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Dialogue with Experts on the EU Legislative Act on Environmental Inspections – Exchange on Possible Changes in the Implementation of EU Environmental Law

Executive Summary

by

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European environmental law has been experiencing partly significant implementation problems in EU Member States for some time now. In order to improve the situation, the European Commission announced **horizontal legislation** in 2014 setting minimum requirements for environmental inspections and monitoring. The Commission has since deferred this proposal, announcing an **Action Plan** instead which identifies appropriate **solutions for improving implementation** in the Member States.

Given the EU level discussion of regulatory approaches and proposals, a return to the idea of horizontal legislation could lead to partly substantial changes in the implementation of EU environmental law by German environmental authorities. By means of a prospective impact assessment, this research project evaluates which approaches appear best suitable to reduce implementation problems of environmental law in Germany. The project focusses on the following four fields of EU environmental law, which exhibit varying degrees of regulation density and depth: emission protection, waste shipment, water protection and nature protection law.

Building on a legal and public administration scientific analysis (background study), civil servants from different competent authorities were asked in a survey to assess the current implementation situation and potential approaches. Various approaches for improving implementation were then discussed in four dialogue events with staff from local, regional and state level competent authorities from different German states.

Background study

The background study analyses the current discussion of implementation problems and solution approaches on EU level and puts them into the context of scientific theories and discourses.

Legal analysis: Status quo of the implementation of EU regulation

The following section shows the results of the legal analysis of the status quo in the EU, Germany and select federal states for the four above-mentioned fields.

For **emission protection law**, the Industrial Emissions Directive 2010/75/EU includes detailed provisions for the monitoring and inspection of facilities. These provisions shape German federal law, which is subsequently implemented on state level. There is however flexibility, which states take advantage of, in the design of monitoring plans and programs as well as in evaluation schemes for the frequency of inspections.

There are currently many EU legal provisions on the monitoring and surveillance of **waste shipments**, particularly on whether or not it is prohibited. The further design of provisions is currently still left primarily up to the Member States. It is especially interesting here to look at whether the control plans dictated since 2017 will help in reducing the implementation deficit.

In recent years, a restructuring of the German legal framework has led to a new systematization of **water law** on the German federal and state levels. Federal and state legislation is quite detailed on monitoring, and the powers granted to authorities are also quite detailed and go beyond the mere transposition of the Water Framework Directive 2000/60/EC.

In the area of **nature protection**, the transposition of the Birds Directive 2009/147/EC and the Habitats Directive 92/43/EEC was severely delayed in Germany. The primary pillar of monitoring is the general unfounded observation and monitoring function under the Habitats Directive. The Federal Agency for Nature Conservation and state authorities are to work together to implement the directive provisions. Monitoring functions on state level are in some cases executed by volunteers given power by the law.

Implementation problems

Looking at the implementation problems described in reports by the European Commission or Member States and in public administration research, implementation problems can be found in all fields despite various densities of legal regulation. These problems can often be traced back to one or more of the following issues:

- ▶ Insufficient capacity in human resources in competent authorities;
- ▶ Coordination problems within and among authorities, between Member States and between various EU legal areas;
- ▶ Information deficits of competent authorities and information asymmetries between competent authorities and duty-holders (e.g. facility operators);
- ▶ Unclear legal and procedural rules;
- ▶ Reluctance to implement legislation by Member States or federal states;
- ▶ Insufficient transparency in the implementation process (especially concerning informal instruments).

Resource and personnel capacities as well as a lack of expertise in the competent authorities are two of the biggest problems in **emission protection**. While authorities are quick to issue permits for industrial facilities, the regular monitoring of facilities is insufficient in several federal states, due to a lack of capacity.

There still remains clear evidence of waste transports which are illegal under the **Waste Shipment Regulation**. The main enforcement problems here include insufficient on-site inspections by EU Member States and the lack of clear criteria for inspections. Furthermore, cooperation between environmental authorities, customs and the police is insufficient in many Member States.

Inadequate resources and insufficient personnel in implementation authorities are also the main contributors to insufficient implementation of **EU water law**. In some federal states there are also indications that agricultural interests override water protection. Coordination problems with other policy fields such as agriculture or with authorities from other countries are also prominent.

In addition to the limited financial resources allocated to protection measures for nature reserves, a personnel shortage in several federal states also creates implementation problems for **nature protection law**. Depending on which administrative tier is responsible for nature protection, protection authorities are subject to political influences to varying degrees. This can lead to a prioritization of other sectors over nature protection considerations.

Goal analysis

The goal to improve the implementation of EU environmental law derives from the 7th EU Environmental Action Programme (2013)¹ and seeks to maximize the benefits of environmental law through better implementation and enforcement. The strategy to be used includes: improving access to information, expanding monitoring and surveillance requirements, improving the possibilities for complaints, and the creation of remedies.

Theoretical framework and the development of regulatory alternatives

To identify regulatory alternatives which adequately address the problem and achieve the stated goals, the identified implementation problems are first placed into an interdisciplinary theoretical

¹ Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', Official Journal of the European Union 354/171 of 28 December 2013.

framework. A theoretical explanation of the implementation problems allows us to draw implications for the development of regulatory alternatives. The theoretical approaches, their explanation of implementation problems as well as the resulting implications are concisely summarised in Table I.

Building on this theoretical framework, this study identifies regulatory alternatives in the current reform discussion (see Table I). However, these recommendations should rather be understood as first impetus for reform options, arising out of the discussion on the concept of “**compliance assurance**”. According to this concept ensuring compliance with environmental law requires a whole series of measures along the compliance chain. These measures range from information for the addressees of environmental protection provisions (“**compliance promotion**”), monitoring and surveillance measures (“**compliance monitoring**”) to the prosecution and sanctioning of environmental offences and crimes (“**enforcement**”). Given the limited resources of environmental authorities, they should ideally follow a risk-based approach. Moreover, an effective and efficient integration of different measures is necessary to ensure compliance with environmental legislation by duty-holders. Cooperation both within and between authorities is also vital here. Compliance assurance thus involves the entire compliance chain, as the identification and combination of various measures will improve implementation of environmental law.

Table I: Theoretical reference framework: Implementation problems and solution approaches

Theory	Explanation of implementation problems	Implications for the development of regulatory alternatives	Approaches from the current reform discussion
Compliance: Enforcement approach	Non- or poor implementation to cut costs or provide benefits to certain actors	Functioning monitoring and sanction system necessary	More effective monitoring measures, documentation of monitoring measures, enforcement
Compliance: Management approach	Insufficient implementation capacity, unclear regulation	Clear and more transparent legal framework and sufficient resources necessary	Clear legal framework, cooperation and coordination, sufficient resources, improved access to information
Transaction cost theory	Monitoring, conflict and implementation costs exceed resources	Consideration of transaction costs in the design of the legal framework, regulations with high transaction costs only when necessary	Information- and risk-based measures, strategic planning and prioritising
Principal-agent theory	Agents use information asymmetries to their own advantage	Reduce information asymmetries through appropriate control and system of incentives, possibly certification of information through third parties	Appropriate mix of measures; clear objectives, system of incentives
Positive theory of regulation	Competent authorities are influenced by interest groups (“regulatory capture”)	Independent and non-partisan authorities, regulations on procedural transparency and public participation	Non-partisanship of authorities, participation and transparency

Source: own table, FÖV.

Dimensions of compliance assurance and evaluation criteria

Evaluation criteria offer a guideline for a prospective impact assessment, allowing for a comparative evaluation of the developed regulatory alternatives. The following criteria are based on typical evaluation criteria and were utilised in the evaluation of the solution approaches drawn from the standardised surveys and dialogue events: potential for goal achievement, feasibility, internal consistency, acceptability and cost.

In order to link the solution approaches discussed to the European discussion, they were organised into one of the three categories mentioned by the European Commission as central pillars of the compliance assurance approach:

- ▶ **Organisation:** sensible distribution of tasks for compliance assurance measures among authorities responsible for implementing environmental law;
- ▶ **Implementation activities:** different measures to ensure compliance with environmental law;
- ▶ **Good administrative practices:** Interactions between competent authorities and between authorities and the public.

Online survey

A standardised online survey of the staff of different competent authorities was conducted to support the background study and the preparation of the dialogue events. The survey focussed on the challenges in implementing environmental legislation based on EU laws and on possible measures to improve the implementation by the competent authorities. Monitoring and surveillance measures were of particular interest here. The questionnaire was directed towards staff of competent authorities who were interested in offering their assessment. 189 civil servants from all federal states and various levels of authority (local, regional and state levels) participated in the survey.

Results: Status quo

The results regarding the status quo of implementation confirmed the causes of implementation problems in Germany, as presented in the background study and discussed on EU level:

Organisation

- ▶ A large portion of the respondents mentioned insufficient resource and personnel capacities and related issues as the largest challenge for implementation. Related issues include problems with replacing or hiring new staff or an aging staff.
- ▶ According to the survey results, cooperation and coordination between authorities becomes more difficult, the further apart authorities are (with regards to administrative level as well as geographical competence).
- ▶ Many respondents found one of the greatest challenges for implementation to be the lack of clarity of the legal framework and too many legal provisions. In particular European regulations were noted to be overwhelming and complex. This response is likely due in part to the lack of human resources capacities and wide areas of competence which make it difficult to keep up with the developments of the legal basis and technical reference documents. This was particularly so for staff in the area of emission protection. A further problem was found to be the difference in approaches of the states to implementation and handling, for example in the definition of waste.
- ▶ The insufficient consideration of environmental issues in other sectors (especially agriculture) was often criticised.

Implementation activities

- Most of the respondents noted that their authorities (at least for the most part) were capable of event-related inspections. Non-event-related and routine inspections were noted to be difficult due to human resource deficiencies.
- There are problems with the implementation of environmental law, in particular because other authorities (e.g. public prosecutors, police, customs) lack special units for environmental issues. Public prosecutors are responsible for many issue areas and are often overloaded. Thus, environmental criminal proceedings are often dismissed or end with the payment of only a small fine.

Good administrative practices

- The availability of data and information for appropriate implementation can be improved (according to the respondents, particularly in the area of nature protection). However, it is not seen as being the biggest problem.

Results: Solution approaches

The survey asked respondents to assess various solution approaches based on the compliance assurance discourse through standardized items. They were also given the opportunity to reference best practice examples and recommend further solutions. The survey results point to the following approaches as priorities of the respondents. Table II lists the five approaches which received the highest share of positive survey responses (rated as “helps to do our work” or “could help in the future”). Each solution approach is accompanied by suggestions for its concrete design, based on survey responses regarding proposed measures or further suggestions by respondents. Significantly, many respondents noted the fundamental necessity of sufficient staffing for successful implementation.

Table II: Online survey: prioritised solution approaches

	Solution approach	Possible measures
1	Information exchange between authorities	Using common technical/procedural guidelines Establishing information exchange routines Exchange between competent authorities of different federal states Task forces for solving priority problems Exchange between environmental and agricultural administrations
2	Improved support materials (application-oriented guidance and training)	Database/portal with systematic collection of guidelines Emission protection: technical procedures and developments Guidelines for waste classification Guidelines for rule of non-deterioration in water protection law Guideline for protection of species
3	Improved availability of data and information	Improved data on the state of the environment Database/portal with good search and filter options Geo-information systems Species mapping
4	Improved cooperation and collaboration	Coordination of monitoring activities: case-meetings or common inspections Collaboration in teams from different environmental areas

	Solution approach	Possible measures
		Introduction of units specialised in environmental crimes and offences within prosecution authorities
5	More discretionary powers	Increased discretionary powers to react adequately to different types of behaviour and motivation <u>vs.</u> Clear provisions for legal sanctions to reduce political pressure on environmental authorities

Source: own table, FÖV.

Dialogue events

The goal of the dialogue events was to discuss the results of the background study and online survey with staff from competent authorities in the fields of emission protection, waste and waste shipment, water and soil protection as well as nature protection. Participants were asked to analyse and evaluate the identified challenges and potential solution approaches for German competent authorities based on the European compliance assurance discussion.

Preparation for the events included the targeted invitation of particular participants to achieve an ideal diversity across authority types, federal states and environmental fields which reflects the variety of the status quo. 233 authorities were directly contacted. In addition, participants of the online survey were also given the opportunity to register for the dialogue events.

Only four of the five originally planned events took place, as the environmental ministries of Baden-Wuerttemberg and Bavaria discouraged their authorities from participating in the online survey and dialogue events. Thus, the dialogue event planned in Munich was cancelled. In contrast, the Environmental Ministry of North Rhine-Westphalia encouraged its state authorities to participate in the survey and events.

The following dialogue events took place: Dortmund (9th June 2017); Berlin (22nd June 2017); Speyer (27th June 2017); Hamburg (11th September 2017). In total, 62 authority representatives registered for the events and 48 participated. 14 of the 16 German federal states were represented, with 20% coming from mid-level state authorities, 20% from special authorities, 21% from independent cities and 39% from districts. Overall, districts and special authorities were slightly overrepresented among the participants. With regards to the areas of competence, 51% of participants came from the area of emission protection, 37% from waste and waste shipment, 39% from water and soil protection, and 35% from species protection.

Event structure

Participants received a discussion paper prior to the dialogue events providing information on the discussion on EU level, presenting select results of the online survey, and proposing possible focusses for the dialogue.

In order to achieve an open discourse, participants were asked to adhere to the Chatham House Rule: *"... participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed."*

The events themselves were divided into three blocks. In the **first block**, the background of the project and current developments and discussions on EU level were presented.

In the **second block**, participants could choose four discussion focusses which they deemed to be particularly worthy of discussion in the context of the project and the EU level discourse. Four topics were proposed for each of the areas of “organization”, “implementation activities” and “good administrative practice”.

Participants were then divided into two groups in order to allow for more intensive discussion and to give every individual an opportunity to speak. Both groups discussed all four focus points using presentation walls.

The following themes were chosen for the presentation wall discussions: improvement of cooperation and collaboration (4 times), consistency of the legal framework (2 times), improved access to information (1 time), development of implementation-focussed strategies (2 times), active communication with duty holders (2 times), improved support materials (3 times) and the inclusion of third parties to relieve implementing authorities (2 times).

This selection mirrors the areas in need of improvement identified in the online survey.

In the **third block**, the results of the first two blocks were presented and collectively discussed with respect to possible optimisation approaches.

Results

At almost all of the events, participants noted in the **first block** that a majority of the compliance assurance measures have already been explicitly or implicitly applied. However, the possibilities of competent authorities to consider the complete compliance chain in their planning of measures and implementation has been limited due to human and other resource issues. As a result, informative measures for addressees bound by environmental legal obligations often fall short.

In most of the discussions, a **risk-based approach** to the planning of inspections was found to be helpful, as it provides authorities with orientation and increases the transparency of authority activities. Some participants were sceptical of dedicating effort to the approach, as human resource deficiencies limit the ability of authorities to carefully and accurately apply measures.

Participants were also critical of EU legal **provisions on the structuring of competent authorities and the use of implementation activities**. These provisions are often not complied with (e.g. the requirements that authorities be sufficiently staffed) or would increase demands on authorities (e.g. through documentation or publication requirements).

The greatest problem with EU environmental law with respect to implementation is not a lack of provisions on implementation, but rather **inconsistency and loopholes in the substantive law**. These issues can only be partly alleviated through guidelines, interpretation assistance, etc. Federalism and variation in state implementation exacerbate the problems. For example, the definition and classification of certain types of waste is not regulated on the EU or federal levels, and state interpretations are inconsistent. Thus, the focus on EU level should be on resolving loopholes and inconsistencies in the substantive law rather than on procedures. During the events, numerous examples for area-specific and cross-sectoral inconsistencies were mentioned. These inconsistencies underline the large differences in the implementation and interpretation of EU legal provisions on state level and through competent authorities.

The following additions were made to the results of the online survey regarding the current **challenges** for implementation:

- **A lack of staff and resources** are the greatest challenges for implementation. The planning and organisation of implementation activities dictated by EU environmental legal provisions and intended to relieve authorities cannot be successful without a minimum level of staff.

- ▶ **Cross-sectoral cooperation** can be improved in many fields. In particular, the exchange between environmental authorities and prosecutors as well as the judiciary is often seen as deficient. The high effort and expected unsatisfactory results (dismissal of charges, inadequate fines) subsequently often discourage the reporting of environmental crimes.
- ▶ Certain fields also **lack adequate guidelines and interpretation assistance** for implementation. Furthermore, these tools are often only made available after legal changes enter into force. It is also often unclear whether competent authorities can use guidelines and interpretation assistance from other states or federal authorities.
- ▶ **Information material and services** related to environmental legal obligations available to facility operators and the public are insufficient. Thus, these actors are often not properly informed about their obligations. A large portion of violations could likely be prevented if addressees were better informed.
- ▶ Improved **access to the data and information** of other authorities could also alleviate inconsistencies in data management and preparation.

The following focuses and solution approaches in the areas of “organisation”, “implementation activities” and “good administrative practice” were discussed in the **second and third blocks**:

Organisation

- ▶ **Improved cooperation and collaboration:** Prerequisites for and approaches to cooperation and collaboration were discussed at the events. It was mentioned that the prerequisites for cooperation are often lacking. The necessary support of supervising and superior authorities is absent and/or there are no time resources available to apply cooperation measures. In general, stronger cooperation and joint projects and surveillance measures would be welcomed. Several approaches were discussed for how to improve cooperation relationships (e.g. common inspections, regular exchange with prosecutors and the judiciary, collaboration with health and safety or agricultural authorities, etc.).
- ▶ **Consistency of the legal framework:** The inconsistency of the legal framework was a recurring topic during the dialogue events. It was noted, that in the legislative process there is no consideration for the implementation situation in the Member States or for the perspective of the competent authorities. This often leads to significant implementation problems. Multiple suggestions were discussed for how the initial situation (e.g. handling of old cases) and the perspective of competent authorities (e.g. assessment and discretionary powers) could be better taken into account.
- ▶ **Improvement of access to information:** An improved access to information for competent authorities was discussed during one of the events. It was particularly noted, that data management and data exchange should ideally follow a consistent approach, as having a variety of IT systems with associated incompatibilities creates additional efforts for authorities. Furthermore, the introduction of a joint environmental data portal for authorities was discussed as a potential way to improve access to relevant environmental data.

Implementation activities

- ▶ **Development of compliance assurance strategies:** During two of the events participants discussed to what extent compliance assurance strategies can help in structuring implementation activities and optimising staff deployment. It was noted here that authorities must be given freedom to establish and implement strategies within local circumstances.
- ▶ **Active communication with duty-holders:** The improvement of communication with duty-holders was addressed at two of the events. A fundamental issue is that smaller businesses and travelling traders are often poorly informed about their obligations, and thus often violate regulations. These violations could often be prevented if the actors were better informed. However, informational resources and materials are not made available. Thus, measures were discussed for improving the information available to duty-holders (e.g. uniform online resources using simple language).

Good administrative practice

- ▶ **Improvement of support materials:** The improvement of support materials for implementing authorities was discussed at two of the events. It was noted that different regulations and structures could hinder the use of joint materials on state level. Furthermore, guidelines and other support materials are often only created after new regulations enter into force or are outdated. Support materials were understood as a broad concept also including joint software and databases for uniformly collecting and managing data. These could be helpful as European legal reporting requirements have created significant additional efforts for competent authorities. There are also no uniform templates or survey instruments for this.
- ▶ **Inclusion of third parties to relieve implementing authorities:** The inclusion of third parties to relieve implementing authorities was a source of controversy, as it could lead to additional cuts in human resources. At the same time, it was emphasised that certain fields rely on external experts to carry out implementation activities (e.g. in the context of emission protection or volunteers in nature protection). According to the participants it is important here that involvement of third parties is backed by monitoring and sanctioning systems in order to tackle negative developments.

Conclusion

The online survey and dialogue events showed that staff from competent authorities are rather sceptical about the proposition of horizontal legislation, as they do not expect it to improve implementation in Germany. Ultimately, a number of elements of the compliance assurance approach are already explicitly or implicitly utilised. Thus, from the perspective of German competent authorities, there is no need to impose legal obligations requiring the implementation of this approach. Nevertheless, non-legal support measures would be welcomed from the EU, the federal government and states to assist in the implementation of existing regulations under the compliance assurance approach.

Legal evaluation

This study does not identify an urgent need in Germany for a cross-sectoral horizontal legal act on European level, which imposes far-reaching minimum requirements for Member States in implementing environmental law. Rather, it is more promising to view the theoretical consideration of a “horizontal legal act” as a political programme, and to evaluate individual legal acts in the context of forthcoming amendments regarding the viability of integrating compliance assurance issues into these existing sectoral regulations.

The German federal structure presents a particular challenge for the **consistency** and effective implementation of environmental law. Almost the entirety of environmental legal norms is determined on state level. Even when regulations appear similar (or sometimes even identical), there is a difference in the normative circumstances, leading to higher transaction costs for all parties. States are also in some cases unable to agree on implementation support materials such as guidelines, interpretation assistance, etc., and thus they never pass the drafting stage.

Given the increasing **complexity** of environmental law provoked by ever more complex circumstances, the challenge is to prioritize in implementation and to avoid overlapping regulations on different political levels. Stronger coordination between different levels is a necessity here.

Assessment from a public administration perspective

Based on the results of the dialogue events combined with those of the online survey, it is possible to derive approaches and concrete measures found to be potentially helpful in improving the implementation of environmental law by competent authorities. These are measures which demand no legal amendments, but rather aim to provide support and coordination for competent authorities. The following approaches and measures were regarded positively:

- ▶ Establishment of a **knowledge database** for implementing authorities for the exchange of information, guidelines, interpretation assistance, etc.;
- ▶ Offer of **online training seminars** to reduce the costs of training measures for authorities with limited resources and to allow for the networking of implementation experts (this could and should not replace personal exchange and requires protected time resources);
- ▶ Establishment of **software tools and databases** to fulfil documentation and reporting requirements;
- ▶ **Coordination of implementation activities** with other competent authorities e.g. in order to conduct joint environmental inspections;
- ▶ Regular **exchange with public prosecutors, police and customs** in order to achieve a better understanding of environmental issues in the judiciary;
- ▶ Support for the networking of implementation experts, e.g. through working groups, regular meetings and the creation of a **social media platform** to connect implementing authorities;
- ▶ **Work shadowing/rotation** of staff from different authorities in order to exchange implementation knowledge and develop a common problem awareness.

It is important to point out that the results of this analysis mirror the perspective of the staff from competent authorities, mostly at regional or local level. This perspective does not necessarily coincide with the perspective of duty-holders or the interested public. This is e.g. reflected in the question of whether the inclusion of the public is helpful in implementation. Competent authorities often see participatory processes as unhelpful because they often require more effort while only offering a small contribution to improve their work. The public may have a very different view here, as participatory processes allow for the inclusion of their preferences and create a more transparent implementation process. Thus, the incorporation of further points of view would be necessary for a complete evaluation of all aspects of the compliance assurance approach. Further investigation is particularly recommended on the acceptance and transparency of authority activities.