BirdLife Position on Improvements Needed to Environmental Inspections Regimes in the European Union

Adopted by the BHDTF on 27 September 2013

Summary

The European Union has developed a comprehensive set of environmental legislation with which to ensure protection of, inter alia, Europe’s biodiversity, whilst contributing to a ‘level playing field’ in the common market. To a large degree this is now transposed into Member State legislation. However, any legislation is only as good as its implementation and enforcement. For the EU Directives related to nature conservation, impact assessment and water this is currently insufficient, as illustrated by the large number of environmental complaints received by the European Commission on these issues and the over-representation of environment infringement cases.

Inspection is a key to identifying where implementation is poor and to enable enforcement. However, at present the tools with which to do inspection at European and Member State level are incomplete and not sufficiently effective. New and expanded tools are needed in order for the European Commission and Member State governments to undertake effective inspection.

This position focuses on the inspection of activities that are illegal under national/regional Member State law mainly in the field of biodiversity conservation. However, BirdLife also sees the urgent need to address, through better inspection, the insufficiencies in national/regional decision making related to the Directives’ implementation, e.g. as far as the granting of derogations is concerned (Birds Directive Art.9, Habitats Directive Art.6(4) and process and quality of impact assessments).

In this position paper BirdLife asks for the introduction of:

1. binding Minimum Criteria for Member State inspection systems;

2. improved Peer Group Oversight of individual Member State’s inspection regimes and networks of support and dissemination of best practice;

3. better European Commission Oversight of Member State inspection practise;

4. better European Commission Capability to identify and follow-up infringements of EU environmental legislation;

The above (in particular points 1,3,4) should be ensured through a new EU Regulation on Environmental Inspection.

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Definitions
1. The following definitions should be used when reading this document:

- **Transposition** is the process of converting EU Directives which set out general rules and objectives for Member States (‘MSs’), but leave it up to them how to apply them, into national law.

- **Implementation** is the application of EU law by MSs. EU Directives are applied though transposed national laws. The details of this application may therefore vary from MS to MS, but are bound by the same general rules and objectives.

- **Enforcement** is the process of ensuring that EU law (and ergo transposed national law) is implemented as intended in Member States. It compels offenders to stop breaches in compliance and ensures that any environmental damage is remediated. It may include sanctions for offenders.

- **Compliance Promotion** are activities aimed at encouraging compliance with EU law, without the use of sanctions. These may include training, best practice sharing, informal assessments, regulatory and financial incentives, technical assistance, positive publicity etc.

- **Inspection** is a subset activity of both enforcement and compliance promotion. Inspection is the process of checking whether EU law is being complied with and whether any breaches are occurring. It can include systematic and targeted monitoring and investigation.

Why Inspection is Important
2. Full transposition and implementation of the EU’s environmental legislation across all MSs is vital to ensure the achievement of EU objectives, such as the 2020 biodiversity targets, but also to ensure a fair ‘level playing field’ for developers and investors across the common market. An important part of implementation is the use of inspection systems to ensure that the provisions of the Directives and Regulations are being complied with. If they are not then inspection allows enforcement actions to be taken to address this. For example, there needs to be inspection to ensure that EU law, as transposed into national/regional related legislation/rules, is respected by citizens on the ground (e.g. hunting legislation regulating hunting seasons in line with the Birds Directive or specific protection regimes for Natura 2000 sites).

3. However, at a higher level, there also needs to be inspection of consents or licences issued by MS authorities in line with the EU Birds & Habitats Directives to ensure that they are carried out within the law, within the timescales set out and compliant with any conditions stipulated (e.g.: mitigation or compensation measures) and to ensure that unlicensed activities are stopped and damage rectified.

4. Inspection is best undertaken at MS level, although there needs to be oversight of MSs’ inspection systems by the European Commission (EC) to ensure equal standards across the EU. In addition, the EC needs access to inspection capacity of its own to follow up on individual complaints about infringements. Several European Court of Justice (ECJ) decisions in recent years have rejected nature conservation related cases on lack of evidence of infringement – so the EC needs to be able to gather and use its own data, potentially to prove evidence of impact on the ground.

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1. Wider definitions can found in ‘Ensuring Environmental Compliance – Trends and Good Practices’ (OECD 2009)

2. See for example ECJ Ruling [C-308/08 Commission vs Spain](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008C0308&from=EN)
5. Lack of proper implementation and enforcement (as a result of inspection) at MS level is directly related to the number of complaint/infringement cases that the Commission has to deal with. Environment infringements currently make up 17% of all infringement cases, the largest single sector\(^3\). Addressing the cause of infractions is vital, both to improve implementation and to free up Commission resources away from its own enforcement role. Insufficient implementation and enforcement is also seen as a key reason for lack of environmental progress, and thus a huge cost factor for the future.\(^4\)

6. For an examination of the status quo on environmental inspection in the EU, see *Annex I*.

**Improvements Needed for EU Environmental Inspection Systems**

7. To address the problems outlined in *Annex I*, BirdLife asks for significant improvements in the following areas:
   - binding **Minimum Criteria** for Member State inspection systems;
   - improved **Peer Group Oversight** of individual member state’s inspection regimes and networks of support and dissemination of best practice.
   - better **European Commission Oversight** of Member State inspection systems
   - better **European Commission Capability** to identify and follow-up complaints and infringements of EU environmental legislation;

The above elements should be ensured through a new **EU Regulation on Environmental Inspection.**

**Minimum Binding Criteria for Member State Inspection Systems**

8. To achieve significant progress for the implementation of EU nature conservation, impact assessment and other key environmental legislation, as well as to ensure equal standards for developers, investors and other users of natural resources, it is of great importance to develop legally binding minimum standards for environmental inspection systems across the EU.

9. The above mentioned 2001 EP and Council *Recommendation on Minimum Criteria for Environmental Inspections* in the Member States set out some useful principles for inspection regime implementation at MS level. Based on these, BirdLife proposes that the minimum standards in a new Environmental Inspections Regulation should include, inter alia, the following elements.

10. There should be an obligation for MSs to carry out **regular risk assessments** to identify the most important topics/areas for inspection activities. These risk assessments should be undertaken in a transparent way, with stakeholder consultation and possibilities for regular review.

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11. There should be an obligation for MSs to develop "environmental inspection plans" (at the most suitable levels - national/regional/local). These plans must:-

a. be developed in a transparent way in consultation with all key stakeholders;

b. list the activities, consents and controls covered by EU environment law and provide details of how these will be inspected.

c. ensure the systematic and ongoing inspection of land management, land-use change and consent/licence conditions to ensure compliance. For plans/projects this should ensure mitigation measures are in place and working as required, at the appropriate time, and during the entire period for which they are necessary. For compensation measures long term inspection is required to ensure the compensation measures are up and running before damage takes place, are working as needed, and are in place in perpetuity;

d. outline how inspections (and enforcement) actions are co-ordinated between regulatory and enforcement bodies, and show how responsibilities and competences are clearly communicated to key stakeholders and the wider public where relevant;

e. provide that inspections include, where appropriate, site visits with appropriate legal provisions giving inspectors access to land, property and documents, and ability to search premises, vehicles and individuals in the case of suspected illegal activity. Systematic site visits should be programmed into inspection plans, but should also form part of reactive inspections in response to complaints or information regarding possible non-compliance;

f. make provision for the use of earth observation (and other remote sensing) data to supplement inspection processes;

g. include procedures and commitments for how competent authorities will register and react to (and in what timescale), incident reports of illegal activity or non-compliance with licences/consents from civil society or other sources;

h. include requirements to report publicly and to the EC how enforcement authorities have reacted to complaints from the public or civil society, and what actions were taken as a result of information given and conclusions made.

12. There should be an explicit requirement for MS to demonstrate they have sufficient staff capacity and the necessary expertise available to carry out inspection as part of their regulatory and enforcement functions.

Peer Group Oversight, Guidance & Training

13. Independent from legally binding standards, improved “Peer Group Oversight” of individual MS's inspection regimes, and networks of support and dissemination of best practice can provide significant added value to improve implementation. As such;

a. IMPEL’s remit should be widened (or an equivalent organisation set up) to include the wider EU environmental legislation. IMPEL provides a useful forum for improving the standard of pollution and waste inspection and enforcement systems in MSs. The Nature, Impact Assessment and other appropriate environment Directives of the EU should be further mainstreamed into its work to provide a useful complementary tool to improve implementation of these Directives, by allowing sharing of good practice on inspection and enforcement
between MSs at “peer-group” level. Best practice identified by IMPEL should inform bilateral agreements on improvements to MS inspection systems as a result of EC assessments (see paragraph 21), and inform EC best practice guidance on inspection systems (see next paragraph);

b. The EC should develop guidance on recommended inspection regimes and best practice, for the EU nature, impact assessment and other appropriate environment Directives, utilising best practice from MSs (possibly identified by IMPEL) and stakeholder working groups. If detailed and focussed enough such guidance might be more useful to MSs than the RMCEI and provide a framework for peer review and EC assessments, and bilateral agreements for improvement.

c. The EC should support the training of MS inspection staff, either directly or through IMPEL (or equivalent) in the requirements set out in the Environmental Inspections Directive/Regulation and developed through best practice and guidance.

European Commission Oversight of MS Inspection Systems

14. As the “Guardian of the EU law” it is incumbent on the EC to ensure that Directives and Regulations are being applied properly, to the same levels, in all MSs. As outlined above the possibilities of the EC to identify systematic implementation and enforcement problems and infringements are still very limited, hampering enforcement of EU law and thus very heterogeneous environmental standards and practice across MSs. To address this, the EC needs to be able to both assess MS inspection systems (including inspection plans) and to take action if these systems are insufficient. If systematic implementation and enforcement problems can be identified and addressed this way, the number of complaints and infringement cases is likely to decrease considerably over time.

15. A system is needed of independent inspectors (either consultant-based and then preferably from another country, or EC-based) who will assess a MS’s inspection systems and the quality and effectiveness (the level of implementation) of those systems. This assessment will identify any gaps and problems with the systems and their implementation, and make recommendations as to how these issues should be addressed. Bilateral talks between the EC and MS should then agree on actions that need to be taken by the MS and a timescale within which these improvements will be made. In worst cases, this should lead to infringement action against a MS if the inadequacies in their systems are leading to inadequate implementation of the Directives, and the MS has failed to implement the agreed improvements.

16. Although the EU Treaty already provides a certain legal basis for such an approach, BirdLife believes that this assessment approach should be included in a new EU Environmental Inspections Regulation with binding minimum inspection criteria and duties on MSs to comply with assessment agreements.

European Commission Capability to Enforce Compliance

17. Improved MS inspection systems and increased EC oversight of these systems and MS decision-making should significantly reduce the number of complaints to and infringement procedures of the EC. However, there will still be cases where the EC has to follow up infringements and enforce compliance. To accelerate and improve the current practice the EC needs to be able to investigate individual infringement cases “on the ground”, as
often they cannot rely solely on the information provided by complainants and/or MSs to fully understand and pursue infringements.

18. Therefore the EC needs to be able to subcontract vetted independent consultants, preferably from another country, who have authorised access to sites and documents in country to investigate complaint/infringement cases on the ground in a MS. A duty to comply with the requests of EC-sanctioned inspectors should be enshrined in the Environmental Inspections Regulation.

19. In addition, resources should be made available for the use of earth observation (and other remote sensing) data as part of the EC inspection function. This may be of particular use in identifying and assessing breaches arising out of land-use change and conversion.

Elements for an Environmental Inspections Regulation

20. Some of the needs and possible solutions identified above need formal legislative backing in order to be effective – therefore BirdLife asks them to be included in a new Environmental Inspections Regulation. Taking into account the above, this needs to:

a. Require MSs to adopt environmental inspection plans\(^5\), based on risk assessments and covering the implementation of the EU Directives on nature conservation, impact assessments, water and other relevant environmental areas. Relevant activities, consents and controls that should be subject to inspection under these Directives should be explicitly listed in the legislation.

b. Establish minimum standards for environmental inspection systems of MSs, as outlined in paragraphs 15-19 above.

c. Set up a requirement on the Commission to assess MS’s inspection systems (including inspection plans), and the implementation of these systems, and require MS’s to comply with recommendations coming out of these assessments.

d. Require MS’s to cooperate with EC (consultant) inspectors investigating infringement cases, through access to sites and documents, as outlined in paragraphs 24-26 above.

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\(^5\) Potentially similar to that in Directive 2010/75/EC (Art.23) on Industrial Emissions, although the differing context and type and breadth of inspections needed might make this a lot more complicated.
Annex I - The Status Quo on Environmental Inspection

**MS Inspection Systems**

Environment Inspection systems (for EU Directives not related to pollution/waste) in MSs are limited in scope and resourcing, and there are few, if any, requirements under the Directives related to nature conservation or impact assessments to compel MSs to set up and implement inspection systems. For instance, many MSs do not have effective systems in place to ensure that conditions on development consent to mitigate or compensate impacts on Nature 2000 sites are complied with, and that these mitigation measures are functional and in place for the lifetime of the potential impact (or in perpetuity for compensation). In addition, inspection to ensure that unlicensed or non-consented actions do not occur, and if they do, that legal action is taken to stop the damaging activity, prosecute offenders and ensure restoration or compensation for damage caused, is often poor.

Environment Inspection is mostly done at MS level in most cases by the authorities granting the licences or consents or managing protected areas. However, often these authorities are over-stretched, with limited staffing, technical expertise and/or equipment. In certain cases, this local inspection role can lead to conflicts of interest if the administration itself has an interest in the development in question. In such cases a lack of a higher level authority inspecting the practices of the lower level can be an issue.

**EC oversight of MS practice of inspection and decision-making**

The EC has some oversight of inspection and decision-making practices through its informal liaison with MS regulators through so called “package meetings” of Commission and Member State officials, and through its complaints and infringements procedures. There is also some ad-hoc monitoring of decision-making (for instance of Habitats Directive Art.6(4) derogations). However, this oversight is neither systematic nor comprehensive. Additionally the EC has only very limited competence to encourage or even oblige MSs to put in place the inspection systems needed to ensure compliance with the Directives.

**EC infringement procedures**

The EC mostly relies on civil society to report incidences of compliance breaches through the complaints system. These may lead to infringement actions being taken against MSs. Resolution of these complaints and infringements is sometimes delayed or prevented by a lack of independently verifiable information. Although independent consultants can be used by the EC to investigate complaints in-country to try to address this issue, these may have trouble getting access to sites or documents and the EC may not have the resources to use them on a regular basis.

It should also be noted that the EC’s action on infringement in most cases focuses on transposition or implementation cases, while the enforcement of related national legislation is generally left to the MS’s responsibility. In the past the EC has only acted on insufficient enforcement in extreme cases of non-enforcement by the authorities (e.g. when the police have been ordered not to sanction poachers). This underlines the need for a clear EC oversight on inspection systems that form the basis for national/regional enforcement action.

**Existing EU-level initiatives to improve inspection of Environment Legislation**

A number of initiatives have been taken at EU level to improve implementation and enforcement, including through better inspection.


related to pollution and waste. An EC Communication on the implementation of this Recommendation and a European Parliament (EP) resolution suggested implementation of these limited sectoral requirements was patchy, with large disparities in how environmental inspection was being carried out between MSs, often due to it being given little political priority and so resourcing.

- The EU has taken some further action to try to improve inspection/enforcement regimes at MS level, for example, through the setting up of IMPEL (the International Association of Environmental Authorities in Europe) which aims to improve inspection through the sharing of best-practice and mutual support. This is focussed on pollution and waste, including some activities on the Water Framework and Environment Impact Assessment Directives, and is now investigating expanding its role to address the Birds and Habitats Directives. It does not enforce implementation itself. The GreEnForce initiative of the EC was focused at improved implementation of nature and forest policy and legislation, but had limited effect, and has been dormant for a number of years.

- Although the option of a European environmental inspection force has been mooted several times by the EC (in 1989 and 1996) and the EP (in 2005 and 2008), in all cases it has not progressed due to resistance from the Council (Member State governments). However, in other areas there are many precedents, for instance, in the regulation of slaughterhouses, investigation of illegal mergers, the use of EC regional funds, investigation into competition infringements, consumer veterinary experts, and in the Community Fisheries Control Agency.

The EC’s proposal for a 7th Environmental Action Programme (EAP) – which has now achieved trilogue agreement (see Annex III) and its recent Communication ‘Building Confidence through Better Knowledge and Responsiveness’ (see Annex II) suggest actions that the EC wants to pursue to improve implementation through better inspection. A recent EC-funded report explored the different options available to enhance the EU role in environmental inspections and to improve the effectiveness of the EC’s own infringement investigations. This includes an option of rolling out, for the environmental legislation, similar provisions for environment Directives as contained in the existing Ozone Depleting Substances Regulation and Laboratory Animals Directive (see Annex IV).

The EC has indicated that a legal proposal for improvements and widening of EU environmental inspection can be expected in late 2013.

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10 EU Enforcement Policy of Community Environmental law as presented in the Commission Communication on implementing European Community Environmental law - Marta Ballesteros, ELNI Review 2/2009
11 http://ec.europa.eu/environment/newprg/proposal.htm
13 Study on possible options for strengthening the EU level role in environmental inspections and strengthening the Commission’s capacity to undertake effective investigations of alleged breaches in EU environment law http://ec.europa.eu/environment/legal/law/pdf/Environmental%20Inpections.pdf
Annex II - EC Communication - Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness COM(2012) 95 final

This Communication sets out various ways that implementation, enforcement and monitoring can be improved at EU and member-state level:

- It includes suggestions for open dialogue between key networks of inspectors to identify **best practice**, 
- It identifies the need to reinforce member-state level implementation monitoring and to **upgrade the existing framework for inspections**, and
- It identifies the need for **co-operation** in inspection between different authorities at MS level.
- It mentions that **new EC legislation should be assessed** for whether it needs to include inspection provisions, but does not mention existing legislation.
- It mentions the potential for improving EU inspection and surveillance capacity, while **respecting Member State administrative authority**. It mentions the Ozone Regulation and Animal Experiments Directive as possible models.

More systematic **peer-review** inspections, along the lines of IMPEL are suggested, along with the use of independent experts in ad-hoc implementation situations, much as they are used already.

Annex III – Proposed 7th Environmental Action Programme

Proposed amendments to the 7EAP text include at paragraph 63(2), as part of Priority Objective 4:

„(c) **Encouraging Member States to rationalise existing inspection capacities and bolster the IMPEL network.** Extending binding criteria for effective Member State inspections and surveillance to the wider body of EU environment law, and developing a complementary capacity at EU level to address situations where there is due reason for concern“

Annex IV – The Ozone-Depleting Substances Regulation and Laboratory Animals Directive

These two pieces of legislation are mentioned as possible models that a limited EC inspection capacity could be based upon. The Ozone Regulation requires member states to do investigations into import/export of controlled substances under the Regulation. Subject to agreement, Commission officials can assist a member state regulator in undertaking these investigations. The regulations set up a requirement for the sharing of information. Under the Animal Experiments Directive, Member States are required to inspect establishments to ensure compliance with the Directive. At least a third of establishments are to be inspected, some without notice. Art.35 of the Directive allows the Commission oversight of any MS’s inspection regime. MS authorities are obliged to take measures to take into account the results of any such oversight.