products withdrawn from the EU market and/or recalled from consumers is quickly circulated between Member States and the European Commission, with the aim of preventing or restricting the selling of these products on the market. The system was established by and operates under the General Product Safety Directive (2001/95/EC, the "GPSD").

The total number of notifications sent through the RAPEX system by Member States has risen gradually since 2004 (when the GPSD was transposed into the national laws by Member States). In the fifth year the number of RAPEX notifications quadrupled from 468 (in 2004) to 1866 (2008). In 2008 the number of notifications rose by 16% compared to 2007. The growth in the number of notifications can be ascribed to increasing awareness and attention given to product safety by national authorities and the business sector, more frequent and more effective controls of consumer products on the market, joint market surveillance actions carried out by national authorities, the EU enlargements in 2004 and 2007 and, finally, several training actions and seminars provided by the European Commission for different stakeholders. As in previous years, toys, electrical appliances and motor vehicles were the most frequently notified products.

#### *Revision of the RAPEX guidelines*

In 2008, the Commission launched the revision of the “Guidelines for the management of the Community Rapid Information System (RAPEX) and for notifications presented in accordance with Article 11 of Directive 2001/95/EC” (the “RAPEX Guidelines”), which were adopted in 2004 in the form of a Commission Decision (2004/418/EC).

The decision to revise the RAPEX Guidelines resulted mainly from the need to (i) adjust the operation of the system to best practices that will ensure more efficient and effective functioning of the system and (ii) to take into account the most important developments in the product safety area. The new RAPEX Guidelines will clarify the application of many existing provisions, such as those that regulate the notification criteria and the scope of the system. The new Guidelines will also introduce new provisions which over the years have proved to be necessary for the consistent application of RAPEX notification obligations by all Member States, for example, provisions on confidentiality, the permanent withdrawal of a notification from the system and the temporary removal of a notification from the RAPEX website. The new RAPEX Guidelines will also include the new improved Risk Assessment Method that is being prepared by a team of experts from the Member States. The Commission Decision introducing the new RAPEX Guidelines is expected to be adopted in 2009.

#### *RAPEX seminars*

In 2008, as in previous years, the Commission services organised RAPEX seminars in the Member States. The training sessions took place in Bulgaria, Malta and Portugal. Since the beginning of 2006, a total of 23 Member States hosted RAPEX seminars and over 1000 inspectors have been trained. The seminars are organised for the benefit of the national market surveillance and customs authorities where they can discuss various aspects of product safety, such as: the application of RAPEX, the European legal framework for consumer products, obligations for national authorities and businesses under the product safety law, risk assessment of consumer products and latest developments in the product safety area. Training activities will continue in 2009.

#### *Seminars on businesses' obligation to notify dangerous products*

In 2008, in addition to RAPEX seminars, the Commission hosted in Brussels training sessions on businesses' obligation to notify dangerous products. Training sessions were intended for national authorities from all Member States and EFTA/EEA countries that are in charge of receiving and treating notifications on dangerous products sent by operators. The training sessions lasted for 4 days and in total 50 experts from national authorities were trained.

During this training experts discussed the relevant aspects of the businesses' notification obligation, such as: notification criteria, information to be provided and required follow-up actions, and tested the new on-line system called "Business Application" to be established by the Commission services in this area.

#### *Joint Actions on market surveillance activities*

To support the Member States in their cross-border activities, in 2008 the Commission awarded a financial contribution of EUR 2.6 million to four joint market surveillance actions. These joint actions focused on: toys for children under three years, sun beds and solarium services, cords and drawstrings in children's clothing, and a follow-up of the successful EMARS project (Enhancing Market Surveillance through Best Practice). Joint actions proved to be very successful in delivering concrete results and, in particular, the three-year EMARS project (concluded at the end of 2008) produced a number of important results including a best practice handbook for market surveillance and a Rapid Advice Forum that provides market surveillance officers with access to the expertise of their colleagues in other Member States in a fast and informal manner. To further strengthen cooperation between the Member States on consumer product safety, the Commission will continue joint actions in 2009 and 2010 and will financially contribute to the best proposals suggested by Member States.

#### *The European Consumer Centres Network (ECC-Net)*

In 2008, the European Consumer Centres Network (ECC-Net) helped more than 60.000 consumers with information and advice on cross-border shopping, both in person and online, ensuring that they are aware of their rights, and providing support in handling complaints.

This is an increase of more than 5000 contacts compared to 2007. In 2008 most complaints dealt with by the ECCs concerned products and services (26.8%), selling techniques/unfair commercial practices (23.8%) and delivery (19.9%). The most concerned sectors were air transport and car rentals, accommodation services, fake lotteries and audiovisual equipments. Almost half of the complaints concerned on-line transactions (46%).

Apart from informing consumers on both EU and national rules, as well as advising consumers facing cross-border problems, the ECCs also helped consumers to reach agreements on complaints with traders using out-of-court dispute resolution mechanisms. Contacts are increasing yearly, with a further increase of 30% in 2008.

With the help of latest technology in the form of a new database, which was launched in January 2007 and is continuously updated, co-operation between centres was more efficient and will be further improved in the future. The ECCs also provided valuable input for the European Commission on significant consumer policy issues.

Within the framework of their co-operation the ECCs were running joint projects, such as a review on complaints regarding air passenger rights (led by the UK ECC for 2008), "Howard" the on-line shopping assistant (already in operation on many ECC web sites), an information campaign with leaflets on tourism and a report on "e-commerce" published in May 2008.

The ECCs were key organizers of other awareness-raising initiatives such as the Best Consumer campaign, the campaigns on consumers' rights related to the opening of energy markets on the UEFA-Euro2008 and other information activities.

### *14.3.3. Evaluation, Priorities & Perspectives*

On 13 March 2007 the Commission adopted a Consumer Policy Strategy for 2007-2013. The strategy sets out the challenges, role, priorities and actions of EU consumer policy for this period. The overall objectives of the Strategy are to empower consumers, to enhance their welfare and to protect them effectively. The Commission's vision is to achieve by 2013 a single, simple set of rules for the benefit of consumers and retailers alike.

Given the progress achieved on the review and development of the consumer acquis, effective enforcement will play an important role. This will include, from the Commission's point of view, continued efforts in accompanying the transposition process in the Member States and supervising the transposition and application of Directives by the Member States.

As part of a larger exercise to monitor how well the internal market functions for consumers, SANCO will develop indicators to measure the effectiveness of enforcement at national level. National policies and institutions related to enforcement play a key role in making the internal market function for consumers: free circulation of safe products and the protection of consumers from rogue traders depend on the effectiveness of enforcement and market surveillance in all Member States. Following a pilot project with members of the CPC (Consumer Protection Cooperation) and GPSD (General Product Safety Directive) committees, an expert group will be set up in 2009 to identify the most appropriate indicators, taking account of differences between national enforcement systems.

The Commission is planning to open a period of joint reflection with the Member States on the future role of ECC-Net. In parallel, an evaluation of the Network is foreseen five years after the merger of the two previous networks into ECC-Net. This evaluation should take place in 2010.

### *14.3.4. Summary of Sector*

The challenge in this sector in the near future is to increase EU-wide consumer confidence for cross border shopping through clearer, simplified and harmonised rules that are uniformly enforced by national authorities. Through enhanced application of the consumer acquis consumers should be as confident about making purchases in other countries as they are at home.

## **14.4. Food Safety**

### *14.4.1. General Introduction*

The EU integrated approach to food safety aims to assure a high level of food safety, animal health, animal welfare and plant health within the European Union through coherent farm-to-table measures and adequate monitoring, while ensuring the effective functioning of the internal market. The implementation of this approach involves the development of legislative as well as other actions.

Legislation applicable to the various components of the food chain includes, in addition to the food and feed law, rules applicable to animal and plant health and to the welfare of animals. The issues covered by that vast acquis are high on the EU's agenda. Europe's citizens expect their food to be safe, and safety concerns carry a high political and financial cost. The need to safeguard the EU against animal and plant diseases also remains a top priority.

#### 14.4.2. Work done in 2008

Work is ongoing on the modernisation and simplification of the legislation applicable to food and feed safety, animal and plant health, and animal welfare. The aim is to achieve better enforceability of existing rules, whilst providing for a state of the art legislative framework.

Both the Animal Health Strategy<sup>412</sup> and the recently launched work towards a Plant Health Strategy<sup>413</sup> include the objective of providing the Community with a more rational and directly enforceable set of rules in these areas in order to replace a vast amount of Directives adopted in the course of the last decades (the food safety area counts one of the largest *acquis*, numbering more than 500 Directives).

A recent study on the implementation of Regulation (EC) No 882/2004 on official controls also suggests the need to reflect on another important feature of the enforcement system in the food safety area – the inspection fees (below).

##### *Implementation of Regulation (EC) No 882/2004*

Regulation (EC) No 882/2004 establishes the general principles applicable to the official controls carried out by Member States in the food and feed sectors and in the areas of animal health and animal welfare. A report on the experience gained from the application of the Regulation, on the basis of Article 65 thereof, has been prepared and will be transmitted to the European Parliament and the Council in the course of 2009.

The Regulation contains in particular specific provisions on the financing of official controls. These provisions allow for a great degree of flexibility in the way they are implemented by Member States. An external evaluation of the system was commissioned in 2008 and aimed at providing a better understanding of the functioning of the provisions laid down in Articles 26 to 29 of Regulation (EC) No 882/2004, as currently implemented by the Member States.

The final result of the evaluation, delivered at the beginning of 2009, confirms the complexity of the situation, identifies some shortcomings in the current legislative framework applicable to inspection fees and in its implementation by Member States, and discusses the possible need to review some of the features of that framework. The Commission services, in consultation with the relevant stakeholders, will therefore consider whether changes to the existing legal framework would be needed to make its application easier and its enforcement more efficient.

From the same perspective, a similar review is ongoing with reference to the official controls provisions contained in Council Directive 96/23/EC on measures to monitor certain substances and residues thereof and in Regulation (EC) No 396/2005 of the European Parliament and of the Council on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC.

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<sup>412</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and social committee and the Committee of the Regions on a new Animal Health Strategy for the European Union (2007-2013) where “Prevention is better than cure”. COM(2007) 539 final.

<sup>413</sup> The Council called on the Commission to evaluate the current plant health *acquis* and to consider possible modifications to it, and subsequently present a proposal for a Community plant health strategy. The Commission has launched the evaluation, and a study is expected to start by mid 2009.



All official controls should in fact be conducted according to the principles and overall approach of Regulation (EC) No 882/2004. Therefore, with the objective of better regulation in mind, consideration will be given to the possibility of integrating the rules currently applicable to official controls on pesticides, contaminants and residues of pharmacologically active substances in food into the framework of Regulation (EC) No 882/2004, so as to rationalise and simplify the overall legislative framework and make its application easier.

### *FVO inspections*

At Community level, valuable information regarding the application of Community legislation along the food chain is provided by the inspection activities of the Commission's FVO. Information collected by the FVO during recent years was carefully screened in 2008 to provide an overview of potential shortcomings in relation to the transposition of the many Directives which currently govern activities along the food chain.

As a result of the FVO inspections, a relatively small number of problems linked to transposition have been identified. The Commission services are in contact with the Member States concerned to address these issues through an array of approaches using its tool-box. The FVO continues to screen Directives with the purpose of identifying any significant transposition problems. In a similar vein, the Commission services are considering the most efficient and effective enforcement action with respect to issues other than transposition that have been identified by the FVO.

In three cases the Commission decided to pursue infringement proceedings against Greece because that Member State persistently failed to comply with a range of important components of Community food safety legislation.

The FVO missions have highlighted since 1998 fundamental systemic shortcomings in the performance of the Greek authorities' official controls in the area of food safety, animal health and animal welfare. These shortcomings being partially attributable to the scarcity of human resources in the Greek veterinary services and after considering that the results of the efforts made by the Greek authorities to solve these problems were unsatisfactory, the case was referred to the Court (C-331/07).

In September 2005 the FVO unravelled further evidence of systemic deficiencies in the management of animal by-products. An infringement procedure which brought together a previous case with new elements was initiated and finally referred to the Court of Justice in 2008.

Also following inspections of the FVO, the Community referred Greece to the Court of Justice for failure to apply in a satisfactory way the Community legislation relating to the protection of animals during transport and in slaughterhouses.

Likewise, the Commission decided to refer an infringement procedure against Italy to the Court of Justice on the grounds that a Member State cannot prevail itself of safety issues to impose trade barriers where such issues have already been addressed by the Community in a uniform and evidence-based approach. In this specific case, the Commission was of the view that as Community legislation sufficiently addresses the problem of avian influenza, Italy is not entitled to impose additional measures by making it compulsory to indicate the origin of the product on the labelling of poultry. Therefore, the Commission referred Italy to the Court.

#### 14.4.3. Food Hygiene

The Community Food “Hygiene Package”, which resulted from the White Paper on Food Safety<sup>414</sup> and entered into application on 1 January 2006, is composed of three Regulations consolidating, updating and simplifying the Community legislation on food hygiene:

- Regulation (EC) No 852/2004 of the European Parliament and of the Council on the hygiene of foodstuffs;
- Regulation (EC) No 853/2004 of the European Parliament and of the Council laying down specific hygiene rules for food of animal origin, and
- Regulation (EC) No 854/2004 of the European Parliament and of the Council laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption.

The new rules are based on the principles of a risk-based approach to a comprehensive and integrated food chain – from farm to fork – and the separation of responsibilities of the food business operators and the competent authorities.

The main objective of these Regulations is to place the primary responsibility for food safety at the level of the food business operators. Moreover, the new rules aim at preventing contamination of food from biological, chemical and physical hazards by enabling food business operators to identify such hazards by the application of procedures based on the Hazard Analysis Critical Control Point (HACCP) principles. These procedures became compulsory for all non-primary food operators. The principle of flexibility incorporated in the new rules enables the continued use of traditional methods at any stage of production, processing or distribution of food.

General provisions are laid down for all foodstuffs, while specific provisions are laid down for foodstuffs of animal origin. Measures providing detailed criteria and conditions for the implementation of the above mentioned Regulations have also been adopted. These include:

- Commission Regulation (EC) No 2073/2005 on microbiological criteria for foodstuffs: This Regulation defines two categories of criteria: *i.e.* food safety criteria which are applicable to products placed on the market during their entire shelf-life, and process hygiene criteria to indicate the correct functioning of the production process. Currently, the focus is on the correct implementation of the criteria. The microbiological criteria are also used as references during discussions on food safety standards for global trade within the Codex Alimentarius Committee for Food Hygiene of the FAO and WHO.
- Commission Regulation (EC) No 2074/2005 laying down implementing measures for certain products under Regulation (EC) No 853/2004 of the European Parliament and of the Council and for the organisation of official controls under Regulation (EC) No 854/2004 of the European Parliament and of the Council, and Regulation (EC) No 882/2004 of the European Parliament and of the Council, derogating from Regulation (EC) No 852/2004 of the European Parliament and of the Council and amending Regulations (EC) No 853/2004 and (EC) No 854/2004. This Regulation contains a set of implementing measures such as provisions concerning food chain information, recognised testing

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<sup>414</sup> COM(1999)719.

methods for detecting marine biotoxins, lists of establishments, model health certificates for certain products of animal origin and a derogation for foods with traditional characteristics;

- Commission Regulation (EC) No 2075/2005 laying down specific rules on official controls for *Trichinella* in meat. This Regulation requires the examination for the presence of *Trichinella* parasite in all slaughtered pigs, wild boar and horses, except for pigs originating from *Trichinella* free farms or regions declared as having a negligible risk. The *Trichinella* parasite causes disease in humans when raw (or undercooked) meat from pigs, wild boar or horses is consumed;
- Commission Regulation (EC) No 2074/2005 laying down transitional arrangements for the implementation of Regulations (EC) No 853/2004, (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council and amending Regulations (EC) No 853/2004 and (EC) No 854/2004. The latter Regulation ensures a smooth transition from the old to the new regime until 31 December 2009. The measures include in particular provisions concerning stocks of food of animal origin, placing of food of animal origin on national markets, materials bearing pre-printed health or identification marks, marking equipment, health import conditions, food chain information, training of slaughterhouse staff, certification of establishments and the accreditation of laboratories.

The Commission continued to seek pro-active solutions outside or in parallel with infringement procedures under Article 226 of the EC Treaty by using the preventive mechanism of Directive 98/34/EC (whereby Member States are obliged to notify the Commission of new national technical rules at the draft stage) and “package meetings” organised with Member States to discuss pending complaints/infringements, notifications of draft legislation, as well as other various horizontal issues.

#### 14.4.3.1. Legislative Changes Underway

Because of its innovative nature, the European Parliament and the Council had requested the Commission to prepare a report already after only three years of application, i.e. by 20 May 2009.<sup>415</sup> The report shall, in particular, review the experience gained from the application of the Food Hygiene Package and consider whether it would be desirable and practicable to extend the implementation of hazard analysis and critical control point ("HACCP") principles to the level of primary production. A wide consultation with the Member States and the other stakeholders launched at the end of 2007 was continued in 2008 to identify the main difficulties that were experienced in implementing these Regulations. On this basis, the Commission is preparing the report which will present factually the experience gained, including the difficulties encountered, in 2006, 2007 and 2008 from the implementation of the hygiene package by all actors involved.

The Commission intends also to follow closely the discussions and the development of the microbiological criteria in the Codex Alimentarius Committee for Food Hygiene and to consider baseline studies on certain microbiological criteria to evaluate their correct implementation. Furthermore, the Commission will consider new criteria or update the existing ones taking into account emerging risks and new risk assessments.

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<sup>415</sup> Article 16 of Regulation (EC) No 852/2004; Article 14 of Regulation (EC) No 853/2004; and, Article 21 of Regulation (EC) No 854/2004.

#### 14.4.3.2.Evaluation

The impact of the new principles and requirements introduced by the Food Hygiene Package is positive. By and large, Member States have taken the necessary administrative and control steps to ensure compliance but there is still room for improvement in relation to implementation. This assessment is further supported by the findings of audits and inspections carried by the Commission's FVO.

The main difficulties identified are in relation to certain exemptions from the scope of the Food Hygiene Package, some definitions laid down in the relevant Regulations and the procedure for adapting those definitions and practical aspects concerning the approval of establishments handling foods of animal origin and the marking of such foodstuffs, the import regime for certain foodstuffs, the implementation of HACCP-based procedures in certain food businesses and the implementation of official controls in certain sectors.

#### 14.4.4. *Food Labelling*

Directive 2000/13/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs sets out harmonised rules to enable European consumers to get comprehensive information on the contents and the composition of food products.

##### 14.4.4.1.Legislative Changes Underway

The existing legislation is outdated. The general food labelling legislation has been in force since 1978, while the existing nutrition labelling rules were adopted in 1990. Since then, the number of products has increased considerably and the way marketing is done has evolved as well as consumer demands.

The Commission accordingly adopted on 30 January 2008, a proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers. This proposal combines Directive 2000/13/EC with Council Directive 90/496/EEC on nutrition labelling for foodstuffs into one instrument. In addition, the proposal simplifies the structure of the horizontal food labelling legislation in Directive 2000/13/EC, by recasting and replacing provisions already in place under this Directive.

According to the proposed Regulation, pre-packaged food will have to display key nutritional information on the front of the package. General requirements on how nutrition information should be displayed on food labels are also set out, although there is room for Member States to promote additional national schemes, provided that they do not undermine the EU rules. For public health reasons, the draft Regulation extends the current requirements for allergen labelling to cover non pre-packed food, including food sold in restaurants and other catering establishments. Industry should also benefit from the proposed new rules, as they set up a clearer, more harmonised legislative framework for food labelling and create a level playing field for all operators. The proposed Regulation was drawn up following extensive consultations with consumer organisations, industry and other stakeholders.

##### 14.4.4.2.Evaluation

The general food labelling legislation dates back to 1979. The evolution of both the foods market and consumers' expectations made the update and modernisation of this legislation necessary. To better identify the important points on which to focus modernisation efforts, a

number of surveys and consultations took place and showed that the main concerns regarding the existing legislation were the following: the volume and dispersal of texts making the legislation confusing; there was a significant part of foods that do not provide information that can be important for health related issues, such as allergens; there was misunderstanding among operators and consumers concerning the use of country of origin labelling; there was a legal limbo regarding the ingredients labelling of alcoholic beverages; and the poor legibility of the labels could make it difficult for consumers to use the information and limit their ability to make informed choices.

The revision of the legislation will bring clarity to provisions that apply to all foods. It will ensure that consumers receive the information that can be important in making health related choices, such as those concerning the presence of allergens or the nutrient content of the product. Importantly, the mandatory information must be legible, so that the consumers can easily read the label. The Commission's proposal is in line with the simplification process in the context of Better Regulation. The replacement of the current horizontal labelling Directives by one concise legislative act in the form of a Regulation will provide for better clarity and consistency of application and enforcement of the rules on food labelling across all Member States.

#### 14.4.5. Nutrition labelling

Nutrition labelling rules are laid down in Council Directive 90/496/EEC. This Directive was recently amended through Commission Directive 2008/100/EC to revise and update a number of the technical rules contained therein, such as the list of vitamins and minerals and their recommended daily allowances values, the definition for "fibre" and the list of energy conversion factors.

##### 14.4.5.1. Legislative Changes Underway

As stated above, the Commission adopted on 30 January 2008, a proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers,<sup>416</sup> which will repeal *inter alia* Council Directive 90/496/EEC. The amending Commission Directive 2008/100/EC will be incorporated in the Commission proposal for a Regulation on the provision of food information to consumers during the discussions of this Regulation.

##### 14.4.5.2. Evaluation

The development of Community legislation relating to nutritional aspects of foods such as food supplements, the addition of vitamins and minerals and the harmonisation of nutrition and health claims meant that there was a need to update the certain technical aspects of the existing rules on nutrition labelling. The adoption of Commission Directive 2008/100/EC ensures coherence between different pieces of legislation. The inclusion of a definition of fibre in Community legislation meant that this could be reflected in discussions on the revision of the definition of fibre at international level in Codex Alimentarius.

With respect to the general review of the nutrition labelling, there is wide agreement that the effectiveness of that labelling can be strengthened as a channel for information to consumers to support their ability to choose a balanced diet. The Commission conducted consultations of

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<sup>416</sup> COM(2008)40final.

stakeholders and the feedback was that there is dissatisfaction among stakeholders on the current legislation. The proposal for the revision of the legislation aims to overcome the problem of disparity of the inclusion of nutrition labelling in different Member States or categories of food, by making the nutrition labelling of a limited number of nutritional elements mandatory on the majority of processed food. The proposal to revise the legislation mentioned under the food labelling section will help to ensure that consumers across the Community have access to relevant nutrition information so as to make informed choices, taking into account the nutrition-related advice provided through Member States' public health activities.

#### 14.4.6. Nutrition and Health Claims

Regulation (EC) No 1924/2006 of the European Parliament and of the Council, which entered into force on 1 July 2008, lays down harmonised rules for the use of health or nutritional claims (such as “low fat”, “high fibre” and “helps lower cholesterol”) on foodstuffs based on nutrient profiles. The latter Regulation aims at ensuring that any claim made on a food label in the EU is clear, accurate and substantiated and will thus enable consumers to make informed and meaningful choices when it comes to food and drinks. This should also contribute to a higher level of human health protection, as it ties in with the Commissions campaign for healthier lifestyle choices by allowing citizens to know exactly what they are consuming. The Regulation also strives to ensure fair competition and promote and protect innovation in the area of food. Only products offering genuine health or nutritional benefits will be allowed to refer to those on their labels.

By means of Regulation (EC) No 353/2008, the Commission established implementing rules for applications for authorisation of health claims, as provided for in Article 15 of Regulation (EC) No 1924/2006. These implementing rules, together with guidance developed with the European Food Safety Authority (EFSA), aim at assisting applicants in elaborating and lodging application dossiers containing, *inter alia*, scientific data for further assessment by the European Food Safety Authority.

##### 14.4.6.1. Legislative Changes Underway

In addition, substantial preparatory work has been completed for the establishment of specific nutrient profiles, as provided for in Article 4 of Regulation (EC) No 1924/2006. Nutrient profiles will determine whether foods are eligible, on the basis of their nutrient composition, to bear claims. Such profiles will be based primarily on the levels of nutrients for which excessive intakes in the overall diet are not recommended (e.g. fat, saturated fat, salt and sugars).

The establishment of nutrient profiles is a complex exercise that needs to take into account dietary recommendations, public health considerations and generally acceptable scientific evidence regarding the relationship between diet, nutrition and health (for which the European Food Safety Authority provided advice in January 2008), as well as industrial/commercial considerations (including innovation) and cultural and dietary/culinary considerations.

The Commission has conducted specific and extensive consultations with stakeholders on the establishment of nutrient profiles. Food producers and retailers anticipate some economic impact due to the restrictions on bearing claims for some products, while consumer groups predict social benefits. This could reduce the obesity levels across Europe and help to prevent

cardiovascular and other diet-related diseases through the support and promotion of a balanced and healthy diet.

#### 14.4.6.2. Evaluation

While the main elements of the Regulation are still in the implementation phase, the new Regulation already prohibits some misleading marketing practices and benefits the European consumers. Claims like "99 % fat free" are prohibited and the permitted nutrition claims shall comply with composition criteria. Health claims referring to the rate or amount of weight loss are also prohibited, and claims on alcoholic beverages are limited to referring to the reduction or the absence of alcohol and energy.

In 2008, in the framework of the preparatory work on the setting of nutrient profiles, the EFSA developed food composition databases. The Commission tested these databases to evaluate the impact of different nutrient profiles systems on the eligibility of foods to bear nutrition and health claims. These data, together with Member States and stakeholders data, will also be used as a baseline to evaluate the impact of the new rules on food composition and consumption, and to a larger extent on the food market and on dietary choices, as required by Article 27 of Regulation (EC) No 1924/2006 in the report on the application of the Regulation.

#### 14.4.7. *Dietetic foodstuffs*

Council Directive 89/398/EEC on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses (dietetic foods) establishes requirements on product composition and appropriate consumer information for foods that are suitable to fulfil the particular nutritional requirements of certain groups of the population.

The application of Council Directive 89/398/EEC has been considered in two recent Commission reports. The first report, adopted on 27 June 2008, covers the "procedure" foreseen in Article 9 of Council Directive 89/398/EEC, which requires the manufacturer or the importer of certain dietetic foodstuffs to notify the competent authorities of the Member State where the products in question are marketed<sup>417</sup>. The second report, adopted on 26 June 2008, summarises the dietary recommendations for people with diabetes and considers the desirability of special provisions for foodstuffs for persons suffering from carbohydrate-metabolism disorders (diabetes)<sup>418</sup>.

These reports point to the need to review Council Directive 89/398/EEC. In particular, attention should be given to the relationship between the Directive's provisions and those of other Community legislation (notably on nutrition and health claims and on food supplements), to foodstuffs intended for diabetics and to the authorisation procedure for the inclusion of new ingredients in infant formulae.

Article 4a of Directive 89/398/EEC foresees the setting of rules for the use of terms concerning the absence of gluten in foodstuffs. The issue is particularly relevant for people with celiac disease, a group of the population suffering from a permanent intolerance to gluten

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<sup>417</sup> Report from the Commission to the European Parliament and the Council on the implementation of Article 9 of Council Directive 89/398/EEC on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses, COM(2008)393 final.

<sup>418</sup> Report from the Commission to the European Parliament and the Council on foods for persons suffering from carbohydrate metabolism disorders (Diabetes), COM(2008)392 final.

and for which appropriate rules for the labelling of suitable foodstuffs are very important. The setting of such rules at Community level will ensure the same high level of protection for consumers and allow for the free movement of the concerned products. The Commission adopted Regulation (EC) No 41/2009 concerning the composition and labelling of foodstuffs suitable for people intolerant to gluten, which will be applicable as of 1 January 2012.

#### 14.4.7.1. Legislative Changes Underway

Directive 89/398/EEC is now nearly 20 years old and a number of issues have arisen in relation to its scope and implementation. Many relate to the continued evolution of the Community Food law, of particular importance in that respect being the adoption of Directive 2002/46/EC on Food Supplements, Regulation (EC) No 1925/2006 on the addition of vitamins and minerals and of certain other substances to foodstuffs, and Regulation (EC) No 1924/2006 on Nutrition and Health Claims.

#### 14.4.7.2. Evaluation

The enforceability of the *acquis* on dietetic food could be improved. The need to rationalise the existing legal framework to take into account of the legislative developments above and of the need to facilitate innovation is being considered.

#### 14.4.8. Food Supplements

Directive 2002/46/EC of the European Parliament and of the Council partially harmonises the rules applicable to the placing of food supplements on the market.

The scope of the Directive covers all food supplements. However, only the rules applicable to the use of vitamins and minerals in the manufacture of food supplements are laid down in the Directive. The use of substances other than vitamins or minerals in the manufacture of food supplements therefore continues to be subject to the rules in force in national legislation. Therefore, Article 4(8) of the Directive provides that the Commission shall submit to the European Parliament and the Council a report on the advisability of establishing specific rules, including, where appropriate, positive lists on categories of nutrients or of substances with a nutritional or physiological effect other than vitamins and minerals.

#### 14.4.8.1. Legislative Changes Underway

Future activities in the field of food supplements relate to the adoption of implementing measures, which include, *inter alia*, the setting of maximum amounts of vitamins and minerals and the updating of the positive list of substances in the Annexes to the Directive. An impact assessment report to analyse the economic, social and environmental impacts of the options for the setting of maximum amounts is currently being prepared.

#### 14.4.8.2. Evaluation

According to Article 4(8) of the Directive, the Commission adopted on 5 December 2008 a Report<sup>419</sup> on the use of substances other than vitamins and minerals in food supplements. It concludes that the existing Community legal instruments already constitute a sufficient

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<sup>419</sup> COM(2008)824.



legislative framework for regulating this area and does not consider it opportune to lay down specific rules for substances other than vitamins or minerals for use in foodstuffs.

#### 14.4.9. *Voluntary addition of vitamins and minerals and of certain other substances to foodstuffs*

There is a wide range of nutrients and other ingredients that might be used in food manufacturing, including (but not limited to) vitamins, minerals including trace elements, amino acids, essential fatty acids, fibre, various plants and herbal extracts. Regulation (EC) No 1925/2006 of the European Parliament and of the Council, which is applicable as of 1 July 2007, harmonises the provisions laid down in Member States that relate to the addition of vitamins and minerals and of certain other substances to foodstuffs. The objective of this Regulation is to ensure the effective functioning of the internal market whilst providing a high level of consumer protection.

##### 14.4.9.1. Legislative Changes Underway

Future activities in the field of fortified foods relate to the adoption of implementing measures, which include *inter alia* the setting of maximum amounts of vitamins and minerals, the updating of the positive list of substances in the Annexes to the Regulation, and the application of Article 8 on substances other than vitamins or minerals.

##### 14.4.9.2. Evaluation

An impact assessment report to analyse the economic, social and environmental impacts of the options for the setting of maximum amounts is currently being prepared.

#### 14.4.10. *GMO Food and Feed*

##### 14.4.10.1. Current Situation

Regulation (EC) No 1829/2003 of the European Parliament and of the Council on genetically modified (GM) food and feed sets out a comprehensive set of rules governing the authorisation process for GM food and feed, while ensuring a high level of protection of human and animal health, of the environment and of consumers' interests.

The Regulation provides for a single Community procedure for the authorisation of all food and feed containing, consisting or produced from a genetically modified organism. This authorisation, valid throughout the Community, is granted subject to a single risk assessment process under the responsibility of the EFSA and a single risk management process involving the Commission and the Member States through a regulatory committee procedure.

In line with its obligations deriving from Regulation (EC) No 1829/2003, the Commission strengthened the application of Community legislation on GM food and feed in the following three main areas:

- Authorisations were granted to those GM food and feed complying with all the conditions set out in the basic legislation:
  - On 28 March 2008 the Commission adopted Decision 2008/279/EC repealing Decision 2006/69/EC authorising the placing on the market of foods and food ingredients produced from genetically modified Roundup Ready maize line

GA21 as novel foods or novel food ingredients under Regulation (EC) No 258/97 of the European Parliament and of the Council;

- On 8 September 2008 the Commission adopted Decision 2008/730/EC authorising the placing on the market of products containing, consisting of or produced from genetically modified soybean A2704-12 (ACS-GMØØ5-3), pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council;
  - On 29 October 2008 the Commission adopted Decision 2008/837/EC authorising the placing on the market of products containing, consisting of or produced from genetically modified LLCotton25 (ACS-GHØØ1-3), pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council, and
  - On 4 December 2009 the Commission adopted Decision 2008/933/EC authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean MON89788 (MON-89788-1), pursuant to Regulation (EC) No 1829/2003 of the European Parliament and of the Council.
- The Commission monitored the situation as regards the risk that non-authorized GM food and feed present in products imported from third countries are placed on the Community market. In April 2008, emergency measures against the presence of the unauthorized genetically modified organism Bt 63 in rice products coming from China were adopted by means of Commission Decision 2008/289/EC. In addition, the Commission updated Commission Decision 2006/601/EC on emergency measures regarding the non-authorized genetically modified organism LL RICE 601 in rice products originating from the United States, so as to take into account new developments of the situation by means of Decision 2008/162/EC.
  - Finally, in line with the requirements of Regulation (EC) No 1829/2003, the Commission ensured the follow up of the emergency measures taken by certain Member States, *i.e.* France and Greece, against the marketing and cultivation in their territory of seed derived from GM maize MON 810.

#### 14.4.10.2. Legislative Changes Underway

An evaluation should take place in 2009 to review and assess the EU legislative framework in the field of GM food and feed. The evaluation seeks to identify existing challenges in its implementation, and to ensure its relevance for the current needs focussing, in particular, on the regulatory approval process and the compulsory labelling of GM food and feed. This evaluation also aims at obtaining a comprehensive set of data and information from an impartial source as well as to gain a clearer view about the functioning of the current regulatory framework, its consequences and impact. This information will be use as a basis for possible future policy decisions to streamline this sector.

#### 14.4.11. Novel Foods

Novel foods are foods and food ingredients that have not been used for human consumption to a significant degree within the Community before 15 May 1997. Regulation (EC) No 258/97

of the European Parliament and of the Council lays out detailed rules for the authorisation of novel foods and novel food ingredients.

Companies that want to place a novel food on the Community market need to submit their application in accordance with Commission Recommendation 97/618/EC which concerns the scientific information and the safety assessment report required.

A total of six novel foodstuffs were approved to be commercialised in the Community for 2008.

#### 14.4.11.1. Legislative Changes Underway

A revision of Regulation (EC) No 258/97 was deemed necessary in order to reflect the fact that genetically modified (GM) food no longer falls within the scope of novel food legislation. The revision is also motivated from the need to avoid stifling innovation by creating a more favourable legislative environment for food industry, and to better facilitate both internal and external trade in foodstuffs. The consumer would also benefit from a wider choice of safe novel foods.

Accordingly, the Commission adopted on 14 January 2008 a proposal for a Regulation of the European Parliament and of the Council on novel foods<sup>420</sup>. This proposal seeks to improve access of new and innovative foods to the EU market, while maintaining a high level of consumer protection and ensuring food safety. Under the draft Regulation, novel foods would be subject to centralised authorisation procedure.

In the future, the Commission will receive the application for authorisation and the EFSA will carry out the scientific assessment on the product. The "one door –one key" approach to approval of novel foods will align the process to that taken on food additives, food enzymes and food flavourings. This means that the applicant may make one application for approval covering all these possible uses of the substance in question.

The proposal also sets out data protection rules, which aim to protect newly developed foodstuffs once authorised and encourage companies to invest in developing new types of foods and food production techniques. Moreover, a notification procedure is introduced for foods which have not been traditionally sold in the EU but which have a safe history of use in third countries.

#### 14.4.11.2. Evaluation

The proposed changes to the rules which currently govern the approval of novel foods in the Community will rationalise the existing legal framework and increase its efficiency and clarity. The new rules will also better respond to the developments of food technology and the needs of food industry and consumers.

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<sup>420</sup> COM(2007)872final.

#### *14.4.12. Food additives*

##### 14.4.12.1. Current Situation

Council Directive 89/107/EEC on the approximation of the laws of the Member States concerning food additives authorised for use in foodstuffs intended for human consumption lays down the general principles for authorisation of food additives in the European Union. This Directive is complemented with the European Parliament and the Council Directives 94/35/EC on sweeteners for use in foodstuffs, 94/36/EC on colours for use in foodstuffs and 95/2/EC on food additives other than colours and sweeteners which lay down the list of authorised food additives and their conditions of use to the exclusion of all others.

A new Regulation (EC) No 1333/2008 on food additives was adopted on 16 December 2008, most provisions of which will apply from 20 January 2010. The Regulation:

- simplifies the food additive legislation by consolidating the provisions of Directives 89/107/EEC, 94/35/EC, 94/36/EC and 95/2/EC;
- confers implementing powers on the Commission to update the Community lists of authorised food additives;
- sets up a re-evaluation programme for all existing food additives;
- establishes a system for a review of all current additives authorisations for their compliance with the principles of the Regulation (EC) No 1333/2008 by 20 January 2011 and transfer of these provisions in the Annex of this Regulation. Until this transfer is completed, the Annexes to Directives 94/35/EC, 94/36/EC and 95/2/EC continue to apply. In addition, powers to adopt implementing measures were conferred to the Commission to amend the annexes to Directives 94/35/EC, 94/36/EC and 95/2/EC until the establishment of the Community list of food additives in the Annex of Regulation (EC) No 1333/2008.

Further simplification of the legal framework is ensured by Regulation (EC) No 1331/2008 which establishes an effective, expedient and transparent common authorisation procedure for food additives, food enzymes and food flavourings.

##### 14.4.12.2. Legislative Changes Underway

A number of implementing measures under Regulation (EC) 1333/2008 and Regulation (EC) No 1331/2008 are required.

It is not yet possible to fully appreciate the enforcement of Regulation (EC) No 1331/2008, as significant improvement is expected (in particular by food businesses) from the simplification of the authorisation procedure for food additives.

#### *14.4.13. Food enzymes*

##### 14.4.13.1. Current Situation

Directive 89/107/EEC only covers enzymes used as food additives. The remaining enzymes were not regulated at all or were regulated as processing aids under non harmonised national provisions, which were diverse. Directive 95/2/EC on food additives other than colours and

sweeteners allows for the use of two enzymes as food additives: E 1103 Invertase and E1105 Lysozyme.

The new Regulation (EC) No 1332/2008 on food enzymes will harmonise for the first time the use of food enzymes, both as food additives and processing aids.

The Community list of food enzymes which will be established under Regulation (EC) No 1332/2008 and based on the safety assessment carried out by the EFSA will be set up in a stepwise manner. The Commission must adopt an implementing measure with modalities concerning the presentation and content of the applications by December 2010. Then interested parties must submit within 24 months applications for the inclusion of an enzyme in the Community list. The establishment of the Community list will take place in a single step procedure after the EFSA has expressed opinions on all products for which sufficient information has been submitted during the 24-month period.

#### 14.4.13.2. Legislative Changes Underway

Implementing measures to establish the modalities concerning the presentation and content of the applications shall be adopted by the Commission by 16 December 2010.

#### 14.4.13.3. Evaluation

Whilst it is not yet possible to fully appreciate the enforcement of Regulation (EC) No 1332/2008, significant improvements are expected (in particular by food businesses) from the simplification of the legislative framework.

#### 14.4.14. Food Flavourings

##### 14.4.14.1. Current Situation

The general framework for food flavourings in the European Community was established by Council Directive 88/388/EEC of 22 June 1988 on the approximation of the laws of the Member States relating to flavourings for use in foodstuffs and to source materials for their production. This Directive lays down general requirements for safe use of flavourings in food and provides definitions for different types of flavourings. It also establishes maximum levels for certain substances that are naturally present in flavourings and in food ingredients with flavouring properties, but which may raise concern for human health.

Commission Directive 91/71/EEC of 16 January 1991 completing Council Directive 88/388/EEC sets out labelling rules on flavourings.

It was necessary to update these Directives in the light of technical and scientific developments. Therefore, the Commission proposed on 28 July 2006 a new Regulation on flavourings and certain food ingredients with flavouring properties.

The new Regulation (EC) No 1334/2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods was adopted on 16 December 2008. It repeals Council Directive 88/388/EEC and Commission Directive 91/71/EEC as from 20 January 2011.

Similar to the previous legislation, the Regulation lays down general requirements for safe use of flavourings and provides definitions for different types of flavourings. The Regulation sets

out flavourings and source materials for which an evaluation and approval is required. The Regulation prohibits the addition of certain substances as such to food and lays down maximum levels for certain substances, which are naturally present in flavourings and in food ingredients with flavourings properties, but which may raise concern for human health. The Regulation also sets out the rules for labelling of flavourings from business to business and for sale to the final consumers. It also describes the specific requirements for use of the term "natural".

Currently, Regulation (EC) No 2232/96 sets out the basic rules for the use of flavouring substances in or on foodstuffs and lays down a procedure for the establishment of a Community list of flavouring substances. The Regulation will become obsolete after the establishment, foreseen by the end of 2010 at the latest, of the Community list provided for in Regulation (EC) No 1334/2008, when only those flavouring substances listed will be allowed to be added to foods.

The European Parliament and the Council Regulation (EC) 2065/2003 on smoke flavourings used or intended for use in or on foods establishes a Community procedure for the safety assessment and the authorisation of smoke flavourings in order to ensure a high level of protection of human health and protection of consumers' interests, as well as to ensure fair trade practices.

In addition, a separate Regulation (EC) No 1331/2008 establishes an effective, expedient and transparent common authorisation procedure for food additives, food enzymes and food flavourings.

#### 14.4.14.2. Legislative Changes Underway

The Community list on flavouring substances will be adopted by end 2010 and will form part of the Regulation (EC) No 1334/2008. An implementing measure for guidance on applications for authorisations on flavourings 2008 will be elaborated under Regulation (EC) No 1331/2008.

A common methodology for monitoring flavourings will be elaborated under Regulation (EC) No 1334/2008.

The Community list on smoke flavourings will be established once the EFSA has published all the opinions on evaluated smoke flavourings, possibly by end 2009/beginning 2010.

#### 14.4.14.3. Evaluation

The use of flavourings will be fully harmonised with specific Community lists for certain categories of flavourings.

#### 14.4.15. Food Contact Materials

##### 14.4.15.1. Current Situation

Regulation (EC) No 1935/2004 of the European Parliament and of the Council on materials and articles intended to come into contact with food (FCM) sets out the basic requirements for a harmonised European market on food contact materials, while ensuring a high level of protection of human health. This legal act empowers the Commission to set material specific rules in specific legislation.

Specific legislation exists for ceramic materials, regenerated cellulose film and plastic food contact materials. In 2008 specific legislation was adopted for recycled plastic to be used in contact with food. Commission Regulation (EC) No 282/2008 on recycled plastic materials and articles intended to come into contact with foods introduces a harmonised procedure for risk assessment and authorisation of recycling processes used to manufacture recycled plastic for food contact. It sets out requirements for the quality assurance systems to be established in companies using authorised recycling processes. It requires that recycled plastics are accompanied by a detailed declaration of compliance. The regulation thus harmonises in the EU the criteria for placing on the market recycled plastic for food contact.

#### 14.4.15.2. Legislative Changes Underway

New developments in food packaging technology cover also the use of packaging materials that can interact with the food by absorbing or releasing substances or that monitor the conditions of the packaged food. These materials are called active or intelligent food contact materials. Basic rules for these materials are set out in the framework Regulation for food contact materials. However, specific rules including establishing a list of authorised substances are to be set out in a specific Commission Regulation.

Harmonisation of legislation for plastic food contact materials started in 1980 and led to a series of 13 Directives setting out a list of authorised substances, limits for the substances in food and testing regimes. Simplification and rationalisation of this legislation dispersed over several Directives will be achieved by the adoption of a Commission Regulation, foreseen in 2010. This Regulation will speed up authorisation of new substances and to simplify rules on migration testing.

#### 14.4.15.3. Evaluation

While the harmonisation of legislation on plastic food contact materials at Community level is nearly complete, only the basic principles are set out for other materials such as paper and board, printing inks, adhesives. In the future it needs to be analysed to what extent harmonisation at Community level of other materials would be necessary.

#### 14.4.16. Plant Protection Products– Pesticide Residues

The yield of agricultural and horticultural crops can be **severely reduced as a result of infestation by pests and diseases**. In order to protect crops before and after harvest, plant protection products (or pesticides) are used. **Such pesticides could have severe undesirable effects** if they are not strictly regulated.

The legislation in this area regulates the placing on the market and use of plant protection products (Directive 91/414/EEC) and the maximum residue levels (MRLs) of pesticides that can be found in or on food and feed (Regulation (EC) No 396/2005).

Prior to Regulation (EC) No 396/2005, the legislation was too complex as it combined harmonised EU<sup>421</sup> and divergent national rules. This situation led to confusion about which MRL was applicable. It made the life of traders and importers difficult and gave rise to

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<sup>421</sup> The previous European legislation set different levels for different kinds of product: some fruit and vegetables (Directive 76/895/EEC), cereals (Directive 86/362/EEC), foodstuffs of animal origin (Directive 86/363/EEC) and plant products, including fruit and vegetables (Directive 90/642/EEC).

questions from consumers, particularly in cases where food exceeding the defined MRL in one Member State was acceptable in other Member States.

Regulation (EC) No 396/2005 covers approximately 1100 pesticides currently or formerly used in agriculture in or outside the EU. It lists limits for 315 agricultural products. These limits also apply to processed products, adjusted to take account of dilution or concentration during processing. The new rules take into consideration the safety of all consumer groups. This includes, for example, babies, children and vegetarians. EFSA is responsible for the safety assessment, which is based on the properties of the pesticide, on the maximum levels expected on food and on the different diets of European consumers.

The evaluation, marketing and use of plant protection products in the Community are regulated under Council Directive 91/414/EEC. This Directive lays out a comprehensive risk assessment and authorisation procedure for active substances and products containing these substances. Each active substance has to be proven safe in terms of human health, including residues in the food chain, animal health and the environment, in order to be allowed to be marketed. It is the responsibility of industry to provide the data showing that a substance can be used safely with respect to human health and the environment.

In accordance with Article 8 of Directive 91/414/EEC concerning the placing of plant protection products on the market, the Commission has to assess within a certain timeframe the active substances contained in plant protection products that were already on the market on the date of the application of that Directive.

In 1992, the Commission launched an ambitious review programme. Regulation (EEC) No 3600/92 laid down detailed rules for the first stage of that programme. The procedures for the three further stages of the programme were established in 2000 (Regulation (EC) No 451/2000), 2002 (Regulation (EC) No 1490/2002) and in 2004 (Regulation No 2229/2004).

The rules laid down in those Regulations provide that persons or companies wishing to secure the inclusion of active substances in the positive list of Annex I of Directive 91/414/EEC submit by a certain date a dossier meeting the requirements of the Directive in order to demonstrate that it may be expected that plant protection products containing those active substances are sufficiently safe for human or animal health or for the environment.

The Commission finalised the review programme of existing pesticides in March 2009. The review has led to the removal from the market of pesticides which cannot be used safely. Of some 1 000 active substances on the market in at least one Member State before 1993, 26 %, corresponding to about 250 substances, have passed the harmonised EU safety assessment. The majority of substances (67%) have been eliminated because dossiers were either not submitted, incomplete or withdrawn by industry.

About 70 substances failed the review and have been removed from the market, because the evaluation carried out did not show safe use with respect to human health and the environment. In order to obtain that the plant protection products containing those active substances can remain on the market, certain companies that notified the dossiers, are seeking the annulment by the Court of those Commission decisions by invoking errors during the assessment or with regard to the procedural rules.



#### 14.4.16.1. Legislative Changes Underway

After an intensive consultation of stakeholders, the Commission proposed on 12 July 2006 a Regulation concerning the placing of plant protection products that will replace Directive 91/414/EEC. The draft Regulation contains measures for shorter and clearer authorisation criteria, streamlined procedures, simplified data protection rules, provisions for the substitution of active substances with safer alternatives and a reduction in testing on vertebrate animals.

#### 14.4.16.2. Evaluation

The Commission received only a few complaints on the bad application by the Member States of Directive 91/414/EEC. Most concern issues relating to the provisions on data protection. In one of those cases an infringement procedure is ongoing. It has to be stressed that in this policy area numerous guidance documents and strong cooperation between Member States and the Commission through expert groups contribute to a correct application of the Community legislation.

#### 14.4.17. Contaminants in food

##### 14.4.17.1. Current situation

The EU harmonisation of legislation on contaminants in food fulfils two essential objectives: the protection of public health and the removal of internal barriers to trade.

Council Regulation (EEC) No 315/93 of 8 February 1993, laying down community procedures for contaminants in food, is the framework for the Community action on contaminants.

The Regulation provides that:

- Food containing a contaminant in an amount which is unacceptable from the public health viewpoint shall not be placed on the market;
- Contaminant levels shall be kept as low as can reasonably be achieved by following good practices at all stages of the production chain;
- In order to protect public health, maximum levels for specific contaminants shall be established where necessary (by comitology); and
- The consultation of EFSA for all provisions which may have an effect upon public health is mandatory.

Based on this framework Regulation, maximum levels for the following specific contaminants in foodstuffs have been established by Commission Regulation (EC) No 1881/2006 of 19 December 2006:

- Nitrate;
- Aflatoxins, ochratoxin A, Fusarium-toxins, and patulin (mycotoxins);
- Lead, cadmium, mercury (heavy metals);

- Dioxins and PCBs;
- 3-MCPD;
- Inorganic tin;
- Benzo(a)pyrene (as marker substance for the group of PAH).

In addition, several Regulations have been adopted containing provisions as regards the sampling and methods of analysis to be used for official control of the compliance with the maximum levels established on contaminants, in order to ensure a harmonised enforcement approach:

- Commission Regulation (EC) No 1882/2006 of 19 December 2006 laying down methods of sampling and analysis for the official control of the levels of nitrates in certain foodstuffs;
- Commission Regulation (EC) No 1883/2006 of 19 December 2006 laying down methods of sampling and analysis for the official control of the levels of dioxins and dioxin-like PCBs in certain foodstuffs;
- Commission Regulation (EC) No 401/2006 of 23 February 2006 laying down methods of sampling and analysis for the official control of the levels of mycotoxins in foodstuffs;
- Commission Regulation (EC) No 333/2007 of 28 March 2007 laying down methods of sampling and analysis for the official control of the levels of lead, cadmium, mercury, inorganic tin, 3-MCPD and benzo(a)pyrene in foodstuffs.

In response to frequent findings of high levels of aflatoxins in some products originating from some third countries, specific measures have been introduced by Commission Decision Commission Decision 2006/504/EC of 12 July 2006 on special conditions governing certain foodstuffs imported from certain third countries due to contamination risks of these products by aflatoxins, imposing special conditions on the import of pistachios from Iran, peanuts from Egypt and China, hazelnuts, dried figs and pistachios from Turkey, Brazil nuts in shell and peanuts from Brazil and almonds from the United States.

Furthermore Commission Decision 2008/352/EC of 29 April 2008 imposes special conditions governing guar gum originating in or consigned from India due to contamination risks of those products by pentachlorophenol and dioxins.

In 2008 the following legislative acts were adopted:

- Commission Regulation (EC) No 565/2008 amending Regulation (EC) 1881/2006: establishment of a maximum level for dioxins and PCBs in fish liver;
- Commission Regulation (EC) No 629/2008 amending Regulation (EC) 1881/2006: amendment to maximum level for lead in mushrooms, for cadmium in mushrooms and certain fish species and mercury in certain fish species and establishment of a maximum level for lead, cadmium and mercury in food supplements.

Two important safeguards were adopted in 2008 to counter risks posed by food contamination:

- Commission Decision 2008/433/EC of 10 June 2008 imposing special conditions governing the import of sunflower oil originating in or consigned from Ukraine due to contamination risks by mineral oil; and
- Commission Decision 2008/798/EC of 14 October 2008 imposing special conditions governing the import of products containing milk or milk products originating in or consigned from China as amended by Decision 2008/921/EC.

#### 14.4.17.2. Legislative Changes Underway

Initiatives for possible changes to the contaminant legislation include the development of proposals to limit the presence in food of other contaminants (T-2 toxin, HT-2 toxin and PCBs) and to review some existing provisions (aflatoxins, ochratoxin A, heavy metals, polycyclic aromatic hydrocarbons (PAHs) and dioxins).

The presence of acrylamide in food is under continual close scrutiny, pending availability of further scientific information and new monitoring.

Data is being collected on a number of other contaminants, such as brominated flame retardants (polybrominated diphenyl ethers (PBDE's), ...), acrylamide, furan, perfluorooctane sulfonates/acids (PFOS/A).

In the contaminants area new and emerging risks are difficult to predict, but require continuous attention to protect public health.

#### 14.4.17.3. Evaluation

Much attention is paid to the effective and uniform enforcement of the legislation on contaminants and of related safeguard Decisions. Consideration is given to enforcement issues from the very first stages of the discussions on new measures, in order to ensure optimal uniform enforcement across the EU.

Enforcement issues are discussed in the Standing Committee on the Food Chain and Animal Health and in relevant expert groups thereof. These discussions result in some cases in guidance documents for the control of the legislation, publicly available and published on the Commission services web pages:

- Guidance document for competent authorities for the control of compliance with EU legislation on aflatoxins<sup>422</sup>;
- Guidelines for the enforcement of provisions on dioxins in the event of non-compliance with the maximum levels for dioxins in food<sup>423</sup>;
- Guidance on sampling of whole fishes of different size and/or weight<sup>424</sup>;
- Guidance for the application of the Decision 2008/433/EC on sunflower oil from Ukraine contaminated with mineral oil<sup>425</sup>;

<sup>422</sup> [http://ec.europa.eu/food/food/chemicalsafety/contaminants/aflatoxin\\_guidance0309\\_en.pdf](http://ec.europa.eu/food/food/chemicalsafety/contaminants/aflatoxin_guidance0309_en.pdf);

<sup>423</sup> [http://ec.europa.eu/food/food/chemicalsafety/contaminants/guidelines-july\\_2004\\_en.pdf](http://ec.europa.eu/food/food/chemicalsafety/contaminants/guidelines-july_2004_en.pdf);

<sup>424</sup> <http://ec.europa.eu/food/food/chemicalsafety/contaminants/guidance-sampling%20-whole-fish-with%20exemples-dec2006.pdf>

- Report on the relationship between analytical results, measurement uncertainty, recovery factors and the provisions of EU food and feed legislation, with particular reference to the contaminants legislation<sup>426</sup>.

#### 14.4.18. Animal Health - Zoonoses

Zoonoses are diseases and infections that can be transmitted from animals to humans, directly or, in particular, through food (e.g. Salmonella in eggs, Listeria in cheeses etc.) The monitoring of zoonoses along the entire food chain and in humans is necessary to assess related risks. Zoonoses, in particular at the level of primary production, must be adequately controlled.

The main pieces of legislation relating to zoonoses are:

- Directive 2003/99/EC of the European Parliament and of the Council on the monitoring of zoonoses and zoonotic agents, amending Council Decision 90/424/EEC and repealing Council Directive 92/117/EEC. The latter Directive aims to obtain comparable data to evaluate related risks. The monitoring of eight zoonoses is mandatory, whereas other zoonoses should be monitored according to the epidemiological situation in each Member State. Monitoring of antimicrobial resistance and investigation of food-borne outbreaks are also required by the Directive; and
- Regulation (EC) No 2160/2003 of the European Parliament and of the Council on the control of salmonella and other specified food-borne zoonotic agents. This Regulation prescribes that controls on zoonoses should cover the whole food chain. Its primary aim is to ensure that effective measures are taken to decrease the occurrence of *Salmonella* serotypes of significance for public health progressively, in different categories of poultry and pigs.

Member States or regions may be granted special guarantees for Salmonella at the placing on their market of foodstuffs of animal origin, similar to the ones granted to Finland and Sweden at their accession, if they have a control programme recognised as equivalent<sup>427</sup>. Such a request was put forward by Denmark. Before analysing the equivalence, it was considered opportune to agree on the minimum requirements for submission and this was laid down in a Commission Guidance Document<sup>428</sup>. The Danish control programmes were then considered equivalent as regards table eggs but not as regards broiler meat because the prevalence of Salmonella in flocks of broilers was still too high. Nevertheless, a qualified majority within the Standing Committee was not reached on a Commission proposal to grant special guarantees to Denmark as regards table eggs because a number of Member States oppose the principle of extending special guarantees.

##### 14.4.18.1. Legislative Changes Underway

A Community target for the reduction of Salmonella should have been set by the end of 2008, subject to a cost/benefit analysis. Obtaining the necessary elements for completing such an

<sup>425</sup> [http://ec.europa.eu/food/committees/regulatory/scfcch/toxic/summary20062008\\_en.pdf](http://ec.europa.eu/food/committees/regulatory/scfcch/toxic/summary20062008_en.pdf)

<sup>426</sup> [http://ec.europa.eu/food/food/chemicalsafety/contaminants/report-sampling\\_analysis\\_2004\\_en.pdf](http://ec.europa.eu/food/food/chemicalsafety/contaminants/report-sampling_analysis_2004_en.pdf)

<sup>427</sup> Article 8 of Regulation (EC) 853/2004 of the European Parliament and of the Council, OJ L 226, 25.6.2004, p.22;

<sup>428</sup> SANCO/745/2008r6([http://ec.europa.eu/food/food/biosafety/salmonella/docs/guidance\\_document\\_swe\\_fin\\_en.pdf](http://ec.europa.eu/food/food/biosafety/salmonella/docs/guidance_document_swe_fin_en.pdf))

analysis proved to be difficult. An external contractor will be procured for the purpose of carrying this through. A Communication from the Commission is being prepared to inform the Parliament and the Council on these difficulties and the delay.

#### 14.4.18.2. Evaluation

With the adoption of Directive 2003/99/EC the system has been considerably improved, in particular with regard to the comparability of data, and extended to cover additional zoonoses on a mandatory basis and certain important aspects such as antimicrobial resistance and foodborne outbreaks.

#### *14.4.19. Transmissible Spongiform Encephalopathies*

Regulation (EC) No 999/2001 of the European Parliament and of the Council lays down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (TSEs).

The Community has made great strides in its battle against bovine spongiform encephalopathy (BSE). The consistent decline in the number of BSE/TSE incidents bears witness to the effectiveness of strong, comprehensive Community measures put in place to combat this disease. The Commission has at no point stopped monitoring or reacting to the challenge of BSE. As a result, consumers' confidence has increased.

In the light of the reduction of BSE cases, new developments in science, and in accordance with the TSE Roadmap, new measures have been adopted to target surveillance and eradication schemes better, revise the list of specified risk materials and set import rules linked to the BSE risk status of countries.

In light of this positive trend, and new developments in science and technology, the TSE Roadmap considers possible amendments to certain BSE measures currently in place while still making food safety and consumer protection the highest priority. Any adaptations made to the BSE measures, however, will not affect in any way the fundamental objectives of TSE eradication and the protection of the EU citizens. These have always been and will continue to be the main considerations of EU policy making in this area.

#### 14.4.19.1. Legislative Changes Underway

In relation to the legislation applicable to TSE, priority is being given to the review of the provisions related to the total feed ban and eradication measures in small ruminants on the basis of evolving science.

#### 14.4.19.2. Evaluation

As regards TSE in particular, efforts focus on the need to adjust existing measures to new scientific findings and thus to risk.

#### 14.4.20. Animal Health – Non Zoonotic Diseases

##### 14.4.20.1. Current Situation

Animal health is an important factor for a functioning agriculture and the safe supply of food. It has been part of the Community acquis from the very beginning of the Community and legislation in force dates back to the 1960s.

Animal health legislation has been adapted over the years, in order to accommodate new diseases such as BSE or changes in the spread of existing diseases such as avian influenza. Outbreaks of e.g. classical swine fever and foot and mouth disease have triggered adoption of specific legislation.

The result is a body of law of over 60 acts (mostly Directives) laying down horizontal and vertical principles for intra Community trade, imports of animals and their products, health and movement controls (veterinary checks), the notification of diseases and financial support.

Formal complaint cases in this area are few. Most refer to isolated cases of alleged incorrect implementation at local level which cannot be solved by the Community institutions but have to be dealt with in national courts.

Nevertheless, requests for interpretation and the difficulties arising from the complexities and inconsistencies have shown that this framework does not comply with more modern requirements for transparency and flexibility. Thus in 2007 the Commission presented its plans to improve the situation through a New Animal Health Strategy<sup>429</sup>. This triggered a broad consultation involving stakeholders, trade partners and institutions. As a result, a Communication on an Animal Health Action Plan<sup>430</sup> was published, listing all actions considered necessary for a new approach on animal health. The most important action is the work preparing a proposal on a new animal health law.

##### ***Disease Situation***

Against this background the challenge to address acute animal health concerns effectively remains. Animal health is under consistent threat of outbreaks within the Community, in neighbouring countries or on the territory of trade partners.

Diseases such as classical swine fever and foot and mouth disease, which cause heavy economic losses, are constantly at our gates. The necessary implementation of tough measures often results in unpleasant portrayals by the press. Modified agricultural practices increase the importance of fish diseases and tuberculoses. Changes in the environment foster the spread of bluetongue.

Bluetongue is a viral disease transmitted by specific midges among ruminants (cattle, sheep, goats) and is difficult to prevent and control. It causes considerable losses to stock farmers. The midges spread within a favourable environment and recently to more northern parts of Europe with new serotypes and large scale epidemics. This suggests its link to climate change.

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<sup>429</sup> COM(2007)539final.

<sup>430</sup> COM(2008)545final.

The threat of a pandemic through the spread of an avian influenza virus is still present though currently we observe only isolated cases.

#### 14.4.20.2. Work done in 2008

The European Commission adopted a Communication laying down the Action Plan for the implementation of the EU's animal health strategy. The Action Plan contains an overview and summary of the key actions. A programming document was agreed. It contains all the actions and their relevant details, such as milestones, marking important steps within the actions, organisations involved and indicative dates for the completion of actions. The plan is updated regularly to enable any interested person, organisation or other parties to follow the progress of the different activities.

Given the devastating impact that serious disease outbreaks can have on farmers, society and the economy, the new strategy is based on the principle that “prevention is better than cure”. The aim is to put greater focus on precautionary measures, disease surveillance, controls and research, in order to reduce the incidence of animal disease and minimise the impact of outbreaks when they do occur.

We have taken a collaborative approach, maintaining effective partnerships at all levels. An Animal Health Advisory Committee involving all stakeholders has been created and is expected to follow the Animal Health Strategy's progress. It is to be consulted on all impact assessments and will advise the Commission on the best means of delivering agreed outcomes. The Committee may also provide strategic guidance on the appropriate level of animal or public health protection, and on priorities for action and communication.

#### *Disease Situation*

The disease status in and outside the Community, modified agricultural practices or changes in the environment such as climate change may call for the adaptation of legislation before the result of the complete overhaul becomes effective. Here the already agreed general principles of the Animals Health Strategy, such as the emphasis on preventive measures, are implemented.

Successful disease control not only relies on an adequate legal framework but also on its consequent implementation. In 2008 Member States have responded to outbreaks, in particular, of avian influenza, in a swift and successful manner, by applying the provisions of Council Directive 2005/94/EC on the control of avian influenza. None of the outbreaks had an impact on public health or major economic losses.

Nevertheless, if Member States fail to transpose respective legislation, such as Italy in the case of Council Directive 2005/94/EC, the Commission will use its powers under Article 226 of the Treaty.

The control of the spread of bluetongue remains difficult. The rules of Council Directive 2000/75/EC on bluetongue control and eradication appear to be not fully sufficient. By means of implementing rules laid down in Commission Regulation (EC) No 1266/2007, the Commission has, however, used the elements of flexibility of Directive 2000/75/EC to better respond to the problem and this has brought satisfactory results, decreasing the number of bluetongue outbreaks in 2008 significantly (~ 58000 outbreaks in 2007 to ~ 24000 outbreaks in 2008).

### 14.4.20.3. Evaluation

Considering the above, animal health is currently in a phase of reform. The entire system is being assessed to identify opportunities of enhancing efficiency. At the same time we have to keep the existing firewall against disease outbreaks in good shape. In 2008, as shown above, we have been successful.

For animal health the action plan envisages measures over the next five years. It is based on the results of an extensive evaluation and a large consultation of stakeholders.

Following a comprehensive evaluation of EU legislation on the animal health of aquaculture animals, this legislation has been updated. Council Directive 2006/88/EC on aquatic animal health takes better account of the diversity of European aquaculture and the significant development of the industry over the last decades (e.g. more farmed species). Implementing decisions and guidelines on the risk based animal health surveillance schemes were adopted to ensure a harmonised implementation of the Directive. By May 2008, it became apparent that Austria, Belgium, Greece, Poland, Portugal, Sweden and the United Kingdom have failed to implement the Directive in time.

The problem of bluetongue needs further reflection and the Commission launched a discussion with the Member States on the need to revise Directive 2000/75/EC. This reflection might lead to new Community rules on bluetongue in the next years.

#### ***Priorities***

The combat of disease outbreak is the first priority dictated by the circumstances. The second priority will be the further development of the Animal Health Strategy as a long term goal.

#### ***Planned action***

The new Animal Health Strategy provides general guidance for the conversion of animal health legislation in the coming years. While all parties involved agree on the general strategy, the challenge is now to mould insights into a new legal framework. To this end areas for more specific impact assessment studies have been identified and specific working groups comprising all stakeholders have been established. Given the devastating impact that serious disease outbreaks can have on farmers, society and the economy, the new legislation does not only have the objective of increased transparency and simplification, but also pursues the principle that “prevention is better than cure”. The aim is to put greater focus on precautionary measures, disease surveillance, controls and research, in order to reduce the incidence of animal disease and minimise the impact of outbreaks when they do occur. The legislation also intends to improve the interfaces of issues inextricably linked to animal health, such as public health, food safety, animal welfare, sustainable development and research.

In 2009, SANCO will start a fundamental reflection process on effective measures to combat bluetongue within the Community.

A guidance document will be drafted to give competent authorities, third countries, business operators, exporters and importers of aquaculture animals an introduction to the placing on the market and import rules of the Directive and implementing legislation.



The FVO will continue to monitor the implementation within the Member States. Failure to implement agreed legislation will be pursued with the powers provided under Article 226 of the Treaty, taking the principle of proportionality into account.

#### 14.4.20.4. Summary of Sector

This sector with a long common regulatory tradition faces major overhaul. The goal is to consolidate a long term and largely successful and profound collaboration in a more modern system by integrating tried and tested methods within an improved framework. The challenge to swiftly and effectively react to epidemics will remain.

##### *14.4.21. Veterinary Import Controls – Live animals and their products*

The present system of border veterinary checks has generally worked well during 2008. The current Directives require Member States to ensure that no consignments from third countries are introduced into the territory of the EU without undergoing mandatory veterinary checks at designated Border Inspection Posts. These checks include 100% documentary, identity and physical checks on all live animals and animal products. Moreover for animal products a random programme of analytical laboratory checks is applied and the level of these checks is reduced to specified levels dependent on the animal and public health status of the exporting country. Additional specific safeguard or reinforced measures may be taken by the Commission when serious or repeated deficiencies are identified (i.e. results of a mission carried out by the FVO) or in cases of outbreaks of major foodborne diseases in a third country.

However, it has been recognised that there is scope to improve the controls and a need to update the legislation on border security of imports and transits of animals and animal products so that it becomes more coherent with other EU legislation. One of the conclusions of the Commission's new Animal Health Strategy<sup>431</sup> is for the development of a policy and framework designed to deliver a better risk based approach to veterinary border inspections and to target illegal trade. To assist in achieving this goal the Commission in 2008 launched a review of the current EU veterinary border import control legislation covering live animals and their products, including an information gathering exercise seeking the views of all Member States.

During 2008 a Council CVO<sup>432</sup> Working Group considered the issue of improved border security including imports of animals and their products and produced a guidance paper for assistance and consideration of the Commission. In addition a paper on a strategy for imports of all food products, including animals and products of animal origin, was prepared by the French Presidency. This paper informed a series of discussions in the Council and a conference under the French Presidency in Paris on 3 October 2008, leading in turn to conclusions adopted at the Agriculture Council in December 2008, following on from discussions at the June Council. The Commission services prepared a paper on the current status and future proposals for imports of food products into the EU. The Economic and Social Committee also adopted a paper on imports in November 2008. These papers have been discussed at various attaches and CVO/CPO<sup>433</sup> meetings.

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<sup>431</sup> COM(2007)539final.

<sup>432</sup> Chief Veterinary Officers (CVO).

<sup>433</sup> Chief Phytosanitary Officers (CPO).

The results of the above are being considered by the Commission with a view to proposing legislation to simplify and clarify existing border veterinary import controls legislation and provide a framework for a more harmonised approach of application and enforcement by the Member States. The legislation would also provide a more coherent relationship with other EU legislation on import controls. A series of consultations has taken place with stakeholders in the framework of the Animal Health Advisory Committee and a wide public stakeholder consultation is envisaged in late 2009/10.

The main problems identified with the current legislative framework are the following:

- The current programme of checks is random and does not address identified risk areas, nor makes best use of existing risk assessment tools. The EU is the biggest importer of food products in the world and this trend is set to increase in the coming years, including in the area of products of animal origin. The volume and diversity of trade has also grown very substantially, increasing the potential level of risk. The EC has also enlarged substantially from 15 to 27 Member States, leading to a greatly increased land border with third countries with increased risks. New technologies are also under-utilised in considering controls and assessing risk. This increase needs to be reflected in how we evaluate the risk of products entering the EU.
- Lack of clarity and common approach to enforcement amongst Member States as regards certain rules and procedures especially as regards supervision of transit consignments, transshipment, pre-notification of consignments, approval and supervision of free and customs warehouses, approval and supervision of ship suppliers, re-enforced checks, re-import of consignments, definition of consignments.
- The system does not take into account latest developments in EU food legislation covering imports as well as new technological developments (and especially TRACES and electronic identification).
- Need to ensure adequate subsidiarity/flexibility for Member States to operate.

#### *14.4.22. Animal feed and animal by-products*

Animal feed and animal by-products (e.g. animal carcasses of dead animals or products of animal origin that are not intended for human consumption) are strictly regulated because of the potential negative impact which their use may have for the safety. Several of the past food crises were related to feed (e.g. dioxin content) or the use of animal by-product (bovine spongiform encephalitis – BSE).

##### 14.4.22.1. Feed marketing

#### ***Current Position***

Currently, the general rules for the marketing of feed are spread over several Directives according to the type of feed concerned:

- Directive 79/373/EEC with the rules for the circulation of compound in the EU (e.g. labelling requirements). It also covers pet food;
- Directive 93/74/EEC contains the principle rules for feeding stuffs intended for particular nutritional purposes (“dietetic feeds”);

- Directive 96/25/EC on general rules for the circulation and use of feed materials; and
- Directive 82/471/EEC lays down the marketing conditions for certain products, belonging to the category feed materials, used in animal nutrition (“bio-proteins”).

Apart from these Directives further specific legislation is applicable, e.g. TSE-Regulation (EC) No 999/2001, containing the ban to feed meat and bone meal to food producing animals, the Regulation (EC) No 1829/2003 on GM Food and Feed, setting the rules for the use of genetically modified feed, the Feed Hygiene Regulation (EC) No 1831/2003, focussing on assuring safety during the production process of feed.

### ***Report on Work Done in 2008***

#### ***Feed Marketing***

In 2008 the Commission adopted a proposal for a Regulation on the placing on the market and use of feed<sup>434</sup>. It intends to replace the legislation on marketing and use of feed, both for farm animals and pets and will thus simplify existing legislation. It will also improve the information requirement in order to increase transparency for farmers and pet owners, foster innovation and competitiveness, reduce the administrative burden for the stakeholders and develop the single market of feed.

This new Regulation closes gaps in the feed safety system concerning emerging feed materials, prohibited substances in feed. It clarifies borderlines between different types of feed and introduces rules on misleading advertising and proper consumer information. The new rules will increase feed safety, clarify the current rules on feed marketing. It reduces administrative burden for stakeholders and is likely to enter into force in 2009.

#### ***Feed additives, contaminants and undesired substances***

In 2008 30 requests for the authorisation of feed additives (mostly zootechnical or nutritional additives) were processed. The authorised additives improve both welfare and productivity of food producing animals. Confidentiality concerning data supporting authorisations has been granted in several cases.

Maximum levels of certain contaminants in feed have been reviewed (Directive 2002/32/EC). Levels for unavoidable carry over of from one feed product to the other during production have been set (Coccidiostats).

The contamination of milk and soy products in China with melamine has triggered import related safeguard measures.

#### ***Evaluation***

The current rules on animal feed are scattered over several Directives and some 50 amending or implementing acts. The medicated feed Directive 90/167/EEC is not in line with the Veterinary Medicines Code (Directive 2001/82/EC) and the new feed hygiene legislation. Existing legislation extremely relies on many cross references. Uniform application is hampered. Hence, only 2.6% of the compound feed produced in Member States is traded on

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<sup>434</sup> COM(2008)124final.

the Internal Market. This appears to be the result of the asymmetrical transposition of Directives. For example, the different transposition of two Member States resulted in different permitted levels for vitamin D3 in complementary feed.

### ***Planned Action***

Directive 90/167/EEC on medicated feed will be recast and modernised in order to be adapted to the new existing Community law concerning feed but also veterinary medicinal products: impact assessment is to be launched.

Implementing rules for the new "feed marketing" Regulation need to be prepared.

#### 14.4.22.2. Feed hygiene

### ***Current position***

Regulation (EC) No 1831/2003 of the European Parliament and of the Council lays down minimum requirements for feed hygiene which apply from primary production of feed (at farm level), through production, processing and distribution, to the point of feeding the animals.

The responsibility for compliance with these requirements rests with feed business operators, although the adequacy of the measures put in place by these operators must be verified by the competent authorities of the Member States before an establishment is approved as part of the feed chain. In most cases this must be done by an on-the-spot visit. There are two resulting priorities, firstly strengthening the approval conditions for establishments using direct heating process for drying and secondly defining microbiological criteria for feed.

The development, dissemination and use of both national and Community guides to good practice are encouraged. However, these guides may only be used on a voluntary basis by the feed business operators. Three Community guides have already been developed<sup>435</sup>. One of these three guides (inclusion of medicated feed) has been modified and is under evaluation. Two more guides are under preparation and will be submitted to evaluation.

The Commission is also considering strengthening the approval conditions for establishments using direct heating process for drying in order to avoid incidents that occurred in the past.

### ***Evaluation***

The Member States have greatly promoted the development of national guides. The participation of the competent authorities differs from one Member State to another, but in general, guidelines for developing such guides, practical advice and guidance have been given by the competent authorities to food sectors. Most private stakeholders' organisations have expressed a positive attitude to national guides to good practice.

#### 14.4.22.3. Feed Labelling

### ***Current position***

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<sup>435</sup> [http://ec.europa.eu/food/food/animalnutrition/feedhygiene/guide\\_goodpractice\\_en.htm](http://ec.europa.eu/food/food/animalnutrition/feedhygiene/guide_goodpractice_en.htm).

Council Directive 96/25/EC on the circulation and use of feed materials, amending Directives 70/524/EEC, 74/63/EEC, 82/471/EEC and 93/74/EEC and repealing Directive 77/101/EEC sets out harmonised rules for the marketing and labelling of feed materials. Feed materials may only be put on the market if they are sound, genuine and of merchantable quality. They must not represent any danger to human or animal health or to the environment. The Annex to Directive provides a non-exhaustive list of the feed materials that need to be identified on the label.

### ***Legislative Changes Underway***

Following approximately five years of preparatory work and based on intense consultation with all stakeholders and Member States, the Commission adopted on 3 March 2008 a proposal for a Regulation of the European Parliament and of the Council on the placing on the market and use of feed<sup>436</sup>. This proposed Regulation considerably simplifies the existing procedures for labelling and marketing animal feed and pet food, while making the overall system more efficient and maintaining the same high level of protection of animal health, animal welfare and public health. Industry should also benefit from the proposed new rules, as they set up a clearer, more harmonised legislative framework for food labelling and create a level playing field for all operators.

### ***Evaluation***

The new feed labelling legislation simplifies greatly the current legislation scattered over more than 5 acts, maintaining however the high level of feed and food safety and the protection of animal health. The new legislation strikes the right balance between consumer protection and information and intellectual property rights, and removes the administrative burden of pre-marketing authorisation of proteins used in feed. This legislation facilitates innovation and competitiveness for the feed business.

#### 14.4.22.4. Animal by-products

### ***Current Position***

Animal by-products not intended for human consumption include slaughterhouse waste, fallen stock and dairy products going to animal feed, as well as a variety of other products for different applications. The health rules for those animal by-products are currently laid down in Regulation (EC) No 1774/2002 and a number of implementing Comitology measures. The Regulation relies on a risk-based categorisation of animal by-products, which determines the options for their use and obligations for their disposal. Experience with the application of the Regulation since 2003 revealed that the interaction with other Community legislation, its risk-benefit ratio, and the proportionality of the prescribed measures in particular as regards their use for technical applications, posed problems and needed to be reviewed.

Currently 7 complaint cases concerning animal by-products are open. These were either triggered by unsatisfactory results of inspection by the FVO or complaints of stakeholders that considered their products not adequately classified.

### ***Report on Work Done in 2008***

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<sup>436</sup> COM(2008)124final.

Current legislation builds on the risk-based categorisation of animal by-products, which determines the obligations to dispose of and the options to use those materials. The Regulation has been applied since 2003. Experience shows that interfaces with Community legislation need to be clarified and that the proportionality of certain measures needs to be reviewed. The latter is especially valid for the potential use of animal by-products for technical applications. As a consequence, the Commission adopted a proposal for a revised Regulation on animal by-products<sup>437</sup>.

### ***Evaluation***

The Regulation on animal by-products has been applied since 2003. Experience shows that interfaces with Community legislation need to be clarified and that the proportionality of certain measures needs to be reviewed. The latter is especially valid for the potential use of animal by-products for technical applications.

The Commission adopted a proposal for a revised Regulation on animal by-products. It is expected that future application of the new legislation will benefit from the extensive consultation with all relevant actors during its creation and from the more streamlined and clearer basic principles, with the possibility to adopt and adapt the detailed rules, as necessary, by Comitology procedure.

### ***Planned Action***

The proposal for a revised Regulation on animal by-products is subject to the co-decision procedure. It is expected that the proposal will be adopted in 2009. The plan is, after having consulted Member States and stakeholders, to complement the new Regulation with Comitology measures determining the technical standards for the collection, processing, use and disposal of animal by-products.

Once the shape of the new rules is clear, the organisation of training courses, in particular, under the "Better Training for Safer Food" initiative, will be considered.

### ***Summary of Sector***

The use of inapt material in the production of food and feed remains a temptation for the feed and food industry as it works under a severe cost pressure. The regulatory challenge is to establish clear and enforceable rules that remain proportionate and do not create a sprawling bureaucracy.

#### 14.4.22.5. Animal Welfare

### ***Current Position***

Despite the fact that animal welfare is not one of the objectives of the Treaty or the Common Agricultural Policy, full regard must be had to it in the formulation and implementation of Community policies as it was stated by the Protocol on the Protection and Welfare of Animals attached to the Treaty of Amsterdam. According to this, the Community has delivered a raft of significant measures in the animal welfare area. Such measures are mostly based on Article 37 EC(agriculture) while others aimed at harmonising health and consumer protection

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<sup>437</sup> COM(2008)345final.

indirectly linked with animal issue as well as measures in the veterinary and phytosanitary fields having as their main objective the protection of human health are adopted on the basis, respectively, of Article 95 and 152 EC. The European Court of Justice has also declared that "the interests of the Community include the health and protection of animals" (Joined cases C-37/06 and C-58/06, para. 23).

### **Animal welfare in holdings/on the farm**

Council Directive 98/58/EC on the protection of animals kept for farming purposes sets general rules for the protection of animals of all species kept for the production of food, textiles or for other farming purposes. It defines general principles and minimum standards on appropriate feeding, comfort and prevention of unnecessary suffering. More specific rules apply to laying hens, broilers, calves and pigs.

### **Animal welfare during transport**

Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations intends to reduce the stress and harm that animals can experience when moved. It sets general principles and introduces standards for vehicles and equipment, and requirements for those dealing with animals in transport. It also provides rules for enforcement of EU rules, such as the use of satellite navigation systems.

### **Animal welfare during slaughter**

Every year nearly 360 million pigs, sheep, goats and cattle, several billion poultry and 25 million fur animals are slaughtered in the Community for the production of meat and textiles. The control of contagious diseases may require the culling of thousands to millions of animals.

The technical requirements of Directive 93/119/EC on the protection of animals at the time of slaughter or killing have become outdated. New technologies, international standards and scientific opinions from the EFSA call for the revision of the Directive. Culling as a response to animal epidemics calls the methods used into question. New stunning methods need harmonised rules. The responsibility of operators and training requirements for staff needs to be redefined.

### ***Complaints:***

The number of complaints on animal welfare remains relatively high (17 current investigations, 22 closed in 2008). This appears to be due to:

- The fact that a part of the Community's population is particularly interested in animal welfare and prepared to use considerable resources to address their concerns;
- The fact that a number of welfare requirements are in conflict with some economic interests;
- The fact that animal welfare science is a relatively new area and consequently stakeholders are not aware of the benefits of respecting some provisions of the EU legislation.

Different levels of priority are given to animal welfare in Member States due to the following factors:

- The need for compromise on minimum standards which lead to complaints against Member States applying stricter rules;
- Animal welfare not being high on the political agenda of some Member States.

Moreover; agricultural practices or cultural traditions accepted in one Member State upset citizens in other Member States who seek improvement via Community institutions. In addition, the situation is aggravated by the fact that many operators are transporting animals without proper knowledge of Council Regulation (EC) No 1/2005 on transport of animals.

### ***Report on Work Done in 2008***

#### **Animal welfare in holdings/on the farm**

As a result of additional means provided by the European Parliament, we commissioned a pilot project for study on the improved methods for animal-friendly production, i.e. on alternatives for castrating pigs and dehorning cattle.

#### **Animal welfare during transport**

The Commission initiated during 2008 a study on travelling times and space allowances, which was used for preparing an impact assessment, because the appropriateness of current requirements is questioned by stakeholders and animal welfare organisations for different reasons.

We also continued our cooperation with the Joint Research Centre to evaluate tracking systems for vehicles transporting animals over eight hours. Such systems could improve enforcement of Community rules involving the transport of animals through several Member States and contribute to simplification and the reduction of administrative burden for stakeholders and control staff.

We have started to draft an impact assessment on the effects of rules concerning improved rules on comfort for and traceability of animal during transport and engaged in preparatory action to promote high quality control posts for resting animals transported over long journeys.

#### **Animal welfare during slaughter**

Following the scientific opinions of 2004 and 2006 from the EFSA, the shortcomings identified by the FVO and complaints, the Commission presented a proposal for a Regulation on the protection of animals at the time of killing<sup>438</sup>. This proposal intends to improve the conditions for animals when slaughtered or culled and ensures that they are treated with respect. To simplify the existing legislation and bring it in line with food hygiene regulations, the proposal integrates welfare considerations into the design of slaughterhouses and requires the regular monitoring of the efficiency of stunning techniques.

#### ***FVO Inspections Findings***

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<sup>438</sup> COM(2008)553.



FVO missions found that in a small number of Member States, where enforcement was strong, good implementation of the laying hens Directive had been achieved and progress had been made in phasing out conventional cages. However the majority of Member States are lagging behind on this issue.

In the pig sector only a handful of Member States have made progress in implementing requirements from 2001 and there is a general lack of enforcement of long standing requirements such as provision of enrichment materials and elimination of tail-docking. Concerning the transport of animals, control of journey times was not sufficiently dealt with, with the exception of one Member State visited.

Although on farm emergency slaughter has been implemented in a number of Member States, the issue of the transport of seriously injured cows to slaughterhouses continues to be a significant problem in others. The main issue regarding animal welfare in relation to slaughter was that although certain Member States only allow animals to be ritually slaughtered without stunning after determining a specific need for this, others have allowed the derogation to be applied to all animals killed at certain slaughterhouses without adequately identifying this need.

### ***Evaluation***

Animal welfare remains an issue attracting public attention.

Some attention is devoted to dealing with situations for which we lack powers to regulate. Stray dogs, for instance, do not fall under the scope of the Treaty but yet the Commission devotes considerable resources to replying to citizens complaining about cruelty.

The different relevance and political weight that animal welfare has amongst Member States makes it difficult to set rules that satisfy agriculture, animal welfare organisations and consumers at the same time. Without further legal powers in the Treaty and additional resources dedicated to this field we will not be able to satisfy the expectations of animal welfare organisations.

### **Animal welfare during transport**

The number of complaints (8 of 17 open complaints deal with transport) and numerous requests for specific amendments reveal that Council Regulation (EC) No 1/2005 on transport of animals needs to be amended. The main concerns are the ambiguity of its scope (which animals and what kind and means of transport are covered), the difficulty to define certain requirements with sufficient clarity, while allowing a degree of flexibility (e.g. water supply, approval of transport means, documentation requirements).

### **Animal welfare in holdings/on the farm**

We continue to receive complaints on certain practices used by farmers to facilitate the rearing and manipulation of animals (e.g. tail docking in pigs, procedures to castrate male piglets). It remains difficult to objectively evaluate these practices. We have reacted by commissioning studies and by encouraging others to conduct such studies. Further exploration of viable alternatives to respective practice is necessary.

Compliance with the laying hens Directive continues to be problematic mainly in the new Member States where cages used are, amongst others, often too small to comply with Community rules.

### ***Priorities***

It will remain important to react swiftly and proportionately to the concerns of interested stakeholders. The FVO will continue to put an emphasis on establishing data on the compliance of Member States with Community rules on animal welfare to detect shortcomings but also in order to understand more precisely why certain Member States have difficulties to comply with welfare rules.

### ***Planned Action***

A number of actions that have been initiated in 2008 will be maintained and expanded. These include, for example, the “Farmland” initiative (an interactive website for children on the origin of food and on the welfare of farm animals), pilot project on the castration of piglets, and improving control posts.

The Commission constantly receives requests to develop European strategies to give transparent information on animal welfare in food production. The Commission wishes to further assess the feasibility of possible options to introduce animal welfare labelling and will present a communication to support an in-depth debate on the subject in the Council and in the European Parliament.

The Community Action Plan on the Protection and Welfare of Animals 2006-2010 envisages the creation of a European Network of Reference Centres for the protection and welfare of animals, which could serve as a coordinating body for the different initiatives related to the animal welfare labelling and perform tasks in particular in relation to harmonisation and coordination, policy advice and sharing of best practices, education and training and dissemination of information. The Centre should also facilitate the preparation of relevant socio-economic studies and impact assessments.

In addition, the Commission will start an evaluation process on the Community policy on animal welfare in order to reassess the need for an action plan, foreseen for 2010.

We intend to present a proposal to amend Council Regulation (EC) No 1/2005 in order to improve the applicability of the rules in an effort to streamline and strengthen the protection of animals during transport.

As to address the problems identified, the proposal on the protection of animals at the time of killing aims at increasing the responsibility of operators on animal welfare and the level of competence of the personal in slaughterhouses. Several changes are also introduced as to take into account the technological changes and the new scientific knowledge in this field.

### ***Summary of Sector***

The challenge in this sector is to reply to the growing European citizens' concerns on animal welfare and to balance expectations of animal welfare organisation with the requirements of a competitive agriculture, while seeking to simplify legislation and reduce administrative burden.

#### 14.4.23. Plant Health

##### 14.4.23.1. Current Situation

In 2008, the strategy of the Commission in this field has gone in two directions:

First, ensure the application of the current *acquis* through, in particular, the strengthening of the emergency measures against pinewood nematode (*Bursaphelenchus xylophilus*), the adoption of new emergency measures against Chinese long horn beetle (*Anoplophora chinensis*), and the update of the list of the harmful organisms mentioned in Directive 2000/29/EC.

In parallel different exercises have been undertaken to initiate an evaluation of the whole *acquis* in this area:

An evaluation of the Community regime of financial contributions to help Member States to control outbreaks of organisms harmful to plants and plant products has been completed. An action plan has been presented and discussed in the Council. This action plan intends to ease the use of the regime by Member States and its administration by the Commission. Certain more strategic issues have also been considered and will be evaluated in the framework of the above mentioned overall evaluation of the plant health regime.

In addition, in order to develop the future Community plant health strategy, terms of reference have been prepared for conducting an overall evaluation of the current Community plant health regime. The regime aims to protect the EU territory against introduction and spread of regulated organisms which are harmful to plants. It lays down specific requirements for imports of all plants and some plant products into the EU and for internal movement of a limited number of plants within the EU. The first objective of the evaluation will be to analyse the results of the existing regime. The second objective will be to clarify which aspects of the current regime need to be improved and to suggest potential options for amendment, including possible improvements to its structure and working practices. The evaluation will start in the early 2009 and be completed in 2010.

In parallel, in order to better protect the Community against the entry and spread of plant harmful organisms, Community legislation has been developed or amended, in particular as regards emergency measures against the pinewood nematode, and the Chinese long horn beetle, attacking a broad range deciduous trees and shrubs).

The implementation of Community legislation in the field of protected zones has been simplified by converting the *ad hoc* Directive 2001/32/EC into the Regulation No (EC) 690/2008.

Moreover, 7 new harmful organisms have been added to the lists of regulated harmful organisms in the basic plant health Directive 2000/29/EC.

EUROPHYT, the Community database for notification of interceptions, has been upgraded in 2008 to automatically inform the third country of origin whenever a consignment originating in that country has been intercepted at import for phytosanitary reasons and has been introduced in EUROPHYT. In essence, this achieves compliance to an international IPPC obligation to inform the country of origin about interceptions at import and facilitates this process for the EU Member States.

A guidance document has been prepared to explain the EU requirements for additional declarations on phytosanitary certificates<sup>439</sup>.

#### 14.4.23.2. Legislative Changes Underway

The preparatory work to allow a recast of the main plant health Directive (Directive 2000/29/EC) was achieved in 2008 and will continue to be rolled out in 2009.

An impact assessment study has been launched to analyse the economic, social and environmental impacts of options for the long-term EU strategy against Western Corn Rootworm (*Diabrotica virgifera*), a regulated harmful organism of maize.

#### 14.4.24. *Seeds and Plant Propagating Material*

##### 14.4.24.1. Current Situation

In 2007-2008, an evaluation of the legislation on marketing of seeds and plant propagating material (12 basic Directives concerned<sup>440</sup>) was carried out. This evaluation, which was placed in the general context of Better Regulation initiative, aimed at establishing objectively how effectively and efficiently the legislation has met its original objectives, and to identify its strengths, the areas for improvement and its robustness with regards to potential new challenges affecting this field. It also aimed to analyse the coherence of the intervention with other related interventions, and with the OECD and other international standards as well as to assess the relevance and the utility of the intervention.

Possible options for future were suggested with a particular attention paid on to the social, environmental and economic impact of each of these options, as well as on the feasibility of each option, stakeholders' level of support and their strengths and weaknesses. The concepts of simplification and reduction of administrative burden on the public authorities and the private sector were also taken into account.

In addition, in September 2008, the Council adopted Directive 2008/90/EC on the marketing of fruit plant propagating material and fruit plants intended for fruit production which is a recast of the Directive on the marketing of fruit plant propagating material. This recast was prepared by the Commission based on the principle of better regulation and simplification to ensure a more efficient and transparent functioning of the internal market for fruit plant

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<sup>439</sup> [http://ec.europa.eu/food/index\\_en.htm](http://ec.europa.eu/food/index_en.htm).

<sup>440</sup> Council Directive 66/401/EEC on the marketing of fodder plant seed (OJ L 125, 11.7.1966, p. 2298–2308); Council Directive 66/402/EEC on the marketing of cereal seed (OJ L 125, 11.7.1966, p. 2309–2319); Council Directive 2002/54/EC on the marketing of beet seed OJ L 193, 20.7.2002, p. 12–32); Council Directive 2002/55/EC on the marketing of vegetable seed (OJ L 193, 20.7.2002, p. 33–59); Council Directive 2002/56/EC on the marketing of seed potatoes (OJ L 193, 20.7.2002, p. 60–73); Council Directive 2002/57/EC on the marketing of seed of oil and fibre plants (OJ L 193, 20.7.2002, p. 74–97); Council Directive 68/193/EEC on the marketing of material for the vegetative propagation of the vine (OJ L 93, 17.4.1968, p. 15–23); Council Directive 2008/72/EC of 15 July 2008 on the marketing of vegetable propagating and planting material, other than seed (OJ L 205, 1.8.2008, p. 28–39); Council Directive 2008/90/EC of 29 September 2008 on the marketing of fruit plant propagating material and fruit plants intended for fruit production (OJ L 267, 8.10.2008, p. 8); Council Directive 98/56 on the marketing of propagating material of ornamental plants (OJ L 226, 13.8.1998, p. 16–23); Council Directive 1999/105/EC on the marketing of forest reproductive material (OJ L 11, 15.1.2000, p. 17–40); Council Directive 2002/53/EC on the common catalogue of varieties of agricultural plant species (OJ L 193, 20.7.2002, p. 1–11).

propagating material. It was intended to clarify and simplify the regulatory framework in which business operates (clarification of the definitions, of the requirements to be met), to adapt the legislation based on technical and scientific progress and finally to align this Directive with the other Directives on the marketing of propagating material which have recently been amended in the framework of the new Common Agricultural Policy<sup>441</sup>.

To facilitate trade, to harmonise rules for the internal market and to reduce administrative burden, the following implementing measures were also adopted:

- In June 2008, the Commission adopted Directive 2008/62/EC providing for certain derogations for the acceptance of agricultural landraces and varieties which are naturally adapted to the local and regional conditions and threatened by genetic erosion and for the marketing of seed and seed potatoes of those landraces and varieties (conservation varieties). This Directive, an implementing measure based on the various Directives on the marketing of seed of agricultural plant species and potatoes, sets out specific conditions under which the marketing of conservation varieties may take place. Before the adoption of this Directive, the marketing of conservation varieties was not possible as these varieties were not able to meet the required marketing conditions set out by the basic Directives.
- In December 2008, Council Decision 2008/971/EC on equivalence of forest reproductive material produced in third countries was adopted. This Decision harmonises at Community level the conditions under which forest reproductive material may be imported from third countries. It was completed by the adoption of Commission Decision 2008/989/EC authorising Member States, in accordance with Council Directive 1999/105/EC, to take decisions on the equivalence of the guarantees afforded by forest reproductive material to be imported from certain third countries.

#### 14.4.24.2. Legislative Changes Underway

Based on the results of the mentioned evaluation the Commission is currently preparing an action plan to be finalised by June 2009. In addition, the process has started to identify the issues on which detailed impact assessments should be carried out before options for the future can be chosen.

Notwithstanding the work done on the evaluation - which will produce its fruits in the future - different actions have been undertaken to ensure the updating and adaptation of the Community legislation on the seed and propagating material legislation to current needs. In particular, several key implementing measures, sometimes long time awaited, were adopted (i.e. Directive 2008/62/EC providing for certain derogations for the acceptance of agricultural landraces and varieties which are naturally adapted to the local and regional conditions and threatened by genetic erosion and for the marketing of seed and seed potatoes of those landraces and varieties and the review of the conditions of import of certain forest material coming from third countries into the Community).

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<sup>441</sup> Council Directive 98/56 on the marketing of propagating material of ornamental plants (OJ L 226, 13.8.1998, p. 16–23); Council Directive 1999/105/EC on the marketing of forest reproductive material (OJ L 11, 15.1.2000, p. 17–40).

#### 14.4.25. Plant Variety Rights

The Community Plant Variety Rights system was created by Council Regulation (EC) No 2100/94. This Regulation is based on the UPOV Convention of 1991 (International Union for the Protection of New Varieties of Plants) and provides protection of new plant varieties valid throughout the European Community. The plant variety protection right is a form of intellectual property akin to a patent. On the basis of a single application to the Community Plant Variety Office based in Angers (F), a breeder may be granted a Community-wide intellectual property right for his/her new variety. In 2008, the Community Plant Variety Rights results were outstanding: more than 3 000 applications were received by the Office in Angers. Currently, nearly 16.000 varieties of plants are protected under the Community Plant Variety Rights system.

During the course of 2008 efforts were made to improve the implementation of the plant variety system. Commission Regulation (EC) No 1239/95 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office was amended by Commission Regulation (EC) No 355/2008 as regards the use of electronic means of communication in proceedings before the Community Plant Variety Office.

Furthermore, Commission Regulation (EC) No 1238/95 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards the fees payable to the Community Plant Variety Office was amended by Commission Regulation (EC) No 572/2008 as regards the level of the annual fee and the fees relating to technical examination, payable to the Community Plant Variety Office, and the manner of payment.

In the frame of "better regulation", a recast of Commission Regulation (EC) No 1239/95 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office started in the last quarter of 2008.

## 15. JUSTICE, FREEDOM AND SECURITY

### 15.1. Immigration and integration

#### 15.1.1. Current position: general introduction

Community legislation in the field of immigration and integration currently consists of seven directives. The two first directives concern illegal immigration and were adopted on the basis of Articles 61(a) and 63(3)(b) of the EC Treaty: the carriers liability Directive 2001/51<sup>442</sup> and Directive 2002/90<sup>443</sup> defining facilitation. As concerns legal migration, three sets of measures of have been adopted:

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<sup>442</sup> Council Directive 2001/51 of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 187, 10.7.2001, p. 45).

<sup>443</sup> Council Directive 2002/90 of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 17).

- a first set of measures adopted in 2003: the family reunification Directive 2003/86<sup>444</sup> and the long-term residents Directive 2003/109<sup>445</sup>;
- Directive 2004/81 of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities<sup>446</sup>;
- the students Directive 2004/114<sup>447</sup> and the researchers Directive 2005/71<sup>448</sup>.

The EU's comprehensive migration policy is still being developed, and consequently efforts in this area are as much about developing new legislation as ensuring the application of existing legislation. As concerns labour migration, the Commission in its 2005 Policy Plan on Legal Migration<sup>449</sup> announced its intention to present proposals for a general framework directive and directives for specific categories of paid workers. As at the end 2008 the Council was close to agreement on the first such specific directive, the highly-skilled workers directive ("EU Blue Card"). In the field of illegal immigration, the European Parliament and Council were close to final agreement on the employer sanctions directive. Both those directives have been adopted in 2009, with a deadline for transposition in 2011.

Further legislative proposals are likely to result from the programme that will follow on from the Hague programme and its accompanying Action Plan.

#### 15.1.2. *Current position: Report on work done in 2008*

As concerns infringements, the Commission continued, in line with the priorities stated in the 2007 Annual Report<sup>450</sup>, to prioritise non-communication cases and the most important suspected infringements disclosed by complaints.

As regards non-communication cases, in the course of 2008 most of the Member States that had not initially complied with the transposition deadlines did so. By the end of the year transposition measures had still not been communicated by Cyprus in relation to Directive 2005/71 and Spain in relation to Directives 2003/109<sup>451</sup>, 2004/81<sup>452</sup>, 2004/114 and 2005/71<sup>453</sup>.

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<sup>444</sup> Council Directive 2003/86 of 22 September 2003 on the right to family reunification (OJ L 251, 3.10.2003, p. 12).

<sup>445</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44).

<sup>446</sup> OJ L 261, 6.8.2004, p. 19.

<sup>447</sup> Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ L 375, 23.12.2004, p. 12).

<sup>448</sup> Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ L 289, 3.11.2005, p. 15).

<sup>449</sup> COM(2005) 669 final.

<sup>450</sup> SEC(2008) 2854 at p.226.

<sup>451</sup> Following judgment of 15.11.2007, Case C-59/07 *Commission v. Spain*, an Article 228 procedure was begun.

<sup>452</sup> Case pending before the Court, Case C-266/08 *Commission v. Spain*.

<sup>453</sup> Case pending before the Court, Case C-523/08 *Commission v. Spain*.

As regards suspected infringements disclosed by complaints, the Commission started an infringement procedure against the Netherlands in relation to the high level of fees charged to those applying for long-term residents permits.

As concerns the management of the existing acquis, a meeting of the contact committee on the legal migration directives provided the opportunity for a useful exchange of views between the Commission and national experts involved in the application of the legal migration directives. A meeting of the national contact points appointed under the long-term residents Directive 2003/109 was also held. Alongside discussions in the contact committee, the European Migration Network<sup>454</sup> (EMN) allowed Member States (and the Commission) to address ad-hoc queries to obtain a quick overview on how other Member States transpose specific provisions of the Directives.

The final report of a study into the transposition of 10 immigration and asylum directives was delivered. The study was carried out by the Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe on behalf of the European Commission. In the field of immigration the report covers Directives 2001/51, 2002/90, 2003/86, 2003/109 and 2004/81.

The Commission presented a report on the application of the family reunification Directive 2003/86<sup>455</sup>, based on the Odysseus network study, a study carried out by the EMN and other studies. The report notably revealed a few cross-cutting issues in relation to the transposition or application of the Directive, such as the provisions on visa facilitation, granting autonomous residence permits, taking into account the best interest of the child, legal redress and more favourable provisions for the family reunification of refugees.

As concerns the development of new legislation, legislative discussions in Council and European Parliament continued on the three proposals presented in 2007: the general framework directive for labour migration (“Rights and single permit”)<sup>456</sup>, the highly-skilled workers directive (“EU Blue Card”)<sup>457</sup> and the employer sanctions directive<sup>458</sup>. In addition, the Commission started preparing its proposals for directives on other specific categories of paid workers (seasonal workers, intra-corporate transferees and remunerated trainees) in line with the 2005 policy plan.

### *15.1.3. Evaluation of work done in 2008*

2008 nevertheless marked the year in which the transposition process for the existing acquis was for the most part achieved. It is regrettable that many Member States were late in transposing the directives in this field. For future directives Member States need to make renewed efforts to complete the transposition within the deadlines.

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<sup>454</sup> Council Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network (OJ L 131, 21.5.2008, p. 7).

<sup>455</sup> COM(2008) 610 final.

<sup>456</sup> Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State COM(2007) 638 final

<sup>457</sup> Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment COM(2007) 637 final

<sup>458</sup> Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals COM(2007) 249 final



The external transposition study covering 5 of the directives provides a good foundation for future work in ensuring the correct application of this acquis. The study notably provided one of the bases for the Commission's report on the family reunification directive, which in turn will form the basis of future work to review that directive. This approach (first an external study, then a Commission report as a basis for further action) will be progressively applied to the other directives which contain a reporting obligation for the Commission.

Legislative activity (preparing new proposals as well as legislative discussions themselves) continued to be important in this sector.

#### *15.1.4. Evaluation results: priorities*

1. Assessing the need for a review of the family reunification Directive 2003/86. This was the first legislative instrument on legal migration at EU level and, as a result several Member States<sup>459</sup> for the first time have a detailed set of rules on the right to family reunification in their national legislation.
2. Preparing Commission reports on the application of other priority directives.

#### *15.1.5. Evaluation results: planned action (2009 and beyond)*

As regards the first priority, the family reunification Directive 2003/86, the Commission will follow up its report on the directive as follows:

- In line with the with the call of the European Pact on Immigration to regulate family migration more effectively<sup>460</sup>, the Commission will launch a wider consultation – in the form of a Green Paper – on the future of the family reunification regime. This could lead to proposals, at earliest in 2010, to amend the current directive.

As regards the second priority, the Commission will start preparing its reports on the victims of trafficking directive. On the basis of those reports the Commission will decide on what further action is needed.

Other activity will include:

- Handling individual enquiries and complaints (the number of which is rising), where possible using the EU Pilot project.
- Commissioning an external transposition study, as well as a study to update the Odysseus network study on the long-term residents directive.

As concerns new legislation:

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<sup>459</sup> EL, CY, MT, RO.

<sup>460</sup> Presidency Conclusions, document 14368/08. The Pact itself is in document 13440/08, and the reference to family migration is at point I(d).

- Two directives have been adopted in 2009: the highly-skilled workers directive (“EU Blue Card”) and the employer sanctions directive. Beginning in 2009 and continuing until the transposition deadline in 2011 the Commission will follow closely the transposition and will offer assistance to Member States through meetings of contact committees and bilateral contacts.

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#### 15.1.6. Summary

Priority will be given to following up the first Commission report on a directive in this sector, the family reunification directive. A Green Paper will launch a consultation on whether the rules should be changed. The Commission will prepare reports for the victims of trafficking directive. Given the ongoing development of the EU’s comprehensive migration policy, attention also needs to be given to the good preparation of new proposals and the following of the transposition of directives that have been adopted in 2009.

## 15.2. Asylum

### 15.2.1. Current position – report on work done in 2008

On 17 June 2008, the Commission adopted a Policy Plan on asylum<sup>461</sup>, summarising the feedback to the Green Paper on asylum policy published in June 2007<sup>462</sup> and setting out a "road map" for the future development of the Common European Asylum System (CEAS). In particular, the plan underlined the need for the Commission to make further legislative initiatives in the near future, including proposals for the revision of the principal existing Community legal instruments in the asylum field, as well as further proposals for the adoption of legislation establishing a European Asylum Support Office to support practical cooperation efforts between Member States in asylum matters and establishing an EU resettlement scheme. Further possible measures, including better coordination of the external aspects of the Community's asylum policy, and providing for greater solidarity between Member States in the reception of asylum seekers, were also contemplated.

On 3 December 2008, the Commission adopted proposals to revise three legislative instruments: the Reception Conditions Directive (Directive 2003/9), the "Dublin" Regulation (Regulation 343/2003)<sup>463</sup>, and the EURODAC Regulation (Regulation 2725/2000). The main purpose of the proposed revision of the Reception Conditions Directive is: to enhance the general standards of treatment for asylum seekers; to ensure greater protection of vulnerable persons; to improve access to the labour market for asylum seekers; to limit the detention of asylum seekers to those situations where it is necessary; and, to ensure that the scope of the Directive extends to all those seeking protection (both refugee and subsidiary protection status). The main purpose of the proposed revisions of the "Dublin" and EURODAC Regulations is: to enhance the protection of asylum seekers, in particular of vulnerable

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<sup>461</sup> "Policy Plan on Asylum – an integrated approach to protection across the EU" (COM(2008) 360).

<sup>462</sup> COM(2007) 301 final

<sup>463</sup> Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person COM(2008) 820 final

persons; to ensure greater efficiency in the system for the determination of the State responsible for examining asylum applications, and; to introduce flexibility in the system to enable the transfer of asylum seekers to be suspended in the interests of solidarity between Member States or in order to ensure the protection of the persons concerned.

In January 2008, the Commission sent letters of formal notice to 15 Member States for non-communication of transposition measures relating to the Asylum Procedures Directive (Directive 2005/85). In September 2008, the Commission sent a reasoned opinion to Belgium for non-communication of transposition measures relating to that Directive; Belgium had not replied to the letter of formal notice. By December 2008, 6 Member States still had not communicated full transposition of the relevant parts of the Directive. In December 2008, proceedings against 4 Member States for non-communication of transposition measures relating to the Qualification Directive (Directive 2004/83) were still pending.<sup>464</sup>

In January 2008, the Commission initiated proceedings against Greece before the European Court of Justice for non-application of the Dublin Regulation, and in particular for not granting effective access to the asylum procedure to asylum seekers who were transferred to Greece under the Dublin Regulation, thus creating a risk of violation of the *non-refoulement* principle; the Greek legislation provided that the substance/merits of an asylum application would not be examined, if the examination had been interrupted by the asylum seeker's having left the territory of Greece.<sup>465</sup> These proceedings before the ECJ were withdrawn in September 2008, following the revision of legislation by Greece.

During 2008, the Commission also pursued activities aimed at enhancing practical cooperation between Member States in the asylum field, notably by organising a series of Workshops focused on the assessment of the protection needs of asylum seekers from particular countries-of-origin.

#### 15.2.2. *Legislative changes underway (2009-2010)*

Discussion of the three Commission proposals for revision of the Reception Conditions Directive, the Dublin Regulation, and the EURODAC Regulation in the Council Working Group is expected to continue throughout 2009.

On 18 February 2009, the Commission adopted a proposal to create a European Asylum Support Office (EASO) as an independent Community agency to manage practical cooperation in the asylum field, including an amendment of the Decision establishing a European Refugee Fund.<sup>466</sup> The establishment of an EASO enjoyed the unanimous political support of the European Council in October 2008, in the context of the conclusion of the so-called European Pact on Immigration and Asylum. It is expected that political agreement will be reached on the proposal during the first half of 2009, and that it will be adopted before the end of 2009.

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<sup>464</sup> The case against Finland resulted in a ruling by the ECJ on 5 February 2009 that Finland had breached Art. 226 (Case C-293/08, *Commission v Finland*).

<sup>465</sup> Case C-130/08, *Commission v. Greece*.

<sup>466</sup> Council Decision No 573/2007/EC.

### 15.2.3. Evaluation based on the current situation

The Community *acquis* in the asylum field, all of which has been in force for less than ten years, is still relatively recent. In line with the ambitions articulated by the Council in the Hague Programme in 2004 and in the Commission's own 2008 Policy Plan, the scope of the *acquis* is in need of being extended and enhanced, in order to see the successful completion of the CEAS. More specifically, Community asylum legislation should ensure higher levels of protection generally, a more level playing field for persons seeking asylum in the different Member States, greater efficiency in the treatment of asylum applications, better coordination of the external aspects of asylum policy, and more solidarity between Member States in sharing the burdens associated with receiving asylum seekers.

Moreover, the Commission is particularly concerned by the fact that, notwithstanding the existence of the common minimum standards and a partial harmonisation in the current *acquis*, the rates of recognition of asylum seekers as qualifying for protection still varies very considerably between Member States. This deficit can be attributed to a number of causes, including a lack of legislative harmonisation, variation in the manner in which the current legislation is applied in practice, and variation in the nature of the information on the situation in countries-of-origin upon which asylum decisions are taken.

In view of these shortcomings, the Commission sees a need to pursue a "twin track" approach consisting of, on the one hand, extending the Community *acquis* and, on the other, at the same time consolidating the *acquis* by means of (a) taking infringement actions against Member States for non-transposition and/or incorrect application of the *acquis*, and (b) enhancing practical cooperation activities, notably regarding the exchange of information/best practice, and the pooling of resources/expertise.

### 15.2.4. Evaluation results: priorities and planned action

To date, the Commission has given priority to the creation and further development of Community legislation in the asylum field, and to facilitating practical cooperation among Member State authorities.

The Commission intends to pursue the following priorities in relation to the development, application and monitoring of Community law in the asylum field in the coming years:

- The creation and further development of Community legislation in the asylum field, notably as regards the amendment of the existing legislative instruments and the adoption of new ones in line with the Policy Plan on asylum and the Immigration and Asylum Pact;
- Pursuit of practical cooperation efforts between Member States, aimed at improving the practical implementation/application of the *acquis* in the Member States, with a view in particular to ensuring an effective transition to the establishment of the EASO;
- Monitoring and evaluation of the implementation of Community legislation in the asylum field;
- Contribution to the Commission's intervention before the ECJ with regard to requests by national courts for preliminary rulings on the interpretation of Community legislation in

the asylum field, and follow-up of individual complaints about compliance with Community legislation in the asylum field in the Member States.

#### 15.2.5. *Summary*

Community law in the asylum field is still in the process of being developed. Some shortcomings have been identified in the existing *acquis* and in the manner in which it is applied. Priority in the short to medium term should be accorded to extending and improving Community legislation in the asylum field. At the same time, it is necessary to intensify practical cooperation between Member States with a view to ensuring more consistency in their application of the *acquis*, in particular by ensuring the successful establishment of a European Asylum Support Office. The Commission will moreover continue to monitor and evaluate the implementation of Community legislation in the asylum field, to intervene before the ECJ with regard to requests by national courts for preliminary rulings on its interpretation, and to follow up complaints against Member States for incorrect application of the *acquis*.

### 15.3. **European visa policy**

#### 15.3.1. *Current position: general introduction*

Currently the issuance of short-stay visas is governed by a number of legal instruments drawn up over the last 15 years which were mostly developed within the Schengen framework.

In order to update and simplify this legal framework, the Commission proposed in 2006 to the Council and the Parliament the revision of the Common Consular Instructions on visas for diplomatic missions and consular posts (CCI) for the introduction of biometrics and the adoption of a Community Code on Visas<sup>467</sup>. The proposals have been under discussion in the Council and the European Parliament for the last two years. They are due to be formally adopted during the first semester of 2009.

#### 15.3.2. *Report on work done in 2008*

Due to the process of revision of the community *acquis* on short-stay visas during the years 2007-2008, it was not considered necessary to advance infringement procedures initiated in 2007 which are related to incorrect implementation of legislation for which the Commission proposed a revision.

In 2008 the Commission received and followed up several complaints from individuals related to the incorrect implementation of Community law in the field of visas. Most of these complaints related to failure to give reasons by consular offices for the visa refusals, lack of comprehensive information on the visa application process, delays in the visa processing time, absence of appeal procedures against refusal or lack of harmonisation among Member States Consular offices regarding the lists of supporting documentation requested from the visa applicants.

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<sup>467</sup> Draft Regulation of the European Parliament and of the Council establishing a Community Code on Visas (COM(2006) 403 final, 19.7.2006).

### *15.3.3. Evaluation based on the current situation*

The complaints received reflected the weakness of the current visa *acquis*; a large majority of these common problems will be resolved with the introduction of the new Visa Code which includes inter alia mandatory provision for reasons on visa refusal and right to appeal, harmonised deadlines for the visa handling process, enforcement of local consular cooperation and development of consular representation at local level. In addition, the introduction of biometrics is expected to ensure sharing of information between Member States Consular offices and to resolve the problem of visa shopping.

### *15.3.4. Evaluation results: priorities and planned action (2009 and beyond)*

In light of the adoption by the European Parliament and the Council of the revision of the Common Consular Instructions introducing biometrics and the Visa Code, the Commission has the intention to encourage the timely, correct and efficient implementation of the new legislative framework by all Member States. Due to the importance of visa policy in EU external relations as well as the impact of an efficient visa policy for fighting against illegal migration, the Commission will also identify, in consultations with Member States, priority areas of action.

## **15.4. Document Security - European passport and residence permits**

### *15.4.1. Current position – report on work done in 2008*

The Commission continued to closely monitor the implementation of the Regulation 1030/2002 laying down a uniform format for residence permits for third country nationals.

In addition, within the framework of the process for the introduction of biometrics to the documents issued by EU Member States, the Council adopted on 18 April 2008 an amendment of Regulation 1030/2002 regarding the collection of the facial image and two finger prints from third country nationals.

Ensuring the implementation of Regulation 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States was a priority for the Commission, in particular in relation with Member States which acceded to the European Union in 2004 and 2007.

In 2008, the revision of regulation 2252/2004 was discussed on the basis of the Commission's proposals dated 18 October 2007 which provides harmonised exceptions for children under 6years old and persons who are physically unable to give fingerprints.

### *15.4.2. Evaluation based on the current situation*

During 2008 the Commission continued to closely monitoring the correct implementation of Regulation 1030/2002 laying down a uniform format for residence permits for third country nationals; in this context, reasoned opinions have been sent to Italy and Belgium for incorrect implementation of Article 9 of that Regulation.

Significant progress has been achieved in 2008 regarding the implementation of Regulation 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States, in particular in relation with Member States which acceded to the European Union in 2004 and 2007.

#### *15.4.3. Evaluation results: priorities and planned action (2009 and beyond)*

Ensuring the correct and timely implementation by all Member States of the second biometric identifier (finger prints) - in line with Regulation 2252/2004 - in the passports and travel documents of EU citizens is a priority action for 2009.

### **15.5. Border management and return policy**

#### *15.5.1. Current position: general introduction*

In the field of border management and return policy, the Commission mainly carried out its control of the application of Community law, which resulted in the launch of infringement proceedings in few cases. Moreover, the Commission handled numerous consultations with Member States on the compatibility of draft bilateral agreements with third countries in the framework of the Local Border Traffic Regulation <sup>468</sup>.

#### *15.5.2. Current position: report on work done in 2008*

The Commission has received and followed-up several complaints and petitions from individuals related to the incorrect application of Community law in the field of border management, and particularly of the Schengen Borders Code <sup>469</sup>. Most of these complaints and petitions concern the non compliance with provisions related to the abolition of internal border controls and to the removal of obstacles to traffic at road crossing points at internal borders between Member States, particularly at the new internal borders after the Schengen enlargement in December 2007.

Within the framework of the Local Border Traffic Regulation, multiple consultations took place between the Commission and a number of Member States on the compatibility of bilateral draft agreements with third countries with the LBT Regulation, in form of exchange of information and informal advice, expert's meetings as well as formal exchange of correspondence. In particular, the Commission analysed the compatibility of the following draft agreements with Community law: Poland-Ukraine, Lithuania-Belarus, Latvia-Russian Federation, Slovakia-Ukraine, Poland-Belarus, Bulgaria-Serbia, Bulgaria-FYROM, Romania-Ukraine. Two bilateral agreements on the local border traffic entered into force in 2008: Hungary-Ukraine and Slovakia-Ukraine.

As far as the implementation of the Council Directive 2004/82/EC is concerned, all Member States notified their national legislation except Poland, against which an infringement procedure was opened and is still pursued for non-communication. The infringement procedure for non-communication against Greece opened in 2007 has been closed, following the communication of the transposition measures.

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<sup>468</sup> 20 December 2006, Regulation (EC) No [1931/2006](#)

<sup>469</sup> 15 March 2006, Regulation (EC) No 562/2006

In the field of return action focused on some remaining open cases of non-communication of transposition of Directives 2001/40/EC (cases related to incomplete transposition had to be launched against CZ, EE, MT and SK) and 2003/110/EC (a pending case against BE could be closed; a 228 reasoned opinion had to be sent to ES).

#### *15.5.3. Evaluation based on the current situation*

The correct application of Community legislation in the field of border management and particularly in the absence of internal border controls has a substantial impact on the area without internal borders in which the free movement of persons has to be ensured. The nature of the problems identified through complaints and petitions of individuals has been and remains a cause of concern for the Commission as to the effective application of the acquis. Particularly, following the Schengen enlargement in December 2007 to the nine Member States which joined the EU in 2004, new problems raised related to the correct application of the acquis at the new internal borders. The Commission endeavours to closely monitor the situation in these internal border zones.

In this context, in March 2009 the Commission adopted a proposal for a Council Regulation on the establishment of the evaluation mechanism to verify the application of the Schengen acquis<sup>470</sup>. This proposal provides for a possibility for the Commission to carry out unannounced on-site visits to verify the absence of controls at internal borders. If this new instrument is adopted by the Council as proposed by the Commission, it will contribute considerably to the correct application of the absence of internal border controls.

In the field of return, the main achievement in 2008 was the adoption of the European Parliament and Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third country nationals. So far, Community legislation in the field of return had been limited to certain specific issues chosen by Member States under their right of co-initiative, such as the organisation of joint flights for removal (Decision 2004/573/EC), assistance in cases of transit for removal by air (Directive 2003/110/EC) and the possibility of mutual recognition of expulsion Decisions (Directive 2001/40/EC). The series of non-communication cases related to these instruments is about to come to an end in 2009.

Contrary to the abovementioned measures, the return Directive 2008/115/EC is the first horizontal piece of Community legislation harmonising systematically and inclusively the standards in Member States on return, removal, entry-ban, detention etc. The focus of the Commissions activities in the next years will therefore be to support and monitor the correct transposition of this important legal instrument by Member States.

#### *15.5.4. Evaluation results: priorities*

In 2008, priority has been given to the follow-up of complaints and petitions received from citizens in the field of internal borders, notably with relation to the checks carried out on persons in internal border zones and with the remaining obstacles to traffic at the road crossing points at internal borders. The Commission regularly addressed national authorities

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<sup>470</sup> COM(2009)102 final.



of the Member States in order to obtain explanations, particularly on the alleged checks on persons within the internal border zones.

In 2008, priority was also given to obtaining an agreement on the return Directive 2008/115/EC. Numerous complaints and petitions related to return issues have been received but no concrete follow-up could be given, due to a lack of binding Community legislation in this field.

#### *15.5.5. Evaluation results: planned action (2009 and beyond)*

As one of the fundamental objectives, the Commission will continue to closely monitor the correct application of the Community legislation in the field of absence of internal border controls. The aforementioned Commission's proposal could undoubtedly contribute to the accomplishment of this objective. Priority will thus still be given to complaints and petitions received from individuals in relation to checks carried out on persons in internal border zones and with the remaining obstacles to traffic at road crossing points at internal borders. It is expected that the volume of enquiries will increase, as the sensitivity of the border acquis increases.

Moreover, the Commission will continue to carry out consultations with Member States and analyse the compatibility of draft LBT agreements with Community law. The priority will also be to closely monitor the compliance with EC law of the agreements which are already in force.

Furthermore, the analysis of the correct transposition of the Directive on the obligation of carriers to communicate passenger data <sup>471</sup> will be finalised in the first months of 2009.

Finally, numerous complaints and petitions related to return issues are being received by the Commission. The recent adoption of the return Directive 2008/115/EC will allow the Commission to become more active and intervene with Member States on return related issues (to a certain extent already during the transposition period which will end in December 2010 and to a full extent after this date). In view of the likely high number of complaints which will be received from 2010 onwards, there will be a need for priority setting.

A focus of the Commissions activities in the next years will also be to accompany and supervise the correct transposition of the return Directive by means of convening contact groups with Member States representatives in order to facilitate the identification of possible problems and questions of interpretation at an early stage and to offer an opportunity for discussion between Member States and the Commission Services.

## **15.6. Free movement of persons**

### *15.6.1. Current position: general introduction*

Free movement of persons constitutes one of the fundamental freedoms of the internal market, to the benefit of EU citizens, of the Member States and of the competitiveness of European

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<sup>471</sup> 2004/82/EC

economy. In the first days of the European project, only workers benefited from free movement. Over time, this right was extended to all EU citizens. Citizenship of the Union confers on every EU citizen a primary and individual right to move and reside freely in the EU (Article 18 of the EC Treaty). The details of this right are to be found in Directive 2004/38/EC<sup>472</sup> which codified the existing legislation and case-law in the area of free movement, and simplified it in the interest of reader-friendliness and clarity.

Article 18 of the EC Treaty stipulates that every EU citizen has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect. The respective limitations and conditions are to be found in Directive 2004/38/EC.

#### *15.6.2. Current position – report on work done in 2008*

In 2008 the Commission continued to deal with a large number of enquiries and complaints in the area of free movement of persons - 1070 for 2008 compared with 770 received in 2007. Complaints management was also a significant part of ensuring full and proper implementation of Directive 2004/38/EC. In 2008, 81 complaints were registered with the Secretariat-General (compared with 64 registered in 2007). There were 91 written EP questions and 29 petitions in the area of free movement of persons in 2008.

The Commission also made an extensive use of informal dispute-settlement mechanisms, such as SOLVIT. According to the 2008 report on development and performance of the SOLVIT network, the number of cases in the residence rights area rose by 93 %.

In 2008 9 cases were submitted to the EU Pilot scheme.

The single most important activity concluded in 2008 was adoption of the report on the application of Directive 2004/38/EC<sup>473</sup>. The purpose of this report was to present a comprehensive overview of how the Directive was transposed into national law and how it was applied in everyday life. With this report, the Commission discharged its obligation under Article 39(1) of the Directive to draw up a report on the application of the Directive and to submit it to the European Parliament and the Council.

The report has been drawn up on the basis of many sources, including an implementation study, carried out by an external contractor, analysing the conformity of national provisions with the Directive, a questionnaire on practical implementation of the Directive answered by the Member States, the Commission's own investigations, individual complaints, co-operation with the European Parliament, Parliamentary resolutions<sup>474</sup>, questions and petitions and discussions in two meetings of the group of experts from Member States on practical issues arising from application of the Directive.

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<sup>472</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158 of 30 April 2004, p. 77).

<sup>473</sup> COM(2008)840 final.

<sup>474</sup> EP resolution of 15 November 2007 on application of Directive 2004/38/EC (P6\_TA(2007)0534).

Concerning implementation of priorities established in the 25<sup>th</sup> Annual Report on the Control of Application of Community law (2007) in the area of free movement of persons for 2008<sup>475</sup>, all 19 infringement procedures against Member States for their failure to communicate the text of the provisions of national law adopted to transpose the Directive have been closed by November 2008, as all Member States have gradually adopted and communicated the transposition measures.

Progress on Article 228 of the EC Treaty cases has been less satisfactory with no cases closed. The correct transposition of the Directive 2004/38/EC, which overhauled the whole system of national rules, will also ensure compliance with the judgments of the Court in a number of Article 228 of the EC Treaty cases.

Concerning cases raising issues of principle or having particularly far reaching negative impact for citizens, the Commission actively pursued a number of such issues. In February 2009, 62 cases concerning the Irish rules requiring third country family members to be lawfully resident in another Member State before arriving in Ireland, which have been ruled contrary to Community law by the Court on 28 July 2008<sup>476</sup> and immediate amendment of the rules by the Irish authorities, were closed.

#### *15.6.3. Evaluation based on the current situation*

Priorities set in the previous Annual Report have proven adequate to allow the Commission to focus its efforts in 2008 on the most important areas. Crucially, all Member States have completed transposition of the Directive by the end of 2008 and the legal situation of EU citizens has therefore improved.

However, despite the efforts of the Commission, the situation in the area of free movement of persons remains serious. The report on the application of Directive 2004/38/EC<sup>477</sup> concluded that the overall transposition of the Directive was rather disappointing. Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States. On the other hand, Member States in some areas adopted transposition measures that are more favourable to EU citizens and their family members than required by the Directive itself.

To address the unsatisfactory transposition, the Commission will also continue working at technical level with the Member States. In September 2008 the Commission created a group of experts from Member States to identify difficulties and to clarify issues of interpretation of the Directive. Two meetings of the group of experts identified a number of issues that require further discussion and clarification, especially as regards the issues of criminality and abuse. A questionnaire was prepared to understand the concerns of the Member States on the ground, and to collect statistical data and best practice. The group will continue to meet on a regular basis.

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<sup>475</sup> COM(2008) 777 final

<sup>476</sup> Judgment of the Court of 25 July 2008 in case C-127/08 *Metock and others* (not yet published).

<sup>477</sup> COM(2008) 840/3

The outlook for 2009 and beyond is not optimistic. The Commission is already in contact with Member States to address the transposition of the Directive in Member States as around one quarter of the provisions of the Directive have not been correctly or fully transposed. The failure to transpose certain provisions at all or in part is producing situations of legal uncertainty which may result in the adoption of legislative or administrative solutions that could impair the rights of EU citizens and their family members.

#### *15.6.4. Evaluation results: priorities*

Priorities for 2009 and beyond must be slightly changed compared to those for the previous period as all non-communication infringements have been meanwhile closed. The main emphasis in the next years will be to commence infringement proceedings for non-conformity. Priority will be also assigned to Article 228 of the EC Treaty cases and cases raising issues of principle or having particularly far reaching negative impact for citizens.

#### *15.6.5. Evaluation results: planned action (2009 and beyond)*

In 2009 and the following years, the Commission will step up its efforts to ensure that the Directive is correctly transposed and implemented across the EU. In order to achieve this result, the Commission will use fully its powers under the Treaty and launch infringement proceedings when necessary.

The Commission will continue working at technical level with the Member States in the group of experts.

The Commission has offered information and assistance to both Member States and EU citizens by issuing communication<sup>478</sup> on guidance for better transposition and application of Directive 2004/38/EC which provided guidance as to a number of issues identified as problematic in transposition or application, such as expulsions and fight against abuse, may be resolved.

The Commission will continue to inform EU citizens about their rights under the Directive. To this end, the Commission will continue to treat provision of information on the Directive as a priority and will continue to distribute a simplified guide for EU citizens and make the best use of the Internet.

The Commission will encourage and support Member States to launch awareness-raising campaigns to inform EU citizens of their rights under Article 34 of the Directive.

#### *15.6.6. Summary*

Free movement of persons constitutes one of the fundamental freedoms of the internal market, to the benefit of EU citizens, of the Member States and of the competitiveness of European economy. In the first days of the European project, only workers benefited from free movement. Over time, this right was extended to all EU citizens. Citizenship of the Union confers on every EU citizen a primary and individual right to move and reside freely in the

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<sup>478</sup> COM(2009)313 final of 2 July 2009

EU (Article 18 of the EC Treaty). The details of this right are to be found in Directive 2004/38/EC which codified the existing legislation and case-law in the area of free movement, and simplified it in the interest of reader-friendliness and clarity.

Despite the importance of the fundamental and personal right of EU citizens to move and reside freely, the transposition of the Directive in Member States is not satisfactory, as the Commission's report on the application of the Directive has found. In the coming years, the Commission will step up its efforts to ensure that the Directive is correctly transposed and implemented across the EU. It will not shy away from using infringement proceedings, where necessary. The Commission will continue to work together closely with Member States at technical level to provide guidance as to how resolve more problematic issues of free movement. This, together with intensified provision of information, should bring real improvements to EU citizens in the near future.

## 15.7. Citizenship

### 15.7.1. *Current position: general introduction*

Article 19 of the EC Treaty grants the right to EU citizens to vote and to stand as a candidate in municipal and European elections in the Member State where they reside, without holding the nationality of that State. These rights were put into effect by Directive 1993/109/EC<sup>479</sup> as regards European Parliament elections and Directive 94/80/EC<sup>480</sup> as regards municipal elections. Directive 1994/80 was modified by Directive 1996/30/EC<sup>481</sup> and Directive 2006/106/EC<sup>482</sup> in view of consecutive enlargements of the Union.

### 15.7.2. *Current position – report on work done in 2008*

In 2008 the Commission continued to deal with a substantial number of enquiries and complaints concerning citizenship and electoral rights of the EU citizens: 80 received in 2008 (49 on electoral rights and 31 on citizenship). There were 18 written EP questions and 3 petitions in this area in 2008.

Concerning implementation of priorities established in the 25<sup>th</sup> Annual Report on the Control of Application of Community law (2007) in the area of the European citizenship, all but one of the infringement procedures against Member States for their failure to communicate the text of the provisions of national law adopted to transpose the Directives in the municipal elections have been closed by March 2009<sup>483</sup>. Since no further infringement proceedings had

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<sup>479</sup> Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

<sup>480</sup> Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals

<sup>481</sup> Council Directive 96/30/EC of 13 May 1996 amending Directive 94/80/EC

<sup>482</sup> Council Directive 2006/106/EC of 20 November 2006 adapting Directive 94/80/EC

<sup>483</sup> Infringement proceedings for non-communication of transposing measures of Directive 2006/106 were closed in June 2008 (Romania), in March 2009 (Lithuania and the Czech Republic); infringement proceedings for non communicating transposition measures of Directive 94/80 were closed in May 2008 (Bulgaria, Romania).

to be opened in 2008, there was only one proceeding open in that area on 31 March 2009 (three proceedings were open on 1 January 2009).

An important activity in the field of Community legislation in electoral matters was the adoption of a compliance study carried out by an external company which assessed the compatibility of the legislation of 12 new Member States with the Directives in the electoral field. This compatibility study also covers the implementation in the national legislation of all Member States of the Act of 1976<sup>484</sup> on the election of representatives of the European Parliament as amended by Council Decision 2002/772/EC, Euratom<sup>485</sup>, which lays down the common principles for the Member States in the organisation of the European Parliament elections.

### *15.7.3. Evaluation based on the current situation*

Essentially, all Member States transposed the Community legislation in electoral matters and no infringement proceedings for incorrect or incomplete transposition were open on 1 January 2009. Therefore, the situation in the field of the electoral rights of EU citizens can be considered satisfactory.

In 2008 the Commission worked closely with the Member States to ensure the implementation of Directive 93/109/EC in the context of the 2009 European elections. Implementation of the Directive in these elections will also be assessed in the post-election report by the Commission.

The compatibility study prepared in 2008 will serve as a tool for the Commission in the assessment and consequent actions taken to ensure the correct and complete transposition of Community law in the national legislations. The Commission will extend the assessment of compatibility so as to also cover the checking whether the national legislations allow EU citizens from other Member States to join political parties in their Member State of residence, under the same conditions as the nationals.

### *15.7.4. Evaluation results: priorities*

Priorities for 2009 and beyond must be slightly changed compared to those for the previous period as all but one of the non-communication infringements have been closed. The main emphasis in the coming years will be to ensure conformity of national legislation of the new Member States with Directives 93/109/EC (participation of EU citizens in European elections) and Directive 94/80/EC (participation of EU citizens in municipal elections), as well as conformity across the EU member states with the 1976 Act on the elections of the representatives of the European Parliament<sup>486</sup>.

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<sup>484</sup> The Act is annexed to Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ L 278, 8.10.1976).

<sup>485</sup> OJ L 283, 21.10.2002.

<sup>486</sup> Act concerning the election of representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976- OJ L 278, 8.10.1976

#### *15.7.5. Evaluation results: planned action (2009 and beyond)*

In 2009 and the following years, the Commission will step up its efforts to ensure that the instruments in electoral matters are correctly transposed and implemented. The Commission will continue working at a technical level with the Member States in the group of experts and launch infringement proceedings when necessary.

Efforts will continue to raise awareness among EU citizens of their electoral rights.

#### *15.7.6. Summary*

Electoral rights of EU citizens accompany their right to free movement: Community law in the electoral field grants the right to EU citizens to participate in municipal and European elections in the Member State where they reside without holding the nationality of that State (Article 19 of the EC Treaty). Detailed arrangements for the exercise of these rights are to be found in Directive 94/80/EC with regard to municipal elections and in Directive 93/109/EC with regard to European elections. The Act of 1976 on the election of representatives of the European Parliament as amended by Council Decision 2002/772/EC, Euratom lays down common principles for Member States in the organisation of the European elections.

Transposition of Community law in electoral matters can be considered satisfactory. However, over the coming years the Commission should focus on checking and ensuring correct transposition and implementations of Directives 93/109/EC with regard to European elections and 94/80/EC with regard to municipal elections, especially in the 12 new Member States that will need close work at technical level with the Member States and use of infringement proceedings, where necessary. Activities for improving awareness of the electoral rights of EU citizens will be carried on.

### **15.8. Fundamental rights**

#### *15.8.1. Current position: general introduction*

Under the Treaty establishing the European Community and the Treaty on European Union, the European Commission has no general powers to intervene in individual cases of violations of fundamental rights.

It can do so only if an issue of European Community law is involved. The Commission ensures that fundamental rights are protected in the application of Community law within the material scope of the legislative instruments they are responsible for.

The Commission has no competence to follow up complaints which have no link with Community law. However, EU citizens are not aware of this fine distinction and continue to rely on the Commission to assist them even where there is no link with Community law. This area falls outside the scope of the Annual Reports on the Control of Application of Community law but it represents an important dossier of relations with EU citizens.

### *15.8.2. Current position – report on work done in 2008*

In 2008 the Commission received a number of individual letters and parliamentary questions as well as petitions concerning alleged violations of fundamental rights by Member States: approximately 800 letters (no change in comparison with 2007) and more than 153 parliamentary questions and petitions (compared with 120 received in 2007). Most of the individual cases do not involve Community law and fall outside the powers of the Commission to control the application of Community law.

The great number of letters received by the Commission reveals a strong interest and expectation from citizens on fundamental rights in Member States. It also reveals that more information is needed to explain that the Commission has no general powers to intervene in cases of violations of fundamental rights and that it can do so only if an issue of Community law is involved.

## **15.9. Protection of personal data**

### *15.9.1. Current position – report on work done in 2008*

The Commission continued the monitoring of the correct application of the Directive 95/46/EC on data protection<sup>487</sup>, the main piece of legislation for this area. It continued to find pro-active solutions outside or in parallel with the infringement procedure through the 'structured dialogue' organised with Member States to discuss mainly infringement cases and the recently implemented EU Pilot scheme. However, in some cases it was not possible to reach agreement and two requests for preliminary ruling important for a number of infringements were referred to the European Court of Justice (one case against Germany (C-524/06) and one case against Finland (C-73/07)), for which judgments were given on 16 December 2009 confirming the arguments of the Commission.

74 enquiries and 20 letters and requests were received. There were a total of 7 petitions in 2008.

In 2008 there were 3 new complaints registered as infringements. The total number of cases was 16. There were a higher number of cases referring to the incorrect application of the data protection directive and the rest to the non-conformity.

### *15.9.2. Evaluation based on the current situation*

The situation and volume of work in 2008 was stable regarding the infringement cases, although the number of enquiries has doubled and the number of complaints has decreased, compared to 2007.

No prioritisation was applied in 2007.

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<sup>487</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data – *O.J.L* 281, 23/11/1995 P. 0031 - 0050



### 15.9.3. Evaluation results: priorities and planned action (2009 and beyond)

Due to the relatively small number of cases in the field of data protection, no prioritisation was applied to them.

The Commission will continue the monitoring of the correct application of the Data Protection Directive 95/46/EC.

## 15.10. Judicial cooperation in civil matters

### 15.10.1. Current position – report on work done in 2008

All Member States have notified their national legislation implementing Directive 2003/8 on legal aid<sup>488</sup>.

Regarding Directive 2004/80 relating to compensation to crime victims<sup>489</sup>, Greece is the only Member State failing to comply with its transposition and communication obligation, the infringement having reached an advanced stage<sup>490</sup>.

In December 2008 the Commission received the final report on a study on the application of Directive 2004/80/EC relating to compensation to crime victims. The objective of the study was to assess the current stage of implementation of Directive 2004/80/EC in all EU Member States. The study served as a basis for a Commission's report adopted in April 2009.

Further, in November 2008 the Commission received the final report on a study on the compensation of victims of cross-border road traffic accidents in the EU. The study consists of comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims. It enables the Commission to assess if Community law – i.e. motor insurance directives and Regulation Rome II ensure effective access to compensation for EU residents involved in road traffic accidents in another Member State (“visiting victims”).

In view of ensuring the correct application of Regulation 2201/2003<sup>491</sup> (the 'Brussels II a Regulation') concerning jurisdiction and the recognition and the enforcement of judgments in matrimonial matters and the matters of parental responsibility, a first request for an urgent preliminary ruling (PPU) on a case of parental child abduction was submitted to the Court of Justice in May 2008 (case C-195/08 PPU). The Court, in its answers to the referral questions, confirmed that opposition to the decision ordering the return of the child was not permitted by

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<sup>488</sup> Council Directive 2003/8 of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, p. 41.

<sup>489</sup> Council Directive 2004/80 of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004, p. 15.

<sup>490</sup> Greece was ruled against by the Court on 18 July 2007 (Case C-2007/026) for failure to notify measures transposing the Directive. On 23 September 2008 the Commission sent a reasoned opinion under the Article 228 of the EC Treaty to Greece. Greece and still has not complied with the Court's judgment.

<sup>491</sup> Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 -OJ L 338, 23.12.2003

Regulation 2201/2003 and that it was for the competent court in the country to which the child had been abducted to allow the immediate return of the child.

Furthermore, one Member State brought a case before the Commission under Art. 227 of the EC Treaty in October 2008, alleging that another Member State had breached Art.10 and 249 of the EC Treaty by virtue of the national Court's incorrect application of Regulation 2201/2003. The Commission issued a reasoned opinion ex art. 227<sup>492</sup> in January 2009, whereby it did not find any infringement.

A comprehensive impact assessment was undertaken for a future proposal on successions and wills.

#### *15.10.2. Evaluation based on the current situation*

The number of formal infringements increased from 12 in 2007 to 18 in 2008. This is due to the entry into force of new instruments – mainly the crime victims' directive (3 cases) and the number of disputes on parental responsibility (3 cases).

In 2008 a special attention was paid to the correct application of Regulation 2201/2003 (the 'Brussels II a Regulation'). The Regulation ensures that children can maintain regular contacts with both parents following a separation and provides clear rules to deter parental child abduction throughout the EU.

The number of preliminary rulings in the area of family law is expected to increase with the new urgent preliminary ruling procedure available since 1 March 2008. The new procedure enables the Court of Justice to deal much more quickly with issues relating to the area of freedom, security and justice. Such an issue may arise, for example, in proceedings concerning parental responsibility if the jurisdiction under Community law of the national court hearing the case depends on the answer to the question referred for a preliminary ruling. Most interestingly as mentioned above, the first ever urgent preliminary ruling procedure required the Court to clarify rules in the Brussels IIa Regulation relating to the return of a child wrongfully retained in another EU Member State (judgment of the Court of 11 July 2008 in case C-195/08 PPU *Rinau*).

Furthermore, in October 2008 there was a rare case of application of the procedure under Article 227 of the EC Treaty between two Member States for misapplication of Regulation 2201/2003 Brussels II a.

The current situation with a restricted role of the Court of Justice in interpreting the family law *acquis* would change with the coming into force of the Lisbon Treaty, which abrogates Article 68 EC.

Other objectives for the Commission:

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<sup>492</sup>C(2009)164

- Increased efforts to improve the knowledge of the family law *acquis* through further training of practitioners (judges, central authorities and lawyers) as well to promote the use of mediation in the settlement of family disputes to prevent that these disputes are brought before the courts.
- If a problem of interpretation arises with one of the family law instruments, the Commission could seize the Court of Justice under Article 68(3) of the Treaty and request a ruling.

Following the entry into force of Regulation 1896/2006 establishing a European Payment Order Procedure<sup>493</sup> and Regulation 861/2007 establishing a European Small Claims Procedure<sup>494</sup>, the Commission has published the references of assisting authorities communicated by Member States on the website of the European Judicial Atlas.<sup>495</sup>

The Commission also published leaflets in all languages about the European Judicial Network's tasks and contact points. The aim is to facilitate requests for judicial cooperation between Member States (e.g. to provide assistance with the service of documents or the taking of evidence) and to make it easier to ensure that Community legislation is properly applied in practice. Further, a Practice Guide on the European Enforcement Order was published in December 2008.

The Directive 2008/52/EC<sup>496</sup> of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters was adopted on 23 April 2008. The Directive provides in particular that Member States shall notify the names of competent authorities for the progressive implementation of the Directive on a three-year period.

Around 12 petitions per year are received in this field.

### *15.10.3. Evaluation results: priorities*

The proper application of existing legislation remains a focus on attention in 2009.

The correct implementation of Regulation 2201/2003 Brussels IIa remains important. Indeed, the prevention of parental child abduction is a priority for further EU action and an important part of the overall Commission strategy to promote the rights of the child.

In 2008 a preliminary study for preparing the report on the application of Regulation 44/2001 (Brussels I)<sup>497</sup> was finalised. The Commission's report<sup>498</sup> adopted in April 2009 evaluated the application of Brussels I in order to highlight problems in the application and ways in which the operation of the Regulation may be improved.

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<sup>493</sup> (OJ L 399 of 30 December 2006, p.1).

<sup>494</sup> (OJ L 199 of 31 July 2007, p. 1).

<sup>495</sup> [http://ec.europa.eu/justice\\_home/judicialatlascivil](http://ec.europa.eu/justice_home/judicialatlascivil).

<sup>496</sup> *OJ L 136, 24.5.2008*

<sup>497</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters-  
*OJ L 012 16/01/2001 P. 0001 - 0023*

<sup>498</sup> COM/2009/0174

The European Judicial Network in civil and commercial matters (EJN) proved to be an important tool in supporting the correct application of Community Law. Managing the EJN continued in 2008, including information and communication activities. The Commission has presented in June 2008 a proposal amending the decision creating the EJN with the aim to enlarging access to all judicial professions and thereby make it the key instrument for civil judicial cooperation. Formal adoption is planned in June 2009.

Pursuant to a Communication<sup>499</sup> in 2008, the Commission established a Justice Forum. The new forum provides a platform for regular dialogue about policies and practice in the area of justice as well as contributing to strengthening mutual trust, improving mutual recognition and access to justice.

As for infringement cases, their limited number does not require prioritization of their treatment. The most common cases concern Directive 2004/80 relating to compensation to crime victims and Regulation 2201/2003 Brussels II a. Other types of infringements concern incorrect application of Regulation Brussels I and of the Regulation on service of documents.

Besides infringements cases, the Commission is contributing to assessment of preliminary questions to the Court of Justice (around ten questions raised in 2008 on civil judicial cooperation issues).

#### *15.10.4. Evaluation results: planned action (2009 and beyond)*

In addition to the Report on the application of Regulation 44/2001 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I), the Commission adopted a Report on the application of the Directive 2004/80/EC relating to compensation to crime victims.

A study will be launched in 2009 in view of assessing the implementation of the Legal Aid Directive.

In family law, the correct implementation of the Regulation 2201/2003 Brussels II a will remain a priority in the forthcoming years.

Furthermore, a new Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations was adopted on 18 December 2008. It will facilitate the recovery of maintenance abroad.

In 2009 the development of websites of the EJN and of the Judicial Atlas will continue in order to ensure the continuity of our action and to comply with the new strategy on E-Justice and the creation of a European judicial electronic Portal. The Commission is co-financing several pilot projects, such as electronic exchanges for the European Payment Order or Insolvency Registers.

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<sup>499</sup> Communication from the Commission on the creation of a Forum for discussing EU justice policies and practice, COM/2008/0038 final

In 2008 three important Regulations entered into force – respectively Regulation 1393/2007 on service of documents<sup>500</sup>, Regulation 1896/2006 establishing a European Payment Order Procedure<sup>501</sup> and Regulation 861/2007 establishing a European Small Claims Procedure<sup>502</sup>. The Commission will continue taking all necessary measures to support the implementation of these Regulations, particularly by publishing the references of assisting Authorities to be communicated by Member States.

#### 15.10.5. Summary

Directive 2003/8 on legal aid<sup>503</sup> has been transposed in all Member States. The transposition of Directive 2004/80 on compensation of crime victims has nearly been completed. The Commission continued examining infringements concerning incorrect application of the Regulations in the civil justice field.

The entry into force of the Mediation Directive and of three Regulations on service of documents<sup>504</sup>, payment order<sup>505</sup> and small claims<sup>506</sup> require Member States to notify specific information to the Commission. The Commission will therefore monitor the correct notifications and publish them in view of a smooth implementation of these instruments at the time of application.

Judicial cooperation in civil matters will be improved and enhanced thanks to the revision of the functioning of the European Judicial Network in civil and commercial matters and the creation of the Justice Forum.

As for infringement cases, their limited number does not require prioritization of their treatment. The most common cases concern Directive 2004/80 relating to compensation to crime victims and Regulation 2201/2003 Brussels II a on parental responsibility. Other types of infringements concern incorrect application of Regulation Brussels I and of the Regulation on service of documents.

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<sup>500</sup> Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000

<sup>501</sup> Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure -*Official Journal L 399*, 30/12/2006 P. 0001 - 0032

<sup>502</sup> Regulation (EC) No [861/2007](#) of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure.

<sup>503</sup> Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes- *OJ L 26*, 31.1.2003, p. 41–47

<sup>504</sup> Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters- *OJ L 160*, 30.6.2000, p. 37–52

<sup>505</sup> Regulation (EC) No [1896/2006](#) of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

<sup>506</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure- *OJ L 199*, 31.7.2007, p. 1–22

In 2008 special attention was paid to the correct application of the Regulation 2201/2003 Brussels II a. Indeed, the prevention of parental child abduction is a priority for further EU action and an important part of the overall Commission strategy to promote the rights of the child, and will remain a priority in 2009 and beyond.

Around 12 EP petitions per year are received in this field.

### **15.11. Security**

On 15 September 2007 the Member States should have brought into force legal instruments to comply with the Data Retention Directive 2006/24/EC. All but 4 Member States have transposed the directive and 18 Member States<sup>507</sup> invoked the clause of Article 15(3) that allowed them to postpone the application of the Directive to the retention of communications data relating to Internet Access, Internet telephony and Internet e-mail until 15 March 2009. On 23 September 2008 the Commission addressed reasoned opinions for non-communication to the following Member States: Austria, Greece, Lithuania, Netherlands, Sweden, Romania and Poland that had all invoked the clause of Article 15(3), as well as Ireland that had not invoked that clause. Ireland had brought an action for annulment of the Directive (Case C-301/06) on the ground that it should have been adopted with a third pillar legal basis (Title VI TEU). The ECJ dismissed the action in its judgment of 10 February 2009.

Having regard to that judgment, the intention of the Commission is to seize the Court to pursue the action against those Member States that failed to notify legislation. Furthermore, the Commission has addressed so-called pre-226 letters to a number of Member States. These letters request those Member States to clarify certain aspects of the notified legislation to allow the Commission to assess whether the Directive was correctly transposed.

Article 14 stipulates that no later than 15 September 2010, the Commission shall submit to the European Parliament and the Council an evaluation of the application of this Directive and its impact on economic operators and consumers. The state of notifications will also be taken on board in that assessment.

### **15.12. List of legal measures in force**

See Annex I for the list of relevant Treaty provisions, Regulation and Directives in force to be monitored by Commission services in the sector of Justice, Freedom and Security, divided by sector. Please note that the list does not include legal instruments adopted under Title VI of the EU Treaty.

A comprehensive list of the *acquis* in force in this area, is publicly available on the EUROPA website<sup>508</sup>.

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<sup>507</sup> The Netherlands, Austria, Estonia, United Kingdom, Cyprus, Greece, Luxemburg, Slovenia, Sweden, Lithuania, Latvia, Czech Republic, Belgium, Poland, Finland, Germany and upon accession Bulgaria and Romania.

<sup>508</sup> [http://ec.europa.eu/justice\\_home/doc\\_centre/intro/doc\\_intro\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/intro/doc_intro_en.htm).

As a follow-up of the Hague Programme, it has become customary to adopt a yearly Scoreboard Plus, the last one published on 2 July 2008<sup>509</sup>. In addition to the monitoring of the adoption process, this communication examines national implementation of policies in the Justice, Freedom and Security fields.

## 16. TRADE

Trade policy is governed by Article 133 of the EC Treaty. The bulk of the Community legislation in this field takes the form of regulations, for example, the basic anti-dumping and countervailing duty regulations, the Generalised System of Preferences Regulation, the Trade Barriers Regulation and the Import and Export Regulations.<sup>510</sup> There are only two directives. These directives are Council Directive 98/29/EC of 7 May 1998 on harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover and Council Directive 84/568/EEC of 27 November 1984 concerning the reciprocal obligations of export credit insurance organizations of the Member States acting on behalf of the State or with its support, or of public departments acting in place of such organizations, in the case of joint guarantees for a contract involving one or more subcontracts in one or more Member States of the European Communities. In 2007/2008 the only relevant issue was the transposition of these directives by Bulgaria and Romania. The transposition measures have been communicated correctly to the Commission and the infringement proceedings which had been opened were closed during 2008.

It is not expected that there will be any significant work required on the transposition of these directives or other potential infringements in 2009.

## 17. ENLARGEMENT

### 17.1. Current position – Relevant legal instruments and related work and reporting on 2008

#### 17.1.1. General introduction

Enlargement policy is based on Article 49 EU Treaty which is not justiciable. However, EC agreements with third countries may contain certain rights and obligations which are directly applicable under EU law. Violation of such provisions by one or more Member States could therefore be subject to infringement proceedings.

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<sup>509</sup> Communication of 2 July 2008 from the Commission to the Council and the European Parliament – Report on the implementation of the Hague programme for 2007 – COM(2008) 373 final. Available on JLS EUROPA website [http://ec.europa.eu/justice\\_home/doc\\_centre/scoreboard\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/scoreboard_en.htm).

<sup>510</sup> Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community as amended; Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidized imports from countries not members of the European Community as amended; Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 as amended; Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization as amended; Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports and Council Regulation (EEC) No 2603/69 of the Council of 20 December 1969 establishing common rules for exports.

In the field of enlargement, this is in particular the case for the 1963 EEC-Turkey Association Agreement, its 1970 Additional Protocol and related Association Council Decisions, particularly Decision 1/80. The Stabilisation and Association Agreements with the former Yugoslav Republic of Macedonia (2004), with Croatia (2005) and Albania (2009) also fall into the same category of EC law, partly liable for trial in the European Court of Justice as far as implementation or application by Member States is concerned. Similar agreements with the potential candidate countries Montenegro, Serbia, as well as Bosnia and Herzegovina, have not yet entered into force.

#### *17.1.2. Report of work done in 2008*

The Commission receives a lot of correspondence and complaints from citizens related to legal acts and agreements in the field of enlargement, including financial instruments. However, these cases mainly concern alleged violation of obligations by the third country or other matters not directly related to the application of EC law by Member States. Recourse to infringement proceedings is therefore very limited in the area of enlargement.

The case concerning workers' rights on access to the labour market of Member States under Decision 1/80 related to the EEC/Turkey Association Agreement, which was referred to the Court in 2006, is still pending. The Commission commented on previous interventions from Member States. The question concerned, which is the introduction of higher administrative fees for handling residence permit requests from Turkish nationals by one Member State, is in parallel the subject of a reference for preliminary ruling. At the end of 2008 the Court organised a hearing on the latter case and may issue its judgment in the near future. The EEC/Turkey Association Agreement is also subject to a number of other references for preliminary rulings, most of them still pending with the Court.

In 2008, the Commission received new complaints related to the application and interpretation of certain provisions, including standstill clauses, of the EEC/Turkey Association Agreement, which are at present being examined. Other cases, which concern the compatibility of mandatory integration exams for Turkish nationals working in a Member State, or the increase of the minimum age of Turkish citizens for issuing residence permits, were subject to a thorough analysis and will now be pursued.

#### **17.2. Evaluation**

Since EU enlargement in 2004 and 2007, the few complaints received with a view to infringement proceedings all concern the application of the EEC/Turkey Association Agreement. Taking into account the references to preliminary rulings pending at the Court, this confirms that the application and interpretation of this Association Agreement is still subject to a variety of legal arguments with regard to residence and work of Turkish citizens in Member States. Other Stabilisation and Association Agreements with Western Balkan countries which have entered into force are, so far, not subject to any infringement case.

The number of complaints that may lead to infringement cases remains limited and therefore does not require additional prioritisation among them. This situation is not likely to change in future.



### **17.3. Evaluation results**

There is only one priority in the area of enlargement and that is the application of the EEC/Turkey Association Agreement. This priority remains unchanged given the limited number of cases.

### **17.4. Summary**

Infringement procedures in the area of enlargement are rare. All pending cases at the Court and the Commission concern the alleged violation of directly applicable provisions, particularly standstill clauses, under the EEC/Turkey Association Agreement.

### **17.5. Legal measures in force**

EEC-Turkey Association Agreement (1963) Official Journal No 217 of 29.12.1964.

## **18. EUROSTAT**

### **18.1. Current position- Report on 2008**

In line with the Commission policy on better monitoring of the application of Community law, the Commission services have continued to work in close partnership with National Statistical Institutes managing the application of the statistical legislation through contacts, networks in the various sectors and regular meetings of national experts.

Since 2006, several internal Reports have been discussed within the Commission services to take note of the state of play and to recommend possible follow-up actions. In order to assure a complete follow up of compliance with Community statistical legislation, there are also certain parallel systems in place which serve the purpose of assuring fulfilment of the complex methodological rules discussed through cooperation with Member States at different sectoral statistical Committees and expert Working Groups.

The most frequently recurring problem concerns the “delays” in meeting the transmission deadlines.

Nevertheless, the improvement of the overall situation can generally be confirmed. Member States in default are making serious efforts to fully comply when they are challenged at suitable level. In most cases, Member States react positively to reminders. In several cases, a solution to the difficulties could be found thanks to reciprocal collaboration between the National Institutes and the Commission services.

### **18.2. Legislative changes underway (2008-2012)**

In accordance with Decision 1578/2007/EC on the Community statistical programme 2008 to 2012<sup>511</sup>, compliance monitoring of Community legislation in the field of statistics is a specific objective of strategic importance for the medium to long-term development of Community statistics:

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<sup>511</sup> Decision 1578/2007/EC of the European Parliament and the Council of 11 December 2007 on the Community statistical programme 2008 to 2012 - Point 3.2 of Annex I – (OJ L 344, 28.12.2007, p. 15).

*"The quality of Community statistics comprises the fundamental requirement of compliance with the principles of the Treaty and the secondary legislation. Therefore, a vigorous and systematic monitoring of the application of the legislation is a priority. A global and coherent compliance strategy structured around the principles of a realistic legislative policy, the obligation of Member States to apply systematically the statistical legislation and a coherent and systematic monitoring of compliance, will be followed. Close contacts with the competent national authorities throughout all of the phases is part of the compliance process".*

### **18.3. Evaluation**

Community statistical legislation is mainly composed of Regulations. The Commission services in this area are responsible for only 5 Directives.

Possible difficulties to apply Community statistical legislation are anticipated and addressed when preparing any draft legislative proposal, which is always the result of close cooperation with Member States.

The measures of implementation of the basic acts (as adopted by comitology procedures) are prepared and discussed with the Member States.

It is useful to stress that the obligations of Member States in the field of statistics are recurring and therefore need constant follow-up. Thanks to continuous collaboration with the Member States, the Commission services are in a position to know beforehand the possible difficulties that a Member State could encounter and can try addressing these difficulties in advance together with the responsible national statistical authority.

### **18.4. Priorities**

The main priority in this area concerns the efficient co-operation with the Member States to improve the quality of Community statistics (accuracy, timeliness and comparability being priorities for the ESS).

The Commission will pursue its policy, based on a comprehensive and coherent approach that ensures follow-up and effective control of the application of statistical legislation.

### **18.5. Planned action**

The objective of having statistics of quality is both an operational objective and a legal requirement insofar as Community statistics production must respect the principles set out in Article 285 of the EC Treaty and in Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics<sup>512</sup> as well as in the various sectoral legislative instruments.

In the field of statistics, the Commission will continue to monitor the application of Community legislation especially through bilateral meetings and discussions with Member States.

The Commission services will carry out this *structured dialogue* with the ambition to ensure the full and correct application of statistical legislation without having to recourse to formal infringement proceedings.

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<sup>512</sup> OJ L 87, 31.3.2009, p. 164

Identified as an area in which improvements are needed on an ESS-wide scale, the ESS will join forces to invest in implementing ESS quality management tools and guidelines.

## **19. PERSONNEL AND ADMINISTRATION**

### **19.1. Current position – Most important legal instruments and related work and reporting on 2008**

#### *19.1.1. Existing measures in force*

In the field of Personnel and Administration, the Commission must guarantee that Community law is correctly applied to the staff of the Communities. To this end, it must ensure that legislation and implementing provisions are adopted by Member States in compliance with the Protocol on Privileges and Immunities of the European Communities and the Regulations and Rules applicable to officials and other servants of the European Communities.

In particular, the following legal texts are applicable:

Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 and further modifications,

The Protocol on the Privileges and Immunities of EC (PPI), annexed to the Merger Treaty of 1965,

Other agreements between the European Commission and Member States regarding the functioning of the Institutions' Services.

#### *19.1.2. Report of work done in 2008*

In 2008, Commission pursued the infringement proceedings launched in 2007 against Belgium. An appeal was lodged with the Court of Justice (Case C-132/09) seeking a judgment confirming the obligation of Belgium to comply with its undertaking, in application of the Headquarters Agreement with the Commission, to subsidise the cost of equipment for European Schools.

In another field, but again regarding Belgium, the Commission considers that the decree of the government of Brussels-Capital Region of 12 June 2003 providing that all construction or expansion of office buildings that exceeds 500m<sup>2</sup> of floor surface is subject to the levying of urbanism charges (*charges d'urbanisme*) is contrary to the tax exemption foreseen in Article 3 of the PPI. Such charges may be clearly qualified as direct taxes and they cannot be deemed as proportional charges for public utility services provided directly to the Institutions.

In coordination with all the other Institutions based in Brussels, the Commission has contested the legality of these charges launching an infringement procedure in October 2007, which is going on.

After the adhesion of new Member States, the Commission has continued to reach further arrangements for the transfer of pension rights of staff who had originally worked and acquired pension rights in Member States. This ongoing process has had a number of successes and some of the competent authorities have already fulfilled their obligations in this regard.

## **19.2. Evaluation based on the current situation**

### **The measures which may require specific implementation / transposition work**

The Commission closely follows the evolution of the policy in Member States as regards European Schools. The rules governing their establishment require not only that new structures be built and adapted to accommodate new needs in due time, but also that the schools are run along efficient lines.

However, as regards the transfer of pension rights, taking into account the direct applicability of the Staff Regulations, a refusal or delay by Member States to come to an agreement regarding the implementation of the necessary procedures for such transfers, could lead the Commission to examine the launch of infringement proceedings against those Member States. Regarding the cooperation with the Member states, this has not been necessary until now.

In any case, the Commission continues to seek pro-active solutions outside or in parallel with the infringement procedure under Article 226 of the EC Treaty. Contacts are regularly organised between the institution's administration and the competent authorities of Member States which serve to anticipate and resolve questions which could otherwise lead to such proceedings.

## **20. BUDGET**

### **20.1. Current position – relevant legal instruments and related work and reporting on 2008**

#### *20.1.1. Existing measures in force*

The existing legal measures in the budgetary area relate to the procedure for the financing of the EU budget through three main own resources: traditional own resources, the VAT-based own resource and the complementary resource based on Member States' GNI. In particular, the following texts are applicable:

Article 269 EC,

Council Decision 2007/436/EC, Euratom on the system of the Communities' own resources.

Council Regulation (EC, Euratom) No 1150/2000 implementing the above decision, in its version of Council Regulation EC, Euratom No 105/2009 applicable from January 1, 2007.

Council Regulation (EEC, Euratom) No 1553/89 on the definitive uniform arrangements for the collection of own resources accruing from value added tax.

Additionally, budgetary receipts are obtained under Articles 3 and 4 of the Protocol on the Privileges and Immunities of EC (PPI), annexed to the Merger Treaty of 1965.

#### *20.1.2. Report of work done in 2008*

##### **Main 2008 activities**

The area of Own resources is based upon directly applicable Council Regulations and Decisions. The main problems with Member States stem from different interpretation of the

budgetary legislation. One priority of the Commission in this respect is the prevention of irregularities. This is mainly realised via control activities made by the Commission's inspectors and their legal and accounting follow-up, thus ensuring the correct functioning of the Community own resources system and the PPI. If, however, anomalies are detected, they are closely followed-up in view of their early settlement. This is the main reason why the number of infringement files to be managed (ca. 30 on average) is rather small. Another reason is that under Art. 11 of Regulation 1150/2000, default interest is due when amounts of Own Resources are paid belatedly. The amount of interest may often exceed the principal claim depending upon the length of the delay.

In 2008, the Commission services detected 117 anomalies in the area of traditional own resources (of which 99 in the course of on-the-spot inspections) and set up 51 reservations in the area of VAT/GNI (= 41 VAT+ 10 GNI). Most of the newly detected anomalies could be solved at an initial stage in bilateral discussions with Member States or in the Advisory Committee on Own Resources.

Regarding infringements, the principal activities in 2008 concerned the follow-up of earlier Court decisions and the contribution to pending cases. The outcome of the group of 9 infringement procedures lodged to the ECJ concerning duty-free military importations for which the oral procedure took place in late autumn 2008 will be of juridical importance. The Court will have to determine in its judgments whether, and to what extent, it is possible for Member States to invoke Art.296 of the EC-Treaty for not applying Community policies on grounds of national security.

Amongst the other infringement files managed in 2008, one case received special priority due to its systemic and institutional importance: Case No. 2008/2152 regards a request, under Article 248 EC, submitted to the German authorities by the European Court of Auditors, for auditing the administrative cooperation of Member States in the area of VAT as laid down in Council Regulation (EC) No 1798/2003 and the refusal of the German Ministry of Finance to allow for such an audit claiming that there was no appropriate legal basis for it.

Where files - as it is usually the case - relate to the recovery of established amounts, it results from budgetary Community rules that any infringement to financing rules by one Member State results in a corresponding increase of own resources to be made available by the other Member States. Thus the Commission, as guardian of the Treaties, has hardly any discretion on whether to start infringement proceedings, and it may not close recovery-related infringement actions only for reasons of political opportunity. Under the current legislative framework, the waiving of financial claims vis-à-vis Member States is impossible.

The context mentioned above does not exclude the possibility to prioritize infringements according to their gravity and their impact on the budget and to take legal action only if it is not possible to settle the issues in bilateral contacts and discussions with Member States in the Advisory Committee for Own Resources.

### *20.1.3. Volume of infringements work and petitions*

On 1 January 2008, there were 30 open infringement files in the budgetary area.

So far, the Commission services in this area have been dealing with only one complaint file, transferred from another service of the Commission. All other cases had been detected by the Commission inspectors or communicated by other services of the Commission.

## **20.2. Evaluation**

As already underlined in the previous Annual Report, Member States generally apply correctly the legislation concerning the Communities' own resources and the PFI. They contribute timely to the EU budget. The few infringements detected by the Commission's controllers do not reflect any systemic problems in the application of the Community law.

The Commission will continue to ensure that the Communities' own resources are timely made available, in full respect of the Community law and that the recovery actions concerning other amounts due by the Member States are efficient.

**ANNEX I - LIST OF MEASURES IN FORCE AND OTHER RELEVANT INSTRUMENTS  
REFERRED TO IN THE TEXT OF THE DOCUMENT**

**I. ENTERPRISE AND INDUSTRY**

**I.1. Pharmaceuticals**

In the pharmaceutical sector, the main measures monitored by the Commission are:

- Regulation (EC) No 726/2004 of the European Parliament and of the Council, laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (EMA);
- Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use;
- Directive 2001/20/EC of the European Parliament and of the Council on clinical trials, complemented by Commission Directives 2003/94/EC and 2005/28/EC;
- Regulation (EC) No 141/2000 of the European Parliament and of the Council on orphan medicinal products, complemented by Commission Regulation (EC) No 847/2000;
- Regulation (EC) No 1901/2006 of the European Parliament and of the Council on medicinal products for paediatric use;
- Regulation (EC) No 1394/2007 of the European Parliament and of the Council on advanced therapy medicinal products;
- Directive 2001/82/EC of the European Parliament and of the Council on the Community code relating to veterinary medicinal products;

Regulation (EEC) 2377/90 on maximum residue limits of veterinary medicinal products in foodstuffs of animal origin.

**II. EMPLOYMENT, SOCIAL AFFAIRS AND EQUAL OPPORTUNITIES**

**List of measures in force**

**II.1. Free movement of workers and coordination of social security schemes**

*II.1.1. Free movement of workers*

Art. 39 TEC

Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

### *II.1.2 Social security*

Article 42 TEC

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and to the members of their families moving within the Community.

Regulation (EC) No 859/2003 of the Council of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

#### **Recently adopted measures due to enter into force in the sector of the Social security**

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security schemes.

#### **New measures already proposed and due to be adopted in the sector of the Social security**

Proposal for a Regulation of the European Parliament and of the Council laying down the procedures for implementing Regulation (EC) No 883/2004 on the coordination of social security schemes.

Proposal for a Regulation of the Council extending the provisions of Regulation (EC) No 883/2004 and of Regulation (EC) No [...] to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

## **II.2. Labour Law**

### *II.2.1. Working conditions*

- Directive 96/71/EC<sup>513</sup> of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services
- Council Directive 97/81/EC<sup>514</sup> of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work;
- Council Directive 98/23/EC<sup>515</sup> of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE,

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<sup>513</sup> OJ L 18, 21.1.1997, p. 1–6

<sup>514</sup> OJ L 14, 20.1.1998, p. 9–14

<sup>515</sup> OJ L 131, 5.5.1998, p. 10–10



CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland;

- Council Directive 1999/70/EC<sup>516</sup> of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP;
- Council Directive 1999/63/EC<sup>517</sup> of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST);
- Council Directive 2000/79/EC<sup>518</sup> of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA);
- Directive 2003/88/EC<sup>519</sup> of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time;
- Council Directive 2005/47/EC<sup>520</sup> of 18 July 2005 on the Agreement between the Community of European Railways (CER) and the European Transport Workers' Federation (ETF) on certain aspects of the working conditions of mobile workers engaged in interoperable cross-border services in the railway sector;
- Directive 2008/104/EC<sup>521</sup> of European Parliament and of the Council of 19 November 2008 on temporary agency work.
- Council Directive 2009/13/EC implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006 and amending Directive 1999/63/EC

### *II.2.2. Information and consultation of workers*

- Council Directive 94/45/EC<sup>522</sup> of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees;
- Council Directive 97/74/EC<sup>523</sup> of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the

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<sup>516</sup> OJ L 244, 16.9.1999, p. 64–64  
<sup>517</sup> OJ L 167, 2.7.1999, p. 33–37  
<sup>518</sup> OJ L 302, 1.12.2000, p. 57–60  
<sup>519</sup> OJ L 299, 18.11.2003, p. 9–19  
<sup>520</sup> OJ L 195, 27.7.2005, p. 15–17  
<sup>521</sup> OJ L 327, 5.12.2008, p. 9–14  
<sup>522</sup> OJ L 254, 30.9.1994, p. 64–72  
<sup>523</sup> OJ L 365, 31.12.1994, p. 46–51

establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees

- Council Directive 2006/109/EC<sup>524</sup> of 20 November 2006 adapting Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, by reason of the accession of Bulgaria and Romania;
- Council Directive 2001/86/EC<sup>525</sup> of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees;
- Council Directive 2003/72/EC<sup>526</sup> of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees;
- Directive 2002/14/EC<sup>527</sup> of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation;
- Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast).

### *II.2.3. Protection of workers*

- Council Directive 91/383/EEC<sup>528</sup> of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship;
- Council Directive 91/533/EEC<sup>529</sup> of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship;
- Council Directive 94/33/EC<sup>530</sup> of 22 June 1994 on the protection of young people at work;
- Council Directive 98/59/EC<sup>531</sup> of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies;

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<sup>524</sup> OJ L 363, 20.12.2006, p. 416–417

<sup>525</sup> OJ L 294, 10.11.2001, p. 22–32

<sup>526</sup> OJ L 207, 18.8.2003, p. 25–36

<sup>527</sup> OJ L 80, 23.3.2002, p. 29–34

<sup>528</sup> OJ L 206, 29.7.1991, p. 19–21

<sup>529</sup> OJ L 288, 18.10.1991, p. 32–35

<sup>530</sup> OJ L 216, 20.8.1994, p. 12–20

<sup>531</sup> OJ L 225, 12.8.1998, p. 16–21

- Directive 2008/94/EC<sup>532</sup> of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (codified version);
- Council Directive 2001/23/EC<sup>533</sup> of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses;

#### *II.2.4. Implementation and application reports*

- Implementation reports concerning the transposition of Directives 91/383/EEC, 97/81/EC, 1999/70/EC, 96/71/EC in the 10 new Member States
- Implementation reports concerning the transposition of Directives 2001/23/EC and 80/987/EC (as amended by 2002/74/EC) in all 25 Member States
- Implementation reports concerning Directives 91/533/EEC, 94/45/EC (extended by 97/74/EC) and 98/59/EC in the 10 new Member States
- Implementation reports concerning Directives 2001/86/EC, 2002/14/EC and 2003/72/EC in all 25 Member States
- Implementation reports concerning Directives 94/33/EC and 2003/88/EC in the 10 new Member States
- Implementation report concerning Directive 2000/34/EC in the EU-15 Member States
- Implementation reports concerning Directives 1999/63/EC, 2000/79/EC in all 25 Member States

### **II.3. Health and safety at work**

- Directive 89/391/EEC<sup>534</sup> of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work;
- Council Directive 89/654/EEC<sup>535</sup> of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Directive 2009/104/EC<sup>536</sup> of the European Parliament and of the Council of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article

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<sup>532</sup> OJ L 283, 28.10.2008, p. 36-42

<sup>533</sup> OJ L 82, 22.3.2001, p. 16-20

<sup>534</sup> OJ L 183, 29.6.1989, p.1.

<sup>535</sup> OJ L 393, 30.12.1989, p.1.

<sup>536</sup> OJ L 260, 3.10.2009, p. 5.

16(1) of Directive 89/391/EEC – Codification of Directive 89/655/EEC, as amended by Directives 95/63/EC and 2001/45/EC);

- Council Directive 89/656/EEC<sup>537</sup> of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Council Directive 90/269/EEC<sup>538</sup> of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Council Directive 90/270/EEC<sup>539</sup> of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Directive 2004/37/EC<sup>540</sup> of the European Parliament and of the Council of 29 April 2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (sixth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC - Codification of Directive 90/394/EEC);
- Directive 2000/54/EC<sup>541</sup> of the European Parliament and of the Council of 18 September 2000 on the protection of workers from risks related to exposure to biological agents at work (seventh individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) - Codification of Directive 90/679/EEC);
- Council Directive 92/57/EEC<sup>542</sup> of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eight individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Council Directive 92/58/EEC<sup>543</sup> of 24 June 1992 on the minimum requirements for the provision of safety and/or health signs at work (ninth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Council Directive 92/91/EEC<sup>544</sup> of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling (eleventh individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Council Directive 92/104/EEC<sup>545</sup> of 3 December 1992 on the minimum requirements for improving the safety and health protection of workers in surface and underground

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<sup>537</sup> OJ L 393, 30.12.1989, p.18.

<sup>538</sup> OJ L 156, 21.6.1990, p.9.

<sup>539</sup> OJ L 156, 21.6.1990, p.14.

<sup>540</sup> OJ L 229, 29.6.2004, p.23.

<sup>541</sup> OJ L 262, 17.10.2000, p.21.

<sup>542</sup> OJ L 245, 26.8.1992, p.6.

<sup>543</sup> OJ L 245, 26.8.1992, p.23.

<sup>544</sup> OJ L 348, 28.11.1992, p.9.

<sup>545</sup> OJ L 404, 31.12.1992, p.10.

mineral-extracting industries (twelfth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);

- Council Directive 93/103/EC<sup>546</sup> of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels (thirteenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Council Directive 98/24/EC<sup>547</sup> of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);

Commission Directives establishing indicative exposure limit values:

- Commission Directive 91/322/EEC<sup>548</sup> of 29 May 1991 on establishing indicative limit values by implementing Council Directive 80/1107/EEC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work,
- Commission Directive 2000/39/EC<sup>549</sup> of 8 June 2000 establishing a first list of indicative occupational exposure limit values in implementation of Council Directive 98/24/E on the protection of the health and safety of workers from the risks related to chemical agents at work,
- Commission Directive 2006/15/EC<sup>550</sup> of 7 February 2006 establishing a second list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC and amending Directives 91/322/EEC and 2000/39/EC;
- Directive 1999/92/EC<sup>551</sup> of the European Parliament and of the Council of 16 December 1999 on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres (fifteenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Directive 2002/44/EC<sup>552</sup> of the European Parliament and of the Council of 25 June 2002 on the minimum health and safety requirements regarding the exposure of workers to the risk arising from physical agents (vibration) (sixteenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Directive 2003/10/EC<sup>553</sup> of the European Parliament and of the Council of 6 February 2003 on the minimum health and safety requirements regarding the

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<sup>546</sup> OJ L 307, 13.12.1993, p.1.

<sup>547</sup> OJ L131, 5.5. 1998, p.11.

<sup>548</sup> OJ L177, 5.7. 1991, p.22.

<sup>549</sup> OJ L 142, 16.6.2000, p.47.

<sup>550</sup> OJ L 38, 9.2.2006, p.36.

<sup>551</sup> OJ L 23, 28.1.2000, p.57.

<sup>552</sup> OJ L 177, 6.7.2002, p.13.

<sup>553</sup> OJ L 42, 15.2.2003, p.38.

exposure of workers to the risk arising from physical agents (noise) (seventeenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC);

- Directive 2004/40/EC<sup>554</sup> of the European Parliament and of the Council of 29 April 2004 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (18th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), ); as amended by Directive 2008/46/EC<sup>555</sup>
- Directive 2006/25/EC<sup>556</sup> of the European Parliament and of the Council of 5 April 2006 on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);
- Council Directive 92/29/EEC<sup>557</sup> of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels;
- Council Directive 83/477/EEC<sup>558</sup> of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work, as amended by:
- Council Directive 91/382/EEC<sup>559</sup> of 25 June 1991 amending directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work,
- Directive 2003/18/EC<sup>560</sup>, of the European Parliament and of the Council of 27 March 2003 amending Council directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work;
- Directive 2007/30/EC<sup>561</sup> of the European Parliament and of the Council of 20 June 2007 amending Council Directive 89/391/EEC, its individual Directives and Council Directives 83/477/EEC, 91/383/EEC, 92/29/EEC and 94/33/EC with a view to simplifying and rationalising the reports on practical implementation.

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<sup>554</sup> OJ L 184, 24.5.2004, p.1.

<sup>555</sup> OJ L 114, 26.4.2008, p. 88

<sup>556</sup> OJ L 114, 27.4.2006, p.38.

<sup>557</sup> OJ L 113, 30.4.1992, p.19.

<sup>558</sup> OJ L 263, 24.9.1983, p.25.

<sup>559</sup> OJ L 206, 29.7.1991, p.16.

<sup>560</sup> OJ L 97, 15.4.2003, p.48.

<sup>561</sup> OJ L 165, 27.6.2007, p.21.

## II.4. Gender equality and anti-discrimination

### II.4.1. Gender equality

- Directive 2006/54/EC<sup>562</sup> of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)
- Council Directive 2004/113/EC<sup>563</sup> of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services
- Directive 2002/73/EC<sup>564</sup> of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions
- Council Directive 97/80/EC<sup>565</sup> of 15 December 1997 on the burden of proof in cases of discrimination based on sex
- Council Directive 96/97/EC<sup>566</sup> of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes
- Council Directive 96/34/EC<sup>567</sup> of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC
- Council Directive 92/85/EEC<sup>568</sup> of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)
- Council Directive 86/613/EEC<sup>569</sup> of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood
- Council Directive 86/378/EEC<sup>570</sup> of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes

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<sup>562</sup> OJ L 204, 26.7.2006

<sup>563</sup> OJ L 373, 21.12.2004

<sup>564</sup> OJ L 269, 5.10.2002

<sup>565</sup> OJ L 14, 20.1.1998

<sup>566</sup> OJ L 151, 18.6.1999

<sup>567</sup> OJ L 145, 19.6.1996

<sup>568</sup> OJ L 348, 28.11.1992

<sup>569</sup> OJ L 359, 19.12.1986

<sup>570</sup> OJ L 241, 3.9.1997

- Council Directive 79/7/EEC<sup>571</sup> of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security
- Council Directive 76/207/EEC<sup>572</sup> of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions
- Council Directive 75/117/EEC<sup>573</sup> of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

#### II.4.2. *Anti-discrimination*

- Council Directive 2000/78/EC<sup>574</sup> of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- Council Directive 2000/43/EC<sup>575</sup> of 29 June 2000 implementing the principle of equal

### III. ENERGY AND TRANSPORT

A full description of the legal basis for controlling the application of the Community *acquis* on energy and transport was provided in the context of the 25<sup>th</sup> Report (Annex I, paragraph 2.1).

#### III.1. ENERGY

The texts of current Community legislation on energy are available in section 12 of the EUR-Lex database

[http://eur-lex.europa.eu/Repview.do?idRoot=1&refinecode=LEG\\*T1=V100;T2=V1;T3=V4&rep=12](http://eur-lex.europa.eu/Repview.do?idRoot=1&refinecode=LEG*T1=V100;T2=V1;T3=V4&rep=12)

The Community *acquis* related to Title II, Chapter 3, can be consulted in section 15 of the EUR-Lex database, the Community *acquis* (heading 12.10.20.10 "Nuclear Safety and Radioactive Waste").

[http://eur-lex.europa.eu/Repview.do?idRoot=1&refinecode=LEG\\*T1=V100;T2=V1;T3=V4&rep=15](http://eur-lex.europa.eu/Repview.do?idRoot=1&refinecode=LEG*T1=V100;T2=V1;T3=V4&rep=15)

A comprehensive list of *acquis* and case-law related to the Euratom Treaty can be consulted in the annexes to the Commission staff working paper (SEC (2007) 347) accompanying the Communication on the 50 years of the Euratom Treaty (COM(2007) 124 final) at

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<sup>571</sup> OJ L 6, 10.1.1979  
<sup>572</sup> OJ L 39, 14.2.1976  
<sup>573</sup> OJ L 45, 19.2.1975  
<sup>574</sup> OJ L 303, 2.12.2000  
<sup>575</sup> OJ L 180, 19.7.2000



<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007SC0347:EN:NOT>

## List of legislation adopted in 2008 in the field of Energy

### Regulations

- Commission Regulation (EC) No 1275/2008 of 17 December 2008 implementing Directive 2005/32/EC of the European Parliament and of the Council with regard to ecodesign requirements for standby and off mode electric power consumption of electrical and electronic household and office equipment
- Regulation (EC) No 1099/2008 of the European Parliament and of the Council of 22 October 2008 on energy statistics

### Directives

- Directive 2008/3/EC of the European Parliament and of the Council of 15 January 2008 amending Directive 2003/54/EC as regards the application of certain provisions to Estonia
- Directive 2008/28/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2005/32/EC establishing a framework for the setting of ecodesign requirements for energy-using products, as well as Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC, as regards the implementing powers conferred on the Commission
- Directive 2008/92/EC of the European Parliament and of the Council of 22 October 2008 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users (recast)

## **III.2. TRANSPORT**

A full description of the legal basis for controlling the application of the Community *acquis* on energy and transport was provided in the context of the 25<sup>th</sup> Report (Annex I, paragraph 2.1).

The texts of current Community legislation on transport are available in section 07 of the EUR-Lex database

<http://eur-lex.europa.eu/en/legis/latest/chap07.htm>

In order to facilitate access to the legislation in force and ease its reading, a European Civil Aviation Handbook has been developed, compiling not only Regulations and Directives, but also Decisions, Case Law and International Agreements in this field.

[http://ec.europa.eu/transport/air/handbook/handbook\\_en.htm](http://ec.europa.eu/transport/air/handbook/handbook_en.htm)

A *Guide to European Community legislation in the field of civil aviation* (2007 Edition) is also available at

[http://ec.europa.eu/transport/air/internal\\_market/internal\\_market\\_en.htm](http://ec.europa.eu/transport/air/internal_market/internal_market_en.htm)

**Newest Legislation adopted in 2008 in the field of Transport:**

## **Regulations**

- Commission Regulation (EC) No 8/2008 of 11 December 2007 amending Council Regulation (EEC) No 3922/91 as regards common technical requirements and administrative procedures applicable to commercial transportation by aeroplane
- Council Regulation (EC) No 71/2008 of 20 December 2007 setting up the Clean Sky Joint Undertaking
- Commission Regulation (EC) No 23/2008 of 11 January 2008 amending Commission Regulation (EC) No 622/2003 laying down measures for the implementation of the common basic standards on aviation security
- Commission Regulation (EC) No 181/2008 of 28 February 2008 laying down certain measures for implementing Council Regulation (EC) No 718/1999 on a Community fleet capacity policy to promote inland waterway transport (Codified version)
- Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC
- Commission Regulation (EC) No 287/2008 of 28 March 2008 on the extension of the period of validity of referred to in Article 2c(3) of Regulation (EC) No 1702/2003
- Regulation (EC) No 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002
- Commission Regulation (EC) No 324/2008 of 9 April 2008 laying down revised procedures for conducting Commission inspections in the field of maritime security
- Commission Regulation (EC) No 331/2008 of 11 April 2008 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community
- Commission Regulation (EC) No 351/2008 of 16 April 2008 implementing Directive 2004/36/EC of the European Parliament and of the Council as regards the prioritisation of ramp inspections on aircraft using Community airports
- Commission Regulation (EC) No 358/2008 of 22 April 2008 amending Regulation (EC) No 622/2003 laying down measures for the implementation of the common basic standards on aviation security
- Commission Regulation (EC) No 482/2008 of 30 May 2008 establishing a software safety assurance system to be implemented by air navigation service providers and amending Annex II to Regulation (EC) No 2096/2005
- Commission Regulation (EC) No 536/2008 of 13 June 2008 giving effect to Article 6(3) and Article 7 of Regulation (EC) No 782/2003 of the European Parliament and of the Council on the prohibition of organotin compounds on ships and amending that Regulation

- Commission Regulation (EC) No 540/2008 of 16 June 2008 amending Annex II to Regulation (EC) No 336/2006 of the European Parliament and of the Council on the implementation of the International Safety Management (ISM) Code within the Community, as regards format of forms
- Council Regulation (EC) No 569/2008 of 12 June 2008 amending Regulation No 11 concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79(3) of the Treaty establishing the European Economic Community
- Commission Regulation (EC) No 668/2008 of 15 July 2008 amending Annexes II to V of Regulation (EC) No 2096/2005 laying down common requirements for the provision of air navigation services, as regards working methods and operating procedures
- Commission Regulation (EC) No 715/2008 of 24 July 2008 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community
- Commission Regulation (EC) No 820/2008 of 8 August 2008 laying down measures for the implementation of the common basic standards on aviation security (Text with EEA relevance)
- Commission Regulation (EC) No 859/2008 of 20 August 2008 amending Council Regulation (EEC) No 3922/91 as regards common technical requirements and administrative procedures applicable to commercial transportation by aeroplane
- Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast)
- Commission Regulation (EC) No 1056/2008 of 27 October 2008 amending Regulation (EC) No 2042/2003 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks
- Commission Regulation (EC) No 1057/2008 of 27 October 2008 amending Appendix II of Annex to Regulation (EC) No 1702/2003 concerning the Airworthiness Review Certificate (EASA Form 15a)
- Regulation (EC) No 1100/2008 of the European Parliament and of the Council of 22 October 2008 on the elimination of controls performed at the frontiers of Member States in the field of road and inland waterway transport (Codified version)
- Commission Regulation (EC) No 1131/2008 of 14 November 2008 amending Regulation (EC) No 474/2006 establishing the Community list of air carriers which are subject to an operating ban within the Community
- Regulation (EC) No 1335/2008 of the European Parliament and of the Council of 16 December 2008 amending Regulation (EC) No 881/2004 establishing a European Railway Agency (Agency Regulation)
- Council Regulation (EC) No 1361/2008 of 16 December 2008 amending Regulation (EC) No 219/2007 on the establishment of a joint undertaking to develop the new generation European air traffic management system (SESAR)

- Commission Regulation (EC) No 1356/2008 of 23 December 2008 amending Regulation (EC) No 593/2007 on the fees and charges levied by the European Aviation Safety Agency

### **Directives**

- Commission Directive 2008/49/EC of 16 April 2008 amending Annex II to Directive 2004/36/EC of the European Parliament and of the Council regarding the criteria for the conduct of ramp inspections on aircraft using Community airports

- Directive 2008/54/EC of the European Parliament and of the Council of 17 June 2008 amending Council Directive 95/50/EC on uniform procedures for checks on the transport of dangerous goods by road, as regards the implementing powers conferred on the Commission

- Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community (Recast)

- Council Directive 2008/59/EC of 12 June 2008 adapting Directive 2006/87/EC of the European Parliament and of the Council laying down technical requirements for inland waterway vessels, by reason of the accession of the Republic of Bulgaria and Romania

- Commission Directive 2008/65/EC of 27 June 2008 amending Directive 91/439/EEC on driving licences

- Commission Directive 2008/67/EC of 30 June 2008 amending Council Directive 96/98/EC on marine equipment

- Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods

- Commission Directive 2008/87/EC of 22 September 2008 amending Directive 2006/87/EC of the European Parliament and of the Council laying down technical requirements for inland waterway vessels

- Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers (recast)

- Directive 2008/110/EC of the European Parliament and of the Council of 16 December 2008 amending Directive 2004/49/EC on safety on the Community's railways (Railway Safety Directive)

- Commission Directive 2008/126/EC of 19 December 2008 amending Directive 2006/87/EC of the European Parliament and of the Council laying down technical requirements for inland waterway vessels

### **Legislation in the pipeline (Air Transport):**

– Proposal for a Regulation on a Code of Conduct for computerised reservation systems

– Proposal for a Regulation amending Regulation (EC) No 216/2008 in the field of aerodromes, air traffic management and air navigation services and repealing Council Directive 06/23/EEC

- Proposal to amend Directive 2002/30/EC concerning noise-related operating restrictions at Community airports
- Commission Regulation on national quality control programmes security
- Commission Regulation on security Commission inspections
- Commission Regulation on exemptions for small airports in the field of security
- Commission Regulation on general measures designed to amend non-essential elements of the common basic standards of security
- Commission Regulation on detailed measures for the implementation of the common basic standards of security
- Commission Regulations exempting from confiscation liquids sold at airports in the USA and South Korea

#### **IV. INTERNAL MARKET AND SERVICES**

##### **IV.1. Existing and in force acquis**

A list of the existing acquis under the remit of the Commission in the area "Internal Market and services" is available at the following web address:

[http://ec.europa.eu/dgs/internal\\_market/mission\\_en.htm](http://ec.europa.eu/dgs/internal_market/mission_en.htm)

##### **IV.2. Recently adopted measures**

Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions (OJ L 79, 20.03.2007, p. 11).

Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards certain disclosure requirements for medium-sized companies and obligation to draw up consolidated accounts {SEC(2008) 466} {SEC(2008) 467} COM/2008/0195 final - COD 2008/0084 (*Adopted December 18, 2008, but formal adoption pending finalisation of the text by the lawyers linguists*)

Directive of the European Parliament and of the Council amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (*Adopted 18 December 2008, but formal adoption pending finalisation of the text by the lawyers linguists*)

Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay, *OJ L 68, 13.3.2009, p. 3.*

##### **IV.3. New measures already proposed and due to be adopted**

Proposals in co-decision

Proposal for a Directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (SOLVENCY II) (recast) (COM (2007) 361 of 10.7.07, and COM (2008) 119 of 26.2.2008, COD 2007/0143), (*expected to be adopted in 2009 and enter into force in late 2012*).

Proposal for a Directive of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (*Plenary vote in January 2009. General approach adopted in the Ecofin Council on 2 December 2008. Adopted in EP on 13 January 2009*)

Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defense and security {SEC(2007) 1598} {SEC(2007) 1599 COM/2007/0766 final - COD 2007/0280 (*Adopted EP January 13 2009. Formal adoption of first reading agreement in Council expected under CZ presidency*)

Proposal for a Council Decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent, COM/2003/0827 final

#### *Proposal for a Community Patent Regulation*

Proposal for a Directive of the European Parliament and of the Council amending Directive 98/71/EC on the legal protection of designs (*spare parts*)

Proposal for a Council Regulation on the statute for a European private company {SEC(2008) 2098} {SEC(2008) 2099} /\* COM/2008/0396 final - CNS 2008/0130 \*/

Proposal for a Directive of the European Parliament and of the Council amending Council Directives 68/151/EEC and 89/666/EEC as regards publication and translation obligations of certain types of companies {SEC(2008) 466} {SEC(2008) 467} /\* COM/2008/0194 final - COD 2008/0083 \*/

Proposal for a Directive of the European Parliament and of the Council amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and Directive 2005/56/EC as regards reporting and documentation requirements in the case of merger and divisions {SEC(2008) 2486} {SEC(2008) 2487} /\* COM/2008/0576 final - COD 2008/0182 \*/

#### *Financial Market:*

Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/48/EC and 2006/49/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management SEC(2008) 2532} SEC(2008) 2533 - COM/2008/0602 final - COD 2008/0191

Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies COM (2008) 704 final, {SEC(2008) 745} {SEC(2008) 2746}

Proposal for a Directive of the European Parliament and of the Council of on the taking up, pursuit and prudential supervision of the business of electronic money institutions, amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (Text with EEA relevance) COM/2008/0627 final

Proposal for a Regulation of the European Parliament and of the Council on cross-border payments in the Community, COM(2008) 640 final

## V. TAXATION AND CUSTOMS UNION

### V.1. CUSTOMS

The following webpage contains a list of legal measures in the **customs area** adopted since 2003:

[http://ec.europa.eu/taxation\\_customs/common/legislation/legislation/customs/index\\_en.htm](http://ec.europa.eu/taxation_customs/common/legislation/legislation/customs/index_en.htm)

- Relevant **Treaty** provisions:

**Art 18;**

**Art 23-27 TCE;**

**Art 95 (approximation of laws);**

**Art 133;**

**Art 135.**

- Relevant **secondary Community law** acts:

**Council Regulation (EEC) No 2913/92** (Council Regulation (EEC) No 2913/92 establishing the Community Customs Code)

**Commission Regulation (EEC) No 2454/93** (provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code);

**The Common Customs Tariff** (Combined Nomenclature and tariff measures): Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and the duty relief legislation (Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of relief from customs duty);

**Regulation (EC) No 1889/2005 of the European Parliament and of the Council;**

**International agreements** in customs matters or the customs provisions of international agreements;

Specific legislation on customs control (counterfeit, drug precursors, cultural goods, cash control) in particular :

**Council Regulation (EC) No 1383/2003;**

**Council Regulation (EC) No 111/2005;**

**Council Regulation (EEC) No 3911/92.**

## V.2. INDIRECT TAXATION

The following webpage contains a list of legal measures in the **tax area** adopted since 2003:

[http://ec.europa.eu/taxation\\_customs/common/legislation/legislation/taxation/index\\_en.htm](http://ec.europa.eu/taxation_customs/common/legislation/legislation/taxation/index_en.htm)

*Existing measures in force (situation on 31/12/2008)*

- Relevant **Treaty** provisions:

Mainly:

**Art 90;**

Additional:

**Art 39;**

**Art 49;**

**Art 43;**

**Art 56.**

- Relevant **secondary Community law** acts:

**Directive 2008/118/EC;**

**Directive 2008/55/EC;** *(This Directive constituted a mere codification of the existing legislation (laid down in Directive 76/308/EEC, which had already undergone several amendments). Therefore, it did not entail any transposition charge for the Member States)*

**Directive 2008/9/EC;**

**Directive 2007/74/EC;**

**Directive 2006/112/EC** (+ amending directives);

**Directive 2006/98/EC;**

**Directive 2006/79/EC;**

**Directive 2003/96/EEC** (+ amending directives);

**Directive 95/60/EC;**

**Directive 95/59/EC;**

**Directive 92/84/EEC;**

**Directive 92/83/EEC;**

**Directive 92/80/EEC;**



**Directive 92/79/EEC** (+ amending directives);  
**Directive 92/12/EEC** (+ amending directives);  
**Directive 91/680/EEC**;  
**Directive 86/560/EEC**;  
**Directive 86/247/EEC**;  
**Directive 83/648/EEC**;  
**Directive 83/183/EEC** (+ amending directive);  
**Directive 83/182/EEC**;  
**Directive 83/181/EEC** (+ amending directives);  
**Directive 79/1072/EEC**;  
**Directive 78/1035/EEC** (+ amending directive);  
**Directive 78/1032/EEC**;  
**Directive 72/230/EEC**;  
**Directive 69/463/EEC**;  
**Directive 68/297/EEC** (+ amending directive).

### **V.3. DIRECT TAXATION**

The following webpage contains a list of legal measures in the **tax area** adopted since 2003:

[http://ec.europa.eu/taxation\\_customs/common/legislation/legislation/taxation/index\\_en.htm](http://ec.europa.eu/taxation_customs/common/legislation/legislation/taxation/index_en.htm)

*Existing measures in force (situation on 31/12/2008)*

- Relevant **Treaty** provisions:

**Art 18**;

**Art 39** (to 42);

**Art 43** (to 48);

**Art 49** (to 55);

**Art 56** (to 60);

**Art 94**;

**Art 293**.

- Relevant **secondary Community law** acts:  
**Directive 69/335/EEC** (+ 4 amending directives);  
**Directive 76/308/EEC** (+ 4 amending directives);  
**Directive 77/799/EEC** (+2 amending directives);  
**Directive 90/434/EEC** (+1 amending directive);  
**Directive 90/435/EEC** (+1 amending directive);  
**Directive 2003/48/EC**;  
**Directive 2003/49/EC** (+1 amending directive).

## VI. HEALTH AND CONSUMERS

Main Measures in Force 31/12/2008

### VI.1. Public Health

*Relevant EC Treaty provisions:*

- Art 95
- Art 152

*Relevant secondary Community law acts:*

- Directive [2001/37/EC](#) of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products
- Directive [2002/98/EC](#) of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC
- Directive [2003/33/EC](#) of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products
- Directive [2004/23/EC](#) of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells
- Commission Directive [2004/33/EC](#) of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components

- Commission Directive [2005/61/EC](#) of 30 September 2005 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards traceability requirements and notification of serious adverse reactions and events
- Commission Directive [2005/62/EC](#) of 30 September 2005 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards Community standards and specifications relating to a quality system for blood establishments
- Commission Directive [2006/17/EC](#) of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells
- Commission Directive [2006/86/EC](#) of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells
- [Decision No 2119/98/EC](#) of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community
- [Regulation \(EC\) No 851/2004](#) of the European Parliament and of the Council of 21 April 2004 establishing a European Centre for disease prevention and control
- Commission Decision [2000/96/EC](#) of 22 December 1999 on the communicable diseases to be progressively covered by the Community network under Decision No 2119/98/EC of the European Parliament and of the Council
- Commission Decision [2002/253/EC](#) of 19 March 2002 laying down case definitions for reporting communicable diseases to the Community network under Decision No 2119/98/EC of the European Parliament and of the Council
- Commission Decision [2000/57/EC](#) of 22 December 1999 on the early warning and response system for the prevention and control of communicable diseases under Decision No 2119/98/EC of the European Parliament and of the Council
- Commission Decision [2007/875/EC](#) of 18 December 2007 amending Decision No 2119/98/EC of the European Parliament and of the Council and Decision 2000/96/EC as regards communicable diseases listed in those decisions
- Commission Decision [2008/351/EC](#) of 28 April 2008 amending Decision 2000/57/EC as regards events to be reported within the early warning and response system for the prevention and control of communicable diseases
- Commission Decision [2008/426/EC](#) of 28 April 2008 amending Decision 2002/253/EC laying down case definitions for reporting communicable diseases to the Community network under Decision No 2119/98/EC of the European Parliament and of the Council

## **VI.2. Consumers**

*Relevant EC Treaty provisions*

- Art 95
- Art 153

*Relevant secondary Community law acts:*

- Council Directive [85/577/EEC](#) of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises
- Council Directive [87/102/EEC](#) of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit
- Council Directive [87/357/EEC](#) of 25 June 1987 on the approximation of the laws of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers
- Council Directive [90/88/EEC](#) of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit
- Council Directive [90/314/EEC](#) of 13 June 1990 on package travel, package holidays and package tours
- Council Directive [93/13/EEC](#) of 5 April 1993 on unfair terms in consumer contracts
- Directive [97/7/EC](#) of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
- Directive [98/6/EC](#) of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers
- Directive [98/7/EC](#) of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit
- Directive [98/27/EC](#) of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests
- Directive [1999/44/EC](#) of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees
- Directive [2001/95/EC](#) of the European Parliament and of the Council of 3 December 2001 on general product safety
- Directive [2002/65/EC](#) of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC
- Directive [2005/29/EC](#) of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC

of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

- Directive [2006/114/EC](#) of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising
- Directive [2008/48/EC](#) of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC
- Directive [2008/122/EC](#) of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts
- Commission Decision [2006/502/EC](#) of 11 May 2006 requiring Member States to take measures to ensure that only lighters which are child-resistant are placed on the market and to prohibit the placing on the market of novelty lighters
- Commission Decision [2008/322/EC](#) of 18 April 2008 prolonging the validity of Decision 2006/502/EC requiring Member States to take measures to ensure that only lighters which are child-resistant are placed on the market and to prohibit the placing on the market of novelty lighters

### **VI.3. Food Safety**

*Relevant EC Treaty provisions:*

- Art 37
- Art 95
- Art 152

#### *VI.3.1. General*

- [Regulation \(EC\) No 178/2002](#) of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety

#### *VI.3.2. Veterinary*

- Council [Directive 90/425/EEC](#) of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market
- Council [Directive 89/662/EEC](#) of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market
- Council [Directive 96/93/EC](#) of 17 December 1996 on the certification of animals and animal products

- Council [Directive 2002/99/EC](#) of 16 December 2002 laying down the animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption
- Council [Directive 89/608/EEC](#) of 21 November 1989 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of legislation on veterinary and zootechnical matters
- Council [Directive 91/496/EEC](#) of 15 July 1991 laying down the principles governing the organization of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC
- Council [Directive 97/78/EC](#) of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries
- [Regulation \(EC\) No 882/2004](#) of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules
- [Regulation \(EC\) No 1760/2000](#) of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97
- Council [Directive 64/432/EEC](#) of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine
- Council [Directive 2008/71/EC](#) of 15 July 2008 on the identification and registration of pigs
- Council [Regulation \(EC\) No 21/2004](#) of 17 December 2003 establishing a system for the identification and registration of ovine and caprine animals and amending Regulation (EC) No 1782/2003 and Directives 92/102/EEC and 64/432/EEC
- Council [Directive 90/426/EEC](#) of 26 June 1990 on animal health conditions governing the movement and import from third countries of equidae
- Council [Directive 90/427/EEC](#) of 26 June 1990 on the zootechnical and genealogical conditions governing intra-Community trade in equidae
- Council [Directive 2003/85/EC](#) of 29 September 2003 on Community measures for the control of foot-and-mouth disease repealing Directive 85/511/EEC and Decisions 89/531/EEC and 91/665/EEC and amending Directive 92/46/EEC
- Council [Directive 2001/89/EC](#) of 23 October 2001 on Community measures for the control of classical swine fever
- Council [Directive 2002/60/EC](#) of 27 June 2002 laying down specific provisions for the control of African swine fever and amending Directive 92/119/EEC as regards Teschen disease and African swine fever

- Council [Directive 92/35/EEC](#) of 29 April 1992 laying down control rules and measures to combat African horse sickness
- Council [Directive 2005/94/EC](#) of 20 December 2005 on Community measures for the control of avian influenza and repealing Directive 92/40/EEC
- Council [Directive 92/66/EEC](#) of 14 July 1992 introducing Community measures for the control of Newcastle disease
- Council [Directive 2006/88/EC](#) of 24 October 2006 on animal health requirements for aquaculture animals and products thereof, and on the prevention and control of certain diseases in aquatic animals
- Council [Directive 2000/75/EC](#) of 20 November 2000 laying down specific provisions for the control and eradication of bluetongue
- [Regulation \(EC\) No 999/2001](#) of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies
- [Regulation \(EC\) No 2160/2003](#) of the European Parliament and of the Council of 17 November 2003 on the control of salmonella and other specified food-borne zoonotic agents
- Council [Directive 92/119/EEC](#) of 17 December 1992 introducing general Community measures for the control of certain animal diseases and specific measures relating to swine vesicular disease
- Council [Directive 82/894/EEC](#) of 21 December 1982 on the notification of animal diseases within the Community
- Council [Directive 91/68/EEC](#) of 28 January 1991 on animal health conditions governing intra-Community trade in ovine and caprine animals
- Council [Directive 90/539/EEC](#) of 15 October 1990 on animal health conditions governing intra-Community trade in, and imports from third countries of, poultry and hatching eggs
- Council [Directive 89/556/EEC](#) of 25 September 1989 on animal health conditions governing intra-Community trade in and importation from third countries of embryos of domestic animals of the bovine species
- Council [Directive 88/407/EEC](#) of 14 June 1988 laying down the animal health requirements applicable to intra-Community trade in and imports of deep-frozen semen of domestic animals of the bovine species
- Council [Directive 90/429/EEC](#) of 26 June 1990 laying down the animal health requirements applicable to intra-Community trade in and imports of semen of domestic animals of the porcine species
- Council [Directive 92/65/EEC](#) of 13 July 1992 laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos



not subject to animal health requirements laid down in specific Community rules referred to in Annex A (I) to Directive 90/425/EEC

- [Regulation \(EC\) No 998/2003](#) of the European Parliament and of the Council of 26 May 2003 on the animal health requirements applicable to the non-commercial movement of pet animals and amending Council Directive 92/65/EEC
- Council [Directive 96/22/EC](#) of 29 April 1996 concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of  $\beta$ -agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC
- Council [Directive 96/23/EC](#) of 29 April 1996 on measures to monitor certain substances and residues thereof in live animals and animal products and repealing Directives 85/358/EEC and 86/469/EEC and Decisions 89/187/EEC and 91/664/EEC
- Council [Directive 2004/68/EC](#) of 26 April 2004 laying down animal health rules for the importation into and transit through the Community of certain live ungulate animals, amending Directives 90/426/EEC and 92/65/EEC and repealing Directive 72/462/EEC
- [Regulation \(EC\) No 854/2004](#) of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption
- [Directive 2004/41/EC](#) of the European Parliament and of the Council of 21 April 2004 repealing certain Directives concerning food hygiene and health conditions for the production and placing on the market of certain products of animal origin intended for human consumption and amending Council Directives 89/662/EEC and 92/118/EEC and Council Decision 95/408/EC
- [Regulation \(EC\) No 1774/2002](#) of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption Council [Directive 98/58/EC](#) concerning the protection of animals kept for farming purposes
- Council [Directive 1999/74/EC](#) of 19 July 1999 laying down minimum standards for the protection of laying hens
- Council [Directive 2007/43/EC](#) of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production
- Council [Directive 2008/119/EC](#) of 18 December 2008 laying down minimum standards for the protection of calves
- Council [Directive 91/630/EEC](#) of 19 November 1991 laying down minimum standards for the protection of pigs
- Council [Regulation \(EC\) No 1255/97](#) of 25 June 1997 concerning Community criteria for staging points and amending the route plan referred to in the Annex to Directive 91/628/EEC



- Council [Directive 93/119/EC](#) of 22 December 1993 on the protection of animals at the time of slaughter or killing
- Council [Directive 77/504/EEC](#) of 25 July 1977 on pure-bred breeding animals of the bovine species
- Council [Directive 88/661/EEC](#) of 19 December 1988 on the zoo technical standards applicable to breeding animals of the porcine species
- Council [Directive 89/361/EEC](#) of 30 May 1989 concerning pure-bred breeding sheep and goats
- Council [Directive 90/428/EEC](#) of 26 June 1990 on trade in equidae intended for competitions and laying down the conditions for participation therein
- Council [Directive 91/174/EEC](#) of 25 March 1991 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals and amending Directives 77/504/EEC and 90/425/EEC
- Council [Directive 94/28/EC](#) of 23 June 1994 laying down the principles relating to the zootechnical and genealogical conditions applicable to imports from third countries of animals, their semen, ova and embryos, and amending Directive 77/504/EEC on pure-bred breeding animals of the bovine species
- Council [Decision 90/424/EEC](#) of 26 June 1990 on expenditure in the veterinary field
- [Regulation \(EC\) No 852/2004](#) of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs
- Council [Directive 92/118/EEC](#) of 17 December 1992 laying down animal health and public health requirements governing trade in and imports into the Community of products not subject to the said requirements laid down in specific Community rules referred to in Annex A (I) to Directive 89/662/EEC and, as regards pathogens, to Directive 90/425/EEC
- [Regulation \(EC\) No 183/2005](#) of the European Parliament and of the Council of 12 January 2005 laying down requirements for feed hygiene
- Regulation (EC) [No 853/2004](#) of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin
- Commission Regulation (EC) [No 2073/2005](#) of 15 November 2005 on microbiological criteria for foodstuffs
- Commission Regulation (EC) [No 2074/2005](#) of 5 December 2005 laying down implementing measures for certain products under Regulation (EC) No 853/2004 of the European Parliament and of the Council and for the organisation of official controls under Regulation (EC) No 854/2004 of the European Parliament and of the Council and Regulation (EC) No 882/2004 of the European Parliament and of the Council, derogating from Regulation (EC) No 852/2004 of the European Parliament and of the Council and amending Regulations (EC) No 853/2004 and (EC) No 854/2004

- Commission Regulation (EC) [No 2075/2005](#) of 5 December 2005 laying down specific rules on official controls for *Trichinella* in meat
- [Directive 2003/99/EC](#) of the European Parliament and of the Council of 17 November 2003 on the monitoring of zoonoses and zoonotic agents, amending Council Decision 90/424/EEC and repealing Council Directive 92/117/EEC
- Council Regulation (EC) [No 1/2005](#) of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97

### VI.3.3. Food Safety Rules

- Commission [Directive 87/250/EEC](#) of 15 April 1987 on the indication of alcoholic strength by volume in the labelling of alcoholic beverages for sale to the ultimate consumer
- Council [Directive 89/396/EEC](#) of 14 June 1989 on indications or marks identifying the lot to which a foodstuff belongs
- Council [Directive 90/496/EEC](#) of 24 September 1990 on nutrition labelling for foodstuffs
- [Directive 2000/13/EC](#) of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs
- [Regulation \(EC\) No 1924/2006](#) of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods
- [Regulation \(EC\) No 1331/2008](#) of the European Parliament and of the Council of 16 December 2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings
- [Regulation \(EC\) No 1333/2008](#) of the European Parliament and of the Council of 16 December 2008 on food additives
- [Regulation \(EC\) No 1332/2008](#) of the European Parliament and of the Council of 16 December 2008 on food enzymes and amending Council Directive 83/417/EEC, Council Regulation (EC) No 1493/1999, Directive 2000/13/EC, Council Directive 2001/112/EC and Regulation (EC) No 258/97
- Council [Directive 88/344/EEC](#) of 13 June 1988 on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients
- Council [Directive 88/388/EEC](#) of 22 June 1988 on the approximation of the laws of the Member States relating to flavourings for use in foodstuffs and to source materials for their production
- Council [Decision 88/389/EEC](#) of 22 June 1988 on the establishment, by the Commission, of an inventory of the source materials and substances used in the preparation of flavourings

- [Regulation \(EC\) No 2232/96](#) of the European Parliament and of the Council of 28 October 1996 laying down a Community procedure for flavouring substances used or intended for use in or on foodstuffs
- [Regulation \(EC\) N° 2065/2003](#) of the European Parliament and of the Council of 10 November on smoke flavourings used or intended for use in or on foods
- [Regulation \(EC\) No 1331/2008](#) of the European Parliament and of the Council of 16 December 2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings
- [Regulation \(EC\) No 1334/2008](#) of the European Parliament and of the Council of 16 December 2008 on flavourings and certain food ingredients with flavouring properties for use in and on foods and amending Council Regulation (EEC) No 1601/91, Regulations (EC) No 2232/96 and (EC) No 110/2008 and Directive 2000/13/EC
- [Regulation 1935/2004/EC](#) of the European Parliament and of the Council of 27 October 2004 on materials and articles intended to come into contact with food
- Commission [Regulation \(EC\) No 2023/2006](#) of 22 December 2006 on good manufacturing practice for materials and articles intended to come into contact with food
- [Directive 2002/46/EC](#) of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements
- [Regulation \(EC\) No 1925/2006](#) of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods
- Council [Directive 89/398/EEC](#) of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses
- Council [Directive 92/52/EEC](#) of 18 June 1992 on infant formulae and follow-on formulae intended for export to third countries
- Council [Directive 89/108/EEC](#) of 21 December 1988 on the approximation of the laws of the Member States relating to quick-frozen foodstuffs for human consumption
- Council [Regulation \(EEC\) No 315/93](#) of 8 February 1993 laying down Community procedures for contaminants in food
- [Regulation \(EC\) No 258/97](#) of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients
- [Regulation \(EC\) N° 1829/2003](#) of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed
- [Regulation \(EC\) N° 1830/2003](#) of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC

- [Directive 1999/2/EC](#) of the European Parliament and of the Council of 22 February 1999 on the approximation of the laws of the Member States concerning foods and food ingredients treated with ionising radiation

**Note:** No technical adaptation as such in the Directive but obligation to publish in Official Journal (C- Series) which (new) Member States authorise the placing on the market of irradiated food other than those in EU list and which irradiation facilities in (new) Member States are approved by the national competent authorities for the treatment of food by ionising radiation.

- [Directive 1999/3/EC](#) of the European Parliament and of the Council of 22 February 1999 on the establishment of a Community list of foods and food ingredients treated with ionising radiation
- Council [Directive 80/777/EEC](#) of 15 July 1980 on the approximation of the laws of the Member States relating to the exploitation and marketing of natural mineral waters
- Commission [Directive 2003/40/EC](#) of 16 May 2003 establishing the list, concentration limits and labelling requirements for the constituents of natural mineral waters and the conditions for using ozone-enriched air for the treatment of natural mineral waters and spring waters
- Commission Regulation (EC) [No 353/2008](#) of 18 April 2008 establishing implementing rules for applications for authorisation of health claims as provided for in Article 15 of Regulation (EC) No 1924/2006 of the European Parliament and of the Council
- Commission Directive [2008/100/EC](#) of 28 October 2008 amending Council Directive 90/496/EEC on nutrition labelling for foodstuffs as regards recommended daily allowances, energy conversion factors and definitions
- Council Directive [89/107/EEC](#) of 21 December 1988 on the approximation of the laws of the Member States concerning food additives authorized for use in foodstuffs intended for human consumption
- Commission Regulation (EC) [No 1882/2006](#) of 19 December 2006 laying down methods of sampling and analysis for the official control of the levels of nitrates in certain foodstuffs
- Commission Regulation (EC) [No 1883/2006](#) of 19 December 2006 laying down methods of sampling and analysis for the official control of levels of dioxins and dioxin-like PCBs in certain foodstuffs
- Commission Regulation (EC) [No 401/2006](#) of 23 February 2006 laying down the methods of sampling and analysis for the official control of the levels of mycotoxins in foodstuffs
- Commission Regulation (EC) [No 333/2007](#) of 28 March 2007 laying down the methods of sampling and analysis for the official control of the levels of lead, cadmium, mercury, inorganic tin, 3-MCPD and benzo(a)pyrene in foodstuffs
- Commission [Decision 2006/504/EC](#) of 12 July 2006 on special conditions governing certain foodstuffs imported from certain third countries due to contamination risks of these products by aflatoxins

- Commission [Decision 2008/352/EC](#) of 29 April 2008 imposing special conditions governing guar gum originating in or consigned from India due to contamination risks of those products by pentachlorophenol and dioxins
- Commission Regulation (EC) [No 565/2008](#) of 18 June 2008 amending Regulation (EC) No 1881/2006 setting maximum levels for certain contaminants in foodstuffs as regards the establishment of a maximum level for dioxins and PCBs in fish liver
- Commission Regulation (EC) [No 629/2008](#) of 2 July 2008 amending Regulation (EC) No 1881/2006 setting maximum levels for certain contaminants in foodstuffs

#### VI.3.4. Feed

- Council [Directive 70/524/EEC](#) of 23 November 1970 concerning additives in feedingstuffs

**Note:** Council Directive 70/524/EEC shall be repealed with effect 18 October 2004. However, Article 16 of Directive 70/524/EEC shall remain in force until Directive 79/373/EEC has been revised to include rules concerning the labelling of feedingstuffs incorporating additives. Transitional measures concerning evaluations under Council Directive 70/524/EEC are set up in Article 25.

- [Regulation \(EC\) No 1831/2003](#) of the European Parliament and of the Council of 22 September 2003 on additives for use in animal nutrition
- Council [Directive 79/373/EEC](#) of 2 April 1979 on the circulation of compound feedingstuffs
- Council [Directive 96/25/EC](#) of 29 April 1996 on the circulation of feed materials, amending Directives 70/524/EEC, 74/63/EEC, 82/471/EEC and 93/74/EEC and repealing Directive 77/101/EEC
- [Directive 2002/32/EC](#) of the European Parliament and the Council of 7 May 2002 on undesirable substances in animal feed
- Council [Directive 93/74/EEC](#) of 13 September 1993 on feedingstuffs intended for particular nutritional purposes
- Commission [Directive 2008/38/EC](#) of 5 March 2008 establishing a list of intended uses of animal feedingstuffs for particular nutritional purposes
- Council [Directive 82/471/EEC](#) of 30 June 1982 concerning certain products used in animal nutrition
- Council [Directive 90/167/EEC](#) of 26 March 1990 laying down the conditions governing the preparation, placing on the market and use of medicated feedingstuffs in the Community

#### VI.3.5. Phytosanitary

- Council [Directive 2000/29/EC](#) of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community
- Council [Directive 69/464/EEC](#) of 8 December 1969 on control of Potato Wart Disease

- Council [Directive 69/465/EEC](#) of 8 December 1969 on control of Potato Cyst Eelworm (until 01/06/2010)
- Council [Directive 74/647/EEC](#) of 9 December 1974 on control of carnation leaf-rollers
- Council [Directive 93/85/EC](#) of 4 October 1993 on control of Potato Ring Rot
- Council [Directive 98/57/EC](#) of 20 July 1998 on the control of *Ralstonia solanacearum* (Smith) Yabuuchi et al.
- Council [Directive 2006/91/EC](#) of 7 November 2006 on control of San José Scale
- Council [Directive 2007/33/EC](#) of 11 June 2007 on the control of potato cyst nematodes and repealing Directive 69/465/EEC (from 01/06/2010)
- Commission [Directive 92/70/EEC](#) of 30 July 1992 laying down detailed rules for surveys to be carried out for purposes of the recognition of protected zones in the Community
- Commission [Directive 93/51/EEC](#) of 24 June 1993 establishing rules for movements of certain plants, plant products or other objects through a protected zone, and for movements of such plants, plant products or other objects originating in and moving within such a protected zone
- Commission [Regulation \(EC\) No 690/2008](#) of 4 July 2008 recognising protected zones exposed to particular plant health risks in the Community
- Commission [Directive 92/90/EEC](#) of 3 November 1992 establishing obligations to which producers and importers of plants, plant products or other objects are subject and establishing details for their registration
- Commission [Directive 92/105/EEC](#) of 3 December 1992 establishing a degree of standardization for plant passports to be used for the movement of certain plants, plant products or other objects within the Community, and establishing the detailed procedures related to the issuing of such plant passports and the conditions and detailed procedures for their replacement
- Commission [Directive 93/50/EEC](#) of 24 June 1993 specifying certain plants not listed in Annex V, part A to Council Directive 77/93/EEC, the producers of which, or the warehouses, dispatching centres in the production zones of such plants, shall be listed in an official register
- Commission [Directive 94/3/EC](#) of 21 January 1994 establishing a procedure for the notification of interception of a consignment or a harmful organism from third countries and presenting an imminent phytosanitary danger
- Commission [Directive 98/22/EC](#) of 15 April 1998 laying down the minimum conditions for carrying out plant health checks in the Community, at inspection posts other than those at the place of destination, of plants, plant products or other objects coming from third countries

- Commission [Directive 2008/61/EC](#) of 17 June 2008 establishing the conditions under which certain harmful organisms, plants, plant products and other objects listed in Annexes I to V to Council Directive 2000/29/EC may be introduced into or moved within the Community or certain protected zones thereof, for trial or scientific purposes and for work on varietal selections
- Council [Directive 91/414/EEC](#) of 15 July 1991 concerning the placing of plant protection products on the market
- [Regulation \(EC\) No 396/2005](#) of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC
- Council [Directive 66/401/EEC](#) of 14 June 1966 on the marketing of fodder plant seed
- Council [Directive 66/402/EEC](#) of 14 June 1966 on the marketing of cereal seed
- Council [Directive 68/193/EEC](#) of 9 April 1968 on the marketing of material for the vegetative propagation of the vine
- Council [Directive 2008/72/EC](#) of 15 July 2008 on the marketing of vegetable propagating and planting material, other than seed

Until 29/09/2012

- Council [Directive 92/34/EEC](#) of 28 April 1992 on the marketing of fruit plant propagating material and fruit plants intended for fruit production

From 30/09/2012

- Council [Directive 2008/90/EC](#) of 29 September 2008 on the marketing of fruit plant propagating material and fruit plants intended for fruit production
- Council [Directive 98/56/EC](#) of 20 July 1998 on the marketing of propagating material of ornamental plants
- Council [Directive 1999/105/EC](#) of 22 December 1999 on the marketing of forest reproductive material
- Council [Directive 2002/53/EC](#) of 13 June 2002 on the common catalogue of varieties of agricultural plant species
- Council [Directive 2002/54/EC](#) of 13 June 2002 on the marketing of beet seed
- Council [Directive 2002/55/EC](#) of 13 June 2002 on the marketing of vegetable seed
- Council [Directive 2002/56/EC](#) of 13 June 2002 on the marketing of seed potatoes
- Council [Directive 2002/57/EC](#) of 13 June 2002 on the marketing of seed of oil and fibre plants



- Commission [Directive 75/502/EEC](#) of 25 July 1975 limiting the marketing of seed of smooth-stalk meadow grass (*Poa pratensis* L.) to seed which has been officially certified 'basic seed' or 'certified seed'
- Commission [Decision 80/512/EEC](#) of 2 May 1980 authorizing the Kingdom of Denmark, the Federal Republic of Germany, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom not to apply the conditions laid down in Council Directive 66/401/EEC on the marketing of fodder plant seed, as regards the weight of the sample for determination of seed of *Cuscuta*
- Commission [Decision 85/370/EEC](#) of 8 July 1985 authorizing the Netherlands to assess the satisfaction of the varietal purity standards laid down in Annex II to Council Directive 66/401/EEC for seed of apomictic uniclinal varieties of *Poa pratensis*, also on the basis of the results of seed and seedling testing
- Commission [Decision 2004/371/EC](#) of 20 April 2004 on conditions for the placing on the market of seed mixtures intended for use as fodder plants
- Commission [Directive 2008/124/EC](#) of 18 December 2008 limiting the marketing of seed of certain species of fodder plants and oil and fibre plants to seed which has been officially certified as 'basic seed' or 'certified seed'
- Commission [Decision 80/755/EEC](#) of 17 July 1980 authorizing the indelible printing of prescribed information on packages of cereal seed
- Commission [Directive 2004/29/EC](#) of 4 March 2004 on determining the characteristics and minimum conditions for inspecting vine varieties
- Commission [Directive 93/61/EEC](#) of 2 July 1993 setting out the schedules indicating the conditions to be met by vegetable propagating and planting material, other than seed pursuant to Council Directive 92/33/EEC
- Commission [Directive 93/62/EEC](#) of 5 July 1993 setting out the implementing measures concerning the supervision and monitoring of suppliers and establishments pursuant to Council Directive 92/33/EEC on the marketing of vegetable propagating and planting material, other than seed
- Commission [Directive 93/48/EEC](#) of 23 June 1993 setting out the schedule indicating the conditions to be met by fruit plant propagating material and fruit plants intended for fruit production, pursuant to Council Directive 92/34/EEC
- Commission [Directive 93/64/EEC](#) of 5 July 1993 setting out the implementing measures concerning the supervision and monitoring of suppliers and establishments pursuant to Council Directive 92/34/EEC on the marketing of fruit plant propagating material and fruit plants intended for fruit production
- Commission [Directive 93/79/EEC](#) of 21 September 1993 setting out additional implementing provisions for lists of varieties of fruit plant propagating material and fruit plants, as kept by suppliers under Council Directive 92/34/EEC



- Commission [Directive 93/49/EEC](#) of 23 June 1993 setting out the schedule indicating the conditions to be met by ornamental plant propagating material and ornamental plants pursuant to Council Directive 91/682/EEC
- Commission [Directive 1999/66/EC](#) of 28 June 1999 setting out requirements as to the label or other document made out by the supplier pursuant to Council Directive 98/56/EC
- Commission [Directive 1999/68/EC](#) of 28 June 1999 setting out additional provisions for lists of varieties of ornamental plants as kept by suppliers under Council Directive 98/56/EC
- Commission [Regulation \(EC\) No 1597/2002](#) of 6 September 2002 laying down detailed rules for the application of Council Directive 1999/105/EC as regards the format of national lists of the basic material of forest reproductive material
- Commission [Regulation \(EC\) No 1598/2002](#) of 6 September 2002 laying down detailed rules for the application of Council Directive 1999/105/EC as regards the provision of mutual administrative assistance by official bodies
- Commission [Regulation \(EC\) No 1602/2002](#) of 9 September 2002 laying down detailed rules for the application of Council Directive 1999/105/EC as regards the authorisation of a Member State to prohibit the marketing of specified forest reproductive material to the end-user
- Commission [Regulation \(EC\) No 2301/2002](#) of 20 December 2002 laying down detailed rules for the application of Council Directive 1999/105/EC as regards the definition of small quantities of seed
- Commission [Regulation \(EC\) No 69/2004](#) of 15 January 2004 authorising derogations from certain provisions of Council Directive 1999/105/EC in respect of the marketing of forest reproductive material derived from certain basic material
- Commission [Decision 2004/678/EC](#) of 29 September 2004 authorising Member States to permit temporarily the marketing of seed of the species *Cedrus libani*, *Pinus brutia* and planting stock produced from this seed not satisfying the requirements of Council Directive 1999/105/EC
- Commission [Decision 2005/853/EC](#) of 30 November 2005 authorising France to prohibit the marketing to the end user, with a view to seeding or planting in certain regions of France, of reproductive material of *Pinus pinaster* Ait. of Iberian Peninsula origin, which is unsuitable for use in such territories under Council Directive 1999/105/EC
- Commission [Decision 2005/871/EC](#) of 6 December 2005 releasing Denmark and Slovenia from certain obligations for marketing of forest reproductive material under Council Directive 1999/105/EC
- Commission [Decision 2006/665/EC](#) of 3 October 2006 temporarily authorising Spain to approve for marketing seed of the species *Pinus radiata* and planting stock produced from this seed imported from New Zealand which does not satisfy the requirements of Council Directive 1999/105/EC in respect of identification and labelling

- Commission [Decision 2007/527/EC](#) of 25 July 2007 authorising Bulgaria and Romania to derogate from Council Directive 1999/105/EC on the marketing of forest reproductive material with regard to the stocks accumulated from 1 January 2003 to 31 December 2006
- Council [Decision 2008/971/EC](#) of 16 December 2008 on the equivalence of forest reproductive material produced in third countries
- Commission [Decision 2008/989/EC](#) of 23 December 2008 authorising Member States, in accordance with Council Directive 1999/105/EC, to take decisions on the equivalence of the guarantees afforded by forest reproductive material to be imported from certain third countries
- Commission [Directive 89/14/EEC](#) of 15 December 1988 determining the groups of varieties of spinach beet and beetroot referred to crop isolation conditions of Annex I to Council Directive 70/458/EEC on the marketing of vegetable seed
- Commission [Directive 2003/91/EC](#) of 6 October 2003 setting out implementing measures for the purposes of Article 7 of Council Directive 2002/55/EC as regards the characteristics to be covered as a minimum by the examination and the minimum conditions for examining certain varieties of vegetable species
- Commission [Directive 93/17/EEC](#) of 30 March 1993 determining Community grades of basic seed potatoes, together with the conditions and designations applicable to such grades
- Commission [Decision 2004/3/EC](#) of 19 December 2003 authorising, in respect of the marketing of seed potatoes in all or part of the territory of certain Member States, more stringent measures against certain diseases than are provided for in Annexes I and II to Council Directive 2002/56/EC
- Commission [Decision 97/125/EC](#) of 24 January 1997 authorizing the indelible printing of prescribed information on packages of seed of oil and fibre plants and amending Decision 87/309/EEC authorizing the indelible printing of prescribed information on packages of certain fodder plant species
- Commission [Decision 2004/266/EC](#) of 17 March 2004 authorising the indelible printing of prescribed information on packages of seed of fodder plants
- Commission [Directive 2008/124/EC](#) of 18 December 2008 limiting the marketing of seed of certain species of fodder plants and oil and fibre plants to seed which has been officially certified as 'basic seed' or 'certified seed'
- Commission [Directive 2008/62/EC](#) of 20 June 2008 providing for certain derogations for acceptance of agricultural landraces and varieties which are naturally adapted to the local and regional conditions and threatened by genetic erosion and for marketing of seed and seed potatoes of those landraces and varieties
- Council [Regulation \(EC\) No 2100/94](#) of 27 July 1994 on Community plant variety rights

## VII. JUSTICE, FREEDOM AND SECURITY

Here below the main measures in force 31/12/2008 in the sector of Justice Freedom and Security

Please note that the list does not include legal instruments adopted under Title VI of the EU Treaty.

A comprehensive list of JLS acquis in force is publicly available on the JLS EUROPA website<sup>576</sup>.

As a follow-up of the Hague Programme, it has become customary to adopt a yearly Scoreboard Plus, the last one published on 2 July 2008<sup>577</sup>. In addition to the monitoring of the adoption process, this communication examines national implementation of policies in the Justice, Freedom and Security fields.

### VII.1. Treaty provisions

#### VII.1.1. Fundamental rights

- Article 6 of the Treaty on European Union and a general principle of Community law according to which Member States must respect fundamental rights when implementing Community law

#### VII.1.2. Citizenship

- Article 12 of the Treaty establishing the European Community
- Articles 17 to 22 of the Treaty establishing the European Community

#### VII.1.3. Protection of personal data

- Article 286 of the Treaty establishing the European Community

#### VII.1.4. Judicial cooperation in civil matters

- Article 65 of the Treaty establishing the European Community

### VII.2. Regulations

#### VII.2.1. Asylum

- Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum

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<sup>576</sup> [http://ec.europa.eu/justice\\_home/doc\\_centre/intro/doc\\_intro\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/intro/doc_intro_en.htm).

<sup>577</sup> Communication of 2 July 2008 from the Commission to the Council and the European Parliament – Report on the implementation of the Hague programme for 2007 – COM(2008) 373 final. Available on JLS EUROPA website [http://ec.europa.eu/justice\\_home/doc\\_centre/scoreboard\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/scoreboard_en.htm).

application lodged in one of the Member States by a third-country national (OJ L 50 of 25 of February 2003, p.1);

- Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 222 of 5 September 2003, p. 1);
- Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L 316 of 15 December 2000, p.1);
  - Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L 62 of 5 March 2002, p. 1);
- Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (OJ L 199 of 31 July 2007, p. 23);

#### VII.2.2. Visas

- Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ L 164, of 14 July 1995, p. 1), amended by:
  - Council Regulation (EC) No 334/2002 of 18 February 2002 (OJ L 53 of 23 February 2002, p. 7);
- Council Regulation (EC) NO 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81 of 21 March 2001, p. 1), amended by:
  - Council Regulation (EC) No 2414/2001 of 7 December 2001 (OJ L 327 of 12 December 2001, p.1);
  - Council Regulation (EC) No 453/2003 of 6 March 2003 (OJ L 69 of 6 March 2003, p. 10);
  - Council Regulation (EC) No 851/2005 of 2 June 2005 (OJ L 141 of 4 June 2005, p. 3);
  - Council Regulation (EC) No 1932/2006 of 2 June 2005 (OJ L 405 of 30 December 2006, p. 23);

- Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (OJ L 116 of 26 April 2001, p. 2);
- Council Regulation (EC) No 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa (OJ L 150 of 6 June 2001, p. 4);
- Council Regulation (EC) No 333/2002 of 18 February 2002 on a uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognised by the Member State drawing up the form (OJ L 53 of 23 February 2002, p. 4);
  - Council Regulation No 1030/2002/EC of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ L 157 of 15 June 2002, p. 1) and Commission Decision of 14 August 2002 laying down the technical specifications for the uniform format for residence permits for third country nationals (not published);
- Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ L 157 of 15 June 2002, p. 1);
- Council Regulation (EC) No 415/2003 of 27 February 2003 on the issue of visas at the border, including the issue of such visas to seamen in transit (OJ L 64 of 7 March 2003, p. 1);
- Council Regulation 693/2003/EC of 14 April 2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual (OJ L 99 of 17 April 2003, p. 8);
- Council Regulation No 694/2003 of 14 April 2003 on uniform formats for Facilitated Transit Documents (FTD and Facilitated Rail Transit Documents (FRTD) provided for in Regulation (EC) No 693/2003 (OJ L 99 of 17 April 2003, p. 15).

### *VII.2.3. Border management and return policy*

- Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network (OJ L 64 of 2 of March 2004, p. 1).
- Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105 of 13 April 2006, p.1);
- Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (OJ L 405 of 30 December 2006, p.1);

#### *VII.2.4. Protection of personal data*

- Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8 of 12 January 2001, p. 1).

#### *VII.2.5. Judicial cooperation in civil matters*

- Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160 of 30 June.2000, p.1);
  - Council Regulation (EC) No 681/2007 of 13 June 2007 amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings (OJ L 159 of 20 June 2007, p. 1);
  - Council Regulation (EC) No 788/2008 of 24 July 2008 amending the lists of insolvency proceedings and winding-up proceedings in Annexes A and B to Regulation (EC) No 1346/2000 on insolvency proceedings (OJ L 213 of 8 August 2008, p. 1);
- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338 of 23 December 2003, p. 1);
- Council Regulation (EC) No 2116/2004 of 2 December 2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See (OJ L 367 of 14 December .2004, p. 1);
- Council Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ L 324 of 10 December 2007, p.79);
- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 012 of 16 January 2001, p.1);
  - Corrigendum to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 307 of 24 November 2001, p. 28);
  - Commission Regulation (EC) No 1496/2002 of 21 August 2002 amending Annex I (the rules of jurisdiction referred to in Article 3(2) and Article 4(2)) and Annex II (the list of competent courts and authorities) to Council Regulation (EC) No

- 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 225 of 22 August 2002, p. 13);
- Commission Regulation (EC) No 1937/2004 of 9 November 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 334 of 10 November 2004, p. 3);
  - Commission Regulation (EC) No 2245/2004 of 27 December 2004 amending Annexes I, II, III and IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 381 of 28 December 2004, p. 10);
- Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174 of 27 June 2001, p. 1);
  - Council Regulation (EC) NO 743/2002 of 25 April 2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters (OJ L 115 of 1 May 2002 p. 1);
  - Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143 of 30 April 2004, p.15);
    - Commission Regulation (EC) No 1869/2005 of 16 November 2005 replacing the Annexes to Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims (OJ L 300 of 17 November 2005, p. 6);
  - Regulation (EC) establishing a European payment order procedure No 1896/2006 of 12 December 2006 (OJ L 399 of 30 December 2006, p.1);
  - Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199 of 31 July 2007, p. 1);
  - Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199 of 31 July 2007, p. 40);
  - Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177 of 4 July 2008, p. 7);
  - Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7 of 10 January 2009, p. 1).

### **VII.3. Directives**

#### *VII.3.1. Immigration and integration*

- Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 187 of 10 July 2001, p. 45);
- Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ L 328 of 5 December 2002, p. 17);
- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3 October 2003, p. 12);
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16 of 23 January 2004, p. 44);
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261 of 6 August 2004, p. 3 and 19);
- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ L 375, 23 December 2004 of p. 12);
- Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ L 289 of 3 November 2005, p. 15).

#### *VII.3.2. Asylum*

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212 of 7 August 2001, p. 12);
- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31 of 6 February 2003, p. 18);
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 of 30 September 2004, p. 2 and 12);



- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326 of 13 December 2005, p. 13).

#### *VII.3.3. Border management and return policy*

- Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data (OJ L 261 of 6 August 2004, p. 4 and 24);
- European Parliament and Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third country nationals (OJ L 348 of 24 December 2008, p. 98);
- Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJ L 149 of 2 June 2001, p. 34);
- Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air (OJ L 321, 6 December 2003, p. 26).

#### *VII.3.4. Free movement of persons*

- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (OJ L 158 of 30 April 2004, p. 77).

#### *VII.3.5. Citizenship*

- Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ L 329 of 30 December 1993, p. 34);
- Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (OJ L 368 of 31 December 1994, p. 38);
  - Council Directive 96/30/EC of 13 May 1996 amending Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (OJ L 122 of 22 May 1996, p. 14);
  - Council Directive 2006/106/EC of 20 November 2006 adapting Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union

residing in a Member State of which they are not nationals, by reason of the accession of Bulgaria and Romania (OJ L 363 of 20 December 2006, p. 409).

#### *VII.3.6. Protection of personal data*

- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23 November 1995, p. 31).

#### *VII.3.7. Judicial cooperation in civil matters*

- Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ L 26 of 31 January 2003, p. 41);
- Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ L 261 of 6 August 2004, p. 2 and 15);
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136 of 24 May 2008, p. 3).

#### *VII.3.8. Security*

- Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105 of 13 April 2006, p. 54).