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An Examination of EU Infringement Procedures

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Report Highlights:

The objective of this report is to demonstrate the European Union's inability to comply with their own regulations, specifically in relation to laws dealing with agricultural issues. The report looks at what an "Infringement" is defined as by the EU, the procedure that the EU employs for their infringement proceedings, the current infringement situation in the EU, and examples of non-implemented legislation in relation to agriculture.

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Introduction

The objective of this report is to demonstrate the European Union's inability to comply with their own regulations, specifically in relation to laws dealing with agricultural issues. The report looks at what an "Infringement" is defined as by the EU, the procedure that the EU employs for their infringement proceedings, the current infringement situation in the EU, and examples of non-implemented legislation in relation to agriculture.

The definition of "Infringement"

By definition in Articles 226-228 of the EC Treaty, an infringement proceeding is an action against a Member State which fails to fulfill an obligation under the EC Treaty or under secondary EU legislation. The proceeding is led by the Commission on its own initiative or at the request of another Member State. Individuals do not have the possibility to force the Commission to start an infringement proceeding. If justified, the proceeding can result in a judgment of the European Court of Justice, stating that the Member State in question has indeed committed an infringement. In case of non-respect of such a judgment, the Court can impose a penalty payment on the failing Member State in a separate proceeding.

The infringement procedure

Each Member State is responsible for the implementation of Community law within its own legal system. The Commission of the European Communities is responsible for ensuring that Community law is correctly applied. If a Member State fails to comply with Community law, the Commission may either attempt to settle the matter itself or refer the case to the European Court of Justice. Infringements are either detected by the Commission itself, or through the filing of a complaint, which can be filed by any individual or group.

When the Commission files a case with the European Court of Justice, each case is drafted, registered and filed by the Commission's legal services. This process normally takes at least one month for each case. No disclosure of any documents is permitted until the case has been completed, rendering the ability to monitor cases extremely difficult. If the European Court of Justice rules that a Member State has failed to comply with EU law, the Member State technically has another three months to conform. Failure to conform thereafter means that the Member State may then again be taken to court by the Commission and the European Court of Justice will issue a second ruling, with possible fines for the Member State.

Infringement proceedings serve as the European Commission's weapon in the fight to enforce the implementation of EU law. It is a lengthy process, whose steps include: 1st Warning Letter (Letter of Formal Notice); 2nd Warning Letter (Reasoned Opinions); Referral to the Court of Justice; Letter of Final Notice; Imposition of Fines. The Commission may combine these steps with its own efforts to solve the infringement, such as setting up a series of meetings with the non-complying Member States in order to discuss their progress.

The EU has recently altered their approach by looking at infringement cases on a case-by-case basis. In a Communication titled "Better Monitoring of the Application of Community Law", the Commission decided that instead of proceeding directly to infringement proceedings, the EC would work to solve the problem with the Member State and find "rapid solutions"¹ to the implementation problem. The reality of this procedure, however, is that

¹ IP/03/621, May 5th, 2003

meetings are set many months apart, and the implementation is delayed even further than if infringement proceedings had been taken straight away.

The Commission has also established the mechanism of “package meetings” to try and resolve non-implementation issues. Package meetings involve assembling experts from the Commission and Member States to discuss a “package” of infringement cases. The goal is to solve the cases through dialogue without having to take them to the Court of Justice. The EC claims that nearly half of the cases are solved through this process. Often times, the cases in the end are given the status of “on their way to being solved”, and therefore are in effect left unresolved.

Some countries have consistently failed to stay below the target deficit maximum of 1.5%. In fact, France, Germany, Luxembourg, Greece and Italy have consistently had a deficit of more than double the target maximum. In March 2002, the Barcelona European Council set a “zero tolerance” target for Directives whose implementation is overdue more than 2 years. In January of 2004, only three Member States—Denmark, Finland and Portugal—had complied with this target.

Because the EU Commission often fails to pursue infringement proceedings in a consistent and standardized manner, the number of unresolved cases continues to mount. Faced already with a big backlog of unresolved cases, the EU will likely experience a significant increase with the addition of 10 new member states in May 2004.

The current infringement situation

In May 2003, the European Commission’s Internal Market Scoreboard² showed that the EU Member States were not implementing EU laws into their national law, and that their record in doing so had worsened from the previous year. From 2002 to 2003 the Member States’ failure to implement EU laws rose by 1.8%, with the actual number of open infringement cases up 6% from 1,505 to 1,598.

At the time, Internal Market Commissioner Frits Bolkestein called on the Heads of Government to implement the outstanding directives, some of which were already more than 5 years overdue. The Commissioner mentioned the damaging effect that non-implementation has on the European economy, but no mention was made of taking appropriate legal action in the Court of Justice.

Four months later in September 2003, the situation had deteriorated even further. The Member States were again reprimanded by Commissioner Bolkestein, but legal action was still not taken in response. Instead, Bolkestein said he would raise the implementation issues with the Member States at the Competitiveness Council at the end of that September, where he planned on singling out Ministers and making them personally commit to improving implementation in their Member States. Other steps to improve performance included intensifying dialogue and adopting a Commission Regulation that shows the best ways to go about implementing EU laws.

By January 2004 the implementation deficit had only improved by one-tenth of one percent. Commissioner Bolkestein reiterated the same criticism of the non-complying Member States, calling again on Ministers to make personal commitments to improve the deficits of their

² http://europa.eu.int/comm/internal_market/en/update/score/

respective Member States. France, Germany, Luxembourg and Greece continued to perform poorly, and the deficits for Belgium and the Netherlands grew considerably worse.³

France and Italy account for 28% of all infringement cases. Spain, Germany, Belgium and Greece are next in line. As of October 31st, 2003, Italy had 146 outstanding infringement cases, France with 135, Spain with 102, Germany with 90, Belgium with 81, and Greece with 75.

As of the latest Internal Market Scoreboard which was published in May 2003, there were 24 Directives whose implementation was overdue by more than two years. Of these 24, three Directives involved Agriculture, and are detailed below.

Example #1: Directive 2001/18/EC

One case which illustrates the ineffectiveness of the implementation and infringement proceeding processes is that of Directive 2001/18/EC on the deliberate release of genetically modified organisms into the environment. Passed in July of 2001, Member States had until October 17, 2002 to implement the Directive into national law. On this date, eleven of the fifteen member states had failed to implement the law.

At the deadline, France, Luxembourg, Belgium, the Netherlands, Germany, Italy, Ireland, Greece, Spain, Austria and Finland had all failed to implement the Directive into national law. Under Article 226, the next step on the part of the Commission is to send a Letter of Formal Notice which serves as the first written warning of non-compliance, which the Commission did at this time.

Belgium, France, Greece and Italy all failed to respond to the Letter of Formal Notice. The response from the Netherlands was deemed unsatisfactory, the responses from Austria, Germany, Luxembourg, Ireland, Finland and Spain failed to show that draft measures were being executed.

Consequently, the Commission then sent a second written warning (Reasoned Opinions) five months later in March 2003.

France, Greece, Germany, Italy and Luxembourg all failed to respond to the Reasoned Opinion. Belgium, Ireland, Spain, the Netherlands, Finland and Austria all had yet to show that there was a proposed timetable for implementation of the law.

In July 2003, two years after the adoption of the law at the EU level, the Member States were referred to the Court of Justice for non-implementation. As of January 2004, the situation showed no signs of improvement.

Example #2: Directive 98/44/EC

Another illustration of the infringement process is that of the legal protection of Biotech inventions, 98/44/EC. The Directive was adopted after a 10-year debate in the Council and the Commission on July 6, 1998. The Netherlands, supported by Italy and Norway, argued that the Directive was unacceptable and asked the Court of Justice for an annulment. This request was eventually denied.

³ IP/04/33, January 12th, 2004

The implementation deadline for this directive was July 30, 2000. Four months after the deadline had passed, the European Commission sent a Letter of Formal Notice to the nine Member States that had not implemented the directive, those being Germany, Austria, Belgium, France, Italy, Luxembourg, the Netherlands, Portugal and Sweden. The Member States still did not implement the Directive after receipt of this first warning.

The European Commission openly recognized the controversy surrounding the Biotech issue and its consequent effect on implementation of the law in the Member States. Because of this, the EC initiated a series of reports whose aim was to follow any developments in biotechnology in order to soften public opinion on this Directive. In January 2002, the Commission published its first report for the Directive. In October 2002, the Commission published its first annual report on patent law and biotech. Even further, the Commission would set up an expert group to consider the legal and technical aspects of biotechnological inventions in January 2003.

In December 2002, two years after the implementation deadline, the European Commission officially requested that the nine Member States implement the directive. If there was not a satisfactory reply within two months, the EC threatened to take the case to the Court of Justice per Article 226.

One year later in January 2003, the Commission met with the 9 Member States in order to try to speed up the process of the implementation of the Directive. This was the third meeting of the sort, the other two being in January 1999 and January 2001. This is part of infringement procedure, and serves as a chance for Member States to update the Commission on the status of implementation to explain their non-compliance.

The result of these two years of efforts, reports, and meetings was that one Member State, Finland, finally implemented the Directive into national law.

Finally, five years after the Directive was adopted by the Commission, in July 2003 the eight remaining Member States—France, Luxembourg, Belgium, the Netherlands, Germany, Italy, Ireland, Greece, Spain, and Austria—were referred to the Court of Justice for non-implementation. As of February 2004, none of the eight remaining Member States had implemented the Directive into national law.

Example #3: Directive 98/81/EC

This Directive served as an amendment to an original Directive adopted in 1990 which is an EU law on the contained use of genetically modified micro-organisms (GMMs). The purpose of this amendment is to update the legislation in order to keep on top of advances in technology and international practices. The Directive was passed in October of 1998, and was to be transposed into national law by the deadline of June 5th, 2000.

At the deadline, ten Member States—France, Luxembourg, Belgium, Germany, Italy, the United Kingdom, Ireland, Greece, Spain and Austria—had failed to implement the Directive into national law. Two months later, the Commission sent a Letter of Formal Notice to the non-complying Member States. To this, France, Luxembourg, Belgium, Italy and Greece failed to reply. Germany, Spain, Austria, the United Kingdom and Ireland replied, but still did not implement the Directive.

Over six months later in February 2001, the Commission decided to send the same ten Member States a second letter of warning (Reasoned Opinion). To the lack of action taken, the EU's Environment Commissioner, Margot Wallstrom, commented: "I am disappointed that

so many Member States have still not implemented this high profile Directive more than six months after the deadline."⁴ The deadline for implementation after the Reasoned Opinion is sent is two months.

Six months later in August 2001, the Commission decided to take Belgium, Germany, the United Kingdom, Greece, Spain and Austria to the Court of Justice. No indications were given to the Commission that these countries were taking concrete steps to implement the EU law.

Over a period of two and a half years after this second warning, four of these countries finally implemented the legislation into national law. In January 2004, Belgium and Spain had still not implemented the legislation, over five years after the law was passed in the Commission.

In January of 2004 Belgium and Spain were officially condemned by the European Court of Justice. Both countries were sent a letter of final notice as punishment, but no fines were imposed upon the countries at this time.

Concluding Remarks

Another directive which we can add to these examples is EC Directive 64/433, a law from 1964 which sets food inspection standards for the EU—and which to this day is failing to be implemented at the Member State level.

As stated before, the EU had 1,598 outstanding infringements as of the 2003 EU Internal Market Scoreboard. It is clear that even though laws are being passed at the EU level, this does not necessarily mean that they are being implemented at the Member State level.

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⁴ IP/01/251, February 26th, 2001