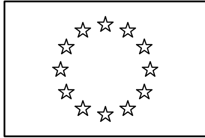

EUROPEAN COMMISSION

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COMMISSION STAFF WORKING DOCUMENT

REGULATORY CYCLE – EXAMPLE SECTORS

Accompanying document to the

REPORT FROM THE COMMISSION

26th ANNUAL REPORT ON MONITORING THE APPLICATION OF COMMUNITY LAW (2008)

{COM(2009) 675}

1. PUBLIC PROCUREMENT

The directives adopted in the 1970s on public works and supply contracts coordination was limited to the prohibition of discriminatory technical specifications, advertising requirements, criteria to qualify to tender for contracts and a supervision procedure. The 1985 White Paper on the completion of the Internal Market adopted a new policy priority for further opening of markets, leading to the 1989 and 1992 directives coordinating review procedures and four further directives adopted in 1992 and 1993 improving the clarity of definitions and requirements, introducing reference to technical standards, extending coverage to the hitherto excluded sectors of water, energy, transport and telecommunications, defining thresholds and exceptions, increasing transparency and further regulating advertising.

Ten years later, in 2004, consolidation followed through two directives designed to simplify and clarify provisions in the light of a public consultation and taking up case law of the Court of Justice on such matters as the treatment of environmental protection in procurement procedures as well as technical updating in the light of developments in electronic procurement processes. Further infringement proceedings and other references to the Court produced further specific clarifications.

The first directive coordinating national review procedures to the award of public works and supplies contract, was adopted in 1989 in order to ensure the effective application of the rules, given the identified inadequacy of existing arrangements at Member State level. This formed part of the opening-up of procurement markets to competition with increased guarantees of transparency and non-discrimination requiring the availability of effective remedies, including interim measures, setting aside of unlawful decisions and compensation for persons harmed by an infringement. In 1992 a second directive was adopted for the same purposes covering the hitherto excluded sectors.

These review provisions have applied since then alongside substantial continuing action by the Commission on individual cases of bad application of the rules. In 2006 the Commission came forward with amendments to the review procedures to follow-up on the case law of the Court and to improve the availability of rapid and effective remedies, taking account of comments of contracting authorities and stakeholders. The proposals provided for: a standstill period for review between contract award and conclusion, conditions under which contracts could be rendered ineffective, and guarantees of information-provision sufficient to allow tenderers to decide whether to initiate review. The regulatory regime was also simplified by the dropping of some little-used procedures. The purpose was to make review procedures more effective and so more attractive, to increase their use as the most direct and quick way of protecting the interests of tenderers and ensuring the correct application of Community law in individual tender processes.

2. PLANT PROTECTION PRODUCTS

The EU legislative *acquis* regulates the marketing and use of pesticide products designed to protect agricultural and horticultural crops from pests and disease and sets maximum residue levels in animal feed and food for human consumption.

The initial EU legislation set different levels for some fruit and vegetables, for cereals, for foodstuffs of animal origin and for plant products including fruit and vegetables in directives adopted from the mid-1970s up to 1990. The 1990 directive increased the earlier degree of harmonisation achieved by bringing to an end the derogation allowing Member States to authorise products containing higher levels of pesticides than the maxima set in the directive. It also provided for progressive development of the regulation of maximum pesticide levels over time due to the lengthy technical preparatory work required. It established Community methods of sampling and analysis to be implemented through committee work. The process of completing and managing this degree of harmonisation was then continued through six Council directives adopted from mid-1993 to mid-1997 and a further 60 Commission directives adopted in the 10 years from 1997.

This legislation created too complex a legal environment, containing a mixture EU harmonised and divergent national rules, leading to confusion as to the applicable maximum residue levels particularly since national rules diverged substantially. The latest regulation, adopted in 2005, covers approximately 1100 pesticides currently or formerly used in agriculture within or outside the EU. It lists a single set of limits for 315 products, adjusted to take account of dilution or concentration in the case of processed products and taking into account all consumer groups and varying diets.

It goes hand-in-hand with rules on the evaluation, marketing and use of plant protection products. These have been developed over time into a comprehensive risk assessment and authorisation procedure covering residues in the food chain, animal health and the environment. Implementation of this legislation by the Commission involved the assessment of active substances already on the market, done through a review programme in four stages according to a framework of rules set out in regulations adopted in 1992, 2000, 2002 and 2004. The programme was completed in March 2009, leading to the removal from the market of 67% of substances.

Few complaints have been made over bad application of the regime. Its application has also been supported by numerous guidance documents and intensive implementation and management work of the Commission and Member States in committees. In 2006, the Commission also proposed a new regulation to introduce shorter and clearer authorisation criteria, streamlined procedures, simplified data protection rules, provision for the substitution of active substances by safer alternatives and reduced testing of vertebrate animals.

This is a clear example of a move from directives to regulations where the legislative *acquis* imposes the precise requirements necessary to support free movement of products, human health and environmental protection. The sector exemplifies extensive legislative and technical implementing work developing common standards over time requiring a sound scientific basis, detailed technical preparations and extensive practical guidance and management to achieve its objectives. It constitutes a similar example to the work now being done under the REACH regulation in the area of chemicals.

3. AVIATION SECURITY

In contrast with many other sectors, aviation security has been subject to EU regulation only over the past seven years. The initial regulation in 2002 responded to concerns about the security of citizens within the EU following-on from the 9/11 terrorist attacks in the US. The

regulation provided for national civil aviation security programmes to be adopted by each Member State to implement the common basic standards set out in this regulation, with specific provisions on flexibility for small airports and a Commission inspection regime. Compliance monitoring was to be ensured through regular national audits based on a common methodology implemented by Commission inspections of national authorities and a representative sample of airports. Member States were required to provide for proportionate and dissuasive penalties for breaches of the regulation.

That regulation is being replaced by the new regulation adopted in March 2008 to simplify, further harmonise and clarify existing rules and improve levels of security. To allow the necessary flexibility for measures to be adapted to evolving risk-assessments and new technology, the regulation only set down basic principles. Security programmes are to be required of airport operators, carriers and other entities implementing security measures in addition to Member State authorities. National programmes for quality control are also required. The Commission is mandated to adopt implementing measures covering such aspects as amendments and additions to common basic standards, criteria for derogations and alternative security measures and specifications for national quality control programmes, as well as to apply a specific urgency procedure. 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.

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. Informal contacts are being maintained with the Member States to assist 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 preparations for Commission inspections on their territories.

The Commission regularly informed the Member States of non-compliances found during inspections through 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.

As already outlined above, 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.

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.

4. LATE PAYMENTS

The area of late payments in commercial transactions provides an example of careful progression to the development of a legislative *acquis* at EU level, taken through several phases of consultation and evaluation in accordance with Better Regulation principles.

In 1994 the European Parliament urged the Commission to submit a proposal to deal with this issue. The Commission responded with its 1995 recommendation. The following year Parliament questioned the need for legislation and the year after the Commission produced its report and evaluation of the situation, concluding that the situation had not improved over recent years and so legislation would be appropriate. The legislative proposal contained provisions on the exercise of retention of title to goods, a short recovery procedure for unchallenged claims and procedures for redress, confirming the importance of the effective application of the law. A directive on combating late payment in commercial transactions was adopted in 2000 and transposed by Member States in 2002.

Despite this Directive, many businesses and other interested parties complained that late payments in commercial transactions continued to be a general problem in the EU. Two external studies ordered by the Commission showed considerable scope for improvement. This conclusion was confirmed by a public consultation and a consultation of the European Business Test Panel in 2008. In 2008 the Small Business Act highlighted the key role of SMEs in the competitive economy and the importance of addressing late payment in commercial transactions. In addition, the European Economic Recovery Plan stressed the need for sufficient and affordable access to finance in the context of the general economic down-turn, in particular by reducing late payment to businesses.

The conclusions drawn from these actions are that there was an urgent need to strengthen the action against widespread late payment throughout the EU. A proposal for a new directive was made in April 2009. The requirements of the existing directive remain valid but the rules are further reinforced to achieve its objectives, in particular concerning the introduction of the right to recovery of internal costs and payment of compensation for late payment; a shortened payment period for public authorities sanctioned by a flat rate compensation from the first day of delay in addition to interest for late payment and compensation for recovery costs.

5. CONSTRUCTION PRODUCTS

Initial EU legislation in the field of construction products was the directive adopted in 1989 in the policy framework of the White Paper on the Completion of the Internal Market. The directive followed largely the New Approach: ensuring open conditions of access for as many manufacturers as possible, market transparency and support for the product standards process, relying on interpretative documentation to connect standards with essential requirements for construction works and a standing committee for its application.

This directive remained in operation, largely unamended, until review in the context of the Commission's 2005 three year rolling programme for simplification under its 'Better Regulation: Simplification Strategy'. This programme sought to make legislation less burdensome, easier to apply and thus more effective while preserving EU policy objectives. The simplification envisaged has the aim to clarify and reduce the administrative burden of the directive, in particular for small and medium-sized enterprises, through increased flexibility in the formulation and use of technical specifications, defining conditions for applying lighter certification rules and the elimination of the implementation obstacles that so far have hampered the creation of a full internal market.

Following this review, the Commission adopted in 2008 its proposal for a regulation to replace the existing directive and varying the approach adapted to harmonisation.[1] In particular, the objective of the regulation was not to define the safety of products, but to ensure the provision of reliable information on product performance. This is achieved by a common technical language to be used by manufacturers when placing products on the market and by public authorities when defining the technical requirements of works which influence, either directly or indirectly, the products to be used in those works.

The legislative instrument of a regulation is used due to experience with the directive, showing important differences in the content and the timing of transposition by Member States, which has had negative consequences on the functioning of the Internal Market, resulting in significant uncertainty as to the meaning, status and value of CE marking.

Public consultations confirmed the need for a wide range of developments. The proposed regulation therefore contains precise definitions of the most relevant concepts in the field of the internal market for construction products. The meaning of CE marking for construction products is clarified. The proposal includes important simplifications of the route to CE marking, thereby reducing the administrative burden for enterprises and micro-enterprises in particular. These measures are expected to significantly reduce the administrative cost of placing construction products on the European market without endangering safety.

Moreover, new and stricter criteria are introduced for notification of bodies carrying out third party tasks in the process of assessment and verification of constancy of performance. Stringent criteria are proposed for the designation of Technical Assessment Bodies. The safeguard procedure under the New Legal Framework is included to enhance the credibility of the whole system. Procedures for obtaining a European Technical Assessment are also to be simplified and clarified.

6. CLIMATE CHANGE - EMISSION TRADING

The Council Decision 1993/389/EC adopted in 1993 set out a method of monitoring and evaluating progress on emissions.

By the beginning of this century, climate change had become a priority for action and a new objective of the creation of a Community-wide emissions scheme by 2005 had been established, committing the EU to an 8% reduction of greenhouse gas emissions from 1990 levels by 2012. Directive 2003/87/EC establishing an emission trading system was therefore

[1] COM(2007) 36 final

adopted in 2003 to achieve this new goal. It provided for the issuing of allowances according to emissions levels and capacity reduction for certain installations and activities, together with monitoring, reporting and penalties. Measures for its implementation were adopted in 2004 and 2005 for its application for an initial three year period from January 2005, followed by five year periods from January 2008.

However, a serious deficiency concerning lack of verified data and overestimated projects in National Allocation Plans for allowances became apparent for the first period. Varying national targets within and between sectors had not led to significant value being placed on reductions in emissions, but rather excess allocation of allowances and even windfall profits for some industries.

In addition, many Member States were late in notifying their NAPs for 2008-12, and 10 Member States appealed against the following Commission decisions. Commission evaluation in 2007 confirmed that the main objective of cost-effective reduction of emissions would be more likely to be achieved by more even application and greater market certainty. The Directive would benefit from clearer definitions and more harmonisation. Therefore, in 2008 the Commission proposed an amending directive entailing a greater level of harmonisation and a long-term emission reduction pathway. This will require vigorous Commission and Member State cooperation and implementation on such matters as allowance auctioning, harmonisation of transitional free allocation, verification and accreditation rules and monitoring and reporting.

7. INDUSTRIAL POLLUTION PREVENTION AND CONTROL

The original IPPC Directive was adopted in 1996 setting out the main principles for the issuing of permits to, and the control of, installations based on best available techniques (BAT) to achieve a high level of environmental protection on a cost effective basis. Sectoral directives apply emission limit values to different kinds of installation (large combustion and waste incineration plants, etc.). The framework encourages the application of new technologies to achieve the set limit values in the overall interest of the Lisbon objectives of sustainable development. Large installations covered by this legislation account for a high proportion of total key atmospheric pollutants.

The 1996 Directive required full implementation by end-October 2007. Only 50% of the total number of required permits had been issued by mid-2006 around 10,000 of the 52,000 installations covered within the EU remained without permits by the deadline due to late implementation by Member States. Two years of extensive data collection by the Commission in the review process launched in 2005 also revealed that: best available techniques were insufficiently applied; unnecessary administrative burdens and costs were resulting from complexity and inconsistencies in the legal framework; insufficient scope and unclear provisions were reducing the results obtained; and lack of reference to more flexible instruments was also limiting results. Potential environmental and health benefit cost savings in the order of €7 – 28billion and 13,000 premature deaths and 125,000 years of life were being lost.

The Commission therefore developed an Action Plan on the implementation and enforcement of the current provisions from 2008 – 2010, and adopted a proposal for new legislation to apply thereafter. The Action Plan includes: increased action, including through infringement

proceedings, to ensure full transposition of existing directives; a cooperative exchange with Member States on reduction of administrative burdens connected with the issuing of permits and the application of controls; enhanced guidance, support for information-exchange, visits and training to improve consistency of approach and increased best practice; continuing monitoring by the Commission of the issuing and renewal of permits, monitoring and inspection systems and analysis and follow-up on complaints; wide-ranging consultations resulting in the adoption and revision of BAT reference documents to ensure improved understanding, more common and generalised application and development of new technologies. A further review of the Action Plan is envisaged towards the end of 2010.

The legislative proposal targets: recasting of the seven existing directives into one more clear and coherent legal instrument; clarification and strengthening of BAT to ensure their more coherent and sound application, based on documented justifications; more stringent emission limit values for large combustion plans to help meeting overall air quality objectives; the introduction of minimum provisions on inspection, review of permits and compliance reporting; increased efficiency through coordinated permit issuing and streamlined reporting provisions. The overall objective is to achieve substantially correct compliance with the existing *acquis* ensuring a more solid basis for the implementation of the revised legislation proposed by the Commission in December 2007. Adoption of the new directive is foreseen towards end 2010 and transposition can be expected to take up to late 2012.

The range, complexity and effort involved in the development of this important part of the EU *acquis* on protection of the environment and air quality is substantial. As in other areas, experience of the implementation of the first round of legislation has disclosed a combination of significant late transposition and implementation of the initial directives, due in substantial part to lack of clarity, inefficiencies and lack of necessary technical support in the initial legislative framework. These deficiencies were best addressed through increased technical development and management cooperation between Commission and Member States alongside further legislative development, rather than infringement proceedings, which have nevertheless played a strong role particularly on late transposition. Despite the rather lengthy ten year timescale initially envisaged for the overall implementation of the legislation, this has proven to be unattainable and at least a further five years are now envisaged. Even this target can only be met through substantially faster and improved Member State implementation action with substantial support provided by the Commission.