

DG Environment, European Commission

Strategic Guidance for
Convergence of NIS
Environmental Legislation with EU
Directives

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Environmental Resources Management
8 Cavendish Square, London W1G 0ER
Telephone 020 7465 7200
Facsimile 020 7465 7272
Email post@ermuk.com
<http://www.ermuk.com>



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Prepared by: Sabine Hoefnagel

For and on behalf of
Environmental Resources Management

Approved by: Catherine Stevens

Signed: *Submitted electronically*

Position: Director

Date: 21st November 2002

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This report was prepared by Environmental Resources Management (ERM) in the context of the European Commission DG Environment framework contract “Financing Capacity for Implementation and Enforcement of Harmonizing Environmental Policy in the NIS”. The report was developed in close co-operation with the EAP Task Force Secretariat.

The objective of this assignment was to develop a road-map for convergence of environmental legislation across the NIS towards EU directives. The report identifies preliminary priorities that could help to target further technical assistance at the regional or national level. The report therefore identifies the EU Directives that could feasibly be targeted for convergence in the next five years, given the environmental priorities and existing implementation capacity in the NIS.

In order to achieve this objective, the report:

- Focuses on key environmental policy instruments that need to be reformed in order to effectively address top priority environmental problems in the NIS, as outlined in national policy documents and legislation;
- Identifies key EU Directives that could guide those principal reforms of environmental policy instruments in the NIS and should, therefore, become convergence priorities;
- Assesses, in a preliminary manner, the key factors that need to be taken into account in a strategy for NIS convergence with the identified “priority” EU Directives. The report analyses the legal, institutional and cost opportunities and obstacles presented by the challenge of convergence and provides preliminary suggestions on how to address and overcome these barriers.

The report will serve to start a discussion among NIS experts and stakeholders, as well as in the donor community, aimed at better structuring of EU environmental convergence assistance to the NIS. The regional workshop on “*Advancing Coherent Reforms of Environmental Policy Instruments in the NIS: Experience and Roadmap for the Future*” organised by the EAP Task Force Secretariat at the OECD in Paris, 3-4 December 2002, could be a forum for opening such a discussion.

The report is based on discussions between the ERM project team and the EAP Task Force Secretariat, review of relevant documentation, consultation with experts from accession countries, NIS governments and NGOs and a

brainstorming session with DG Environment held in Brussels on 11 October 2002.

1.2 ***REPORT STRUCTURE***

The report is structured as follows:

- *Section 2* provides a background to the report, looking at relevant activities and processes carried out to date;
- *Section 3* outlines some of considerations to be taken into account in relation to convergence and provides an analysis for each of these considerations and opportunities to tackle the barriers to convergence;
- *Section 4* provides the conclusions and recommendations;
- *Annex A* is a list of documentation examined.

CONVERGENCE AND THE NIS

In recent years, many NIS governments, especially but not exclusively in the western NIS, have expressed interest in working towards convergence of their countries' environmental legislation with that of the European Union (EU). This interest is driven by the general economic and political orientation towards the EU, which is their most important foreign trading and investment partner, and by the example of approximation efforts of EU accession countries in Central and Eastern Europe. In addition, several western NIS countries will soon share a border with the EU as a result of the enlargement process, which further strengthens their particular interest. This trend towards convergence in environmental legislation is supported by the Partnership and Co-operation Agreements between the EU and the various NIS country governments, signed over the last decade.

The NIS Environment Strategy is currently being prepared for adoption by environment ministers at the Environment for Europe Conference in Kiev in May 2003. This will point to EU convergence as one of the possible avenues for reforming NIS environmental legislation and specific environmental policy instruments. The implementation of the NIS Environment Strategy could leverage assistance from donors and international organisations to support policy and legislative reforms. The European Commission would be a key player in these activities, with some European bilateral donors and IFIs, having already implemented several technical assistance projects covering selected aspects of environmental policy and legislative reform. However, so far, donor assistance to the NIS has been relatively insignificant, unfocused and uncoordinated resulting in little consistent impact on reform. The development of a road-map for convergence should assist in overcoming these deficiencies.

At the moment neither NIS governments nor the donors have a clear sense of how best to prioritise the convergence efforts, which can lead to a waste of time and technical assistance funds. In addition, several NIS governments do not have the drivers, financial resources, or institutional capabilities to harmonise their national environmental regulatory framework with the entire *acquis communautaire* in the short to medium-term.

Box 2.1

NIS Environment Strategy

At the conference in Aarhus in 1998, Ministers of Environment of the region of the UN/ECE agreed to refocus the “Environment for Europe” process on the needs of the NIS and CEEC not involved in EU enlargement. To facilitate implementation of the Aarhus decision, Ministers of Environment of Georgia and Ukraine proposed to develop an Environmental Strategy by and for the NIS that would lead to real improvements in the state of the environment in the NIS.

The overall objective of the Strategy is to integrate and optimise environmental policy in order to prevent further environmental degradation in the NIS. The Strategy would aim to find solutions to common environmental problems building on the experience of reforming the economic and administrative systems of the NIS in the environmental domain.

The main objectives of the Strategy are to:

- improve environmental legislation, policies and institutions
- eliminate the main risks to human health through pollution prevention and control
- manage natural resources in countries “in transition” in a sustainable manner
- fully integrate environmental considerations into the development of key economic sectors
- establish and strengthen mechanisms for mobilising and allocating financial resources to achieve environmental objectives including eco-conversion of external debt
- promote environmental democracy and strengthen the information base for policy making

The development of the NIS Environmental Strategy is being led and closely coordinated by senior officials of the countries’ environment ministries and supported by such international organizations as the World Bank, OECD, UNECE, UNEP, WHO, etc. It is expected to be adopted by the NIS Ministers at the pan-European environmental ministerial summit in Kiev, Ukraine in May 2003.

Hence, the objective of convergence should not be to directly transpose EU Directives into laws in the NIS in the way it is being done in the EU accession countries. Instead, the objective should be *step by step* convergence with the principal EU regulatory requirements, building institutional capacity to implement such reforms at the same time, to maximise the effectiveness of efforts to meet the strategic priorities.

2.1.1

Convergence Versus Approximation

In light of the above, this report avoids the use of the word “approximation” in the NIS context, as this word has taken on a very specific meaning related to the accession process. It also avoids use of the word ‘harmonisation’, except where this is the specific language used in an existing published report. The concept of harmonising legislation generally sets an expectation of closer alignment of specific pieces of legislation than does convergence.

Approximation, in an accession context, is described as a unique obligation of

membership of the EU⁵. It is an obligation to fully align national laws, regulations, rules and procedures in order to give effect to the entire body of EU law contained in the *acquis communautaire*⁶.

There are three key steps to approximation:

- **Transposition.** The requirements of EU legislation must be fully incorporated into national legislation. This will require adoption or amendment to national laws, regulations, rules and procedures;
- **Implementation.** Also known as **Practical Application.** Implementation is the incorporation of EU law by the competent authority/ies into individual decisions. It includes providing the infrastructure, budgets and provisions needed to enable the competent authorities to perform their obligations under EU law and to take appropriate decisions;
- **Enforcement.** The necessary controls and penalties must be provided to ensure full and proper compliance with the law.

Thus the objective of the approximation process is to fully integrate all the EU legislation requirements into the national legal system so that the accession country is then ready and able to fulfil all the EU Member States' obligations. This will usually include a complete institutional re-structuring so that the accession country can comply with all EU requirements such as reporting to the Commission.

Convergence is a somewhat different process. It means bringing two legal systems closer together rather than the full alignment required by approximation. Convergence implies that the main principles/features of one legal system should be reflected/integrated into the other legal system, taking into account the specificity of the other system and without necessarily adopting exactly the same requirements in detail.

Convergence implies the following process:

⁵ See, Guide for Implementation of the European Union Environmental Legislation, <http://www.europa.eu.int/comm/environment/enlarg/handbook/handbook.htm>.

⁶ The *acquis communautaire* is defined as the directives, regulations and decisions adopted on the basis of the various Treaties which together make up the primary law of the European Union. It is the term used to describe all the principles, policies, laws and objectives that have been agreed by the European Union. It includes the Treaties, all Community legislation, all the principles of law and interpretations of the European Court of Justice, and all international agreements signed by the European Commission as interpreted by the declarations and resolutions of the Council of Ministers.

- Analysis of the relevant EU legislation in order to define the main principles and features;
- Review of the national legislation in the particular area and analysis of institutional arrangements to determine to what extent it integrates these EU principles and features;
- Adaptation of the national legislation and / or development of implementing regulations which integrate the main principles and features of the EU legislation;
- Adaptation of the institutional arrangements to implement the adapted national legislation in practice.

Since the EU system is founded on a compliance-based approach to regulation, whereas the NIS approach is still largely based on command and control, convergence will require a focus on the identification of instruments or legislative provisions that move the society and institutional structures towards a compliance-orientated approach, backed up by economic incentives.

2.1.2 Potential Benefits of Convergence

One of the main incentives for promoting convergence with European legislation in the NIS is the environmental benefits linked to such an approach. It therefore corresponds to the overall objective of the NIS environmental strategy to integrate and optimise environmental policy in order to prevent further environmental degradation. *Box 3.6*, drawn from a report published in 2001, lists some of the possible benefits of approximation in the accession countries. Convergence, if handled effectively, will achieve as many of the benefits of approximation as possible, at the lowest cost.

Possible Environmental Benefits of Approximation

- Better public health as exposure to pollution is reduced and, as a result, the number of respiratory diseases and premature deaths decreases.
- Less damage to forests, buildings, fields and fisheries through a reduction of acid rain and other forms of pollution – leading to wider economic benefits (increased yields) and reduced costs (building façade works).
- Lower risk of (irreversible) damage to natural resources such as groundwater aquifers.
- Better protection of natural ecosystems and (endangered) species.
- Promotion of tourism as a result of a cleaner environment (forests, bathing waters, nature reserves).
- Reduced risk of water-related illnesses and improved taste of water as a result of better bathing water and drinking water quality.
- Increased economic efficiency and higher productivity as a result of modern technology, supporting competitiveness of industry.
- Lower production and maintenance costs through availability of cleaner water, reducing pretreatment needs.
- Lower consumption of primary material as a result of a more efficient use and higher levels of reuse and recycling.
- Support for employment and benefits for local and regional development.
- Company culture benefits through improved awareness of environmental risks and approaches to minimize risks and respond to eventual events.
- Social benefits through greater learning, awareness, involvement and responsibility with regard to environmental matters (e.g. social responsibility and involvement in separation of waste and recycling).

Source: Ecotec Research and Consulting, the Benefits of Compliance of the Environmental Acquis for the Candidate Countries, DG Environment Framework Contract: Environmental Policy in the Applicant Countries and their Preparations for Accession, Final Report, 2001.

2.2**RELEVANT PLAYERS, ACTIVITIES AND PROCESSES TO DATE****2.2.1****NIS Environmental Policies**

Environmental policies of the Newly Independent States have been formulated in a number of national strategies, government decrees and policy statements. They were developed against the common legacy of the rigid administrative system that was prevalent in the Soviet Union. Thus, they have a lot of common reference points, although the national circumstances and priorities differ significantly from country to country. The main instruments of environmental policy in the NIS in need of change are discussed in *Section 3.1*.

Many NIS countries have stated their interest to work towards convergence of their environmental legislation with the EU, most notably in the Partnership and Cooperation Agreements. Several countries have begun to outline policies of environmental convergence as part of the overall process of socio-economic integration with the European Union (such as Ukraine), or determination to join the WTO (such as Russia). However, very few specific environmental convergence initiatives have been undertaken to date.

2.2.2

Partnership and Cooperation Agreements (PCAs)

In 1992, the Council of Ministers decided that new agreements should be negotiated between the EU and the NIS to replace the Trade and Cooperation Agreement (TCA), signed with the Soviet Union in 1989. These PCAs aim to take account of the new political and economic realities facing the NIS.

Each PCA establishes a strong and comprehensive political and economic partnership between the EU and the partner country, covering trade in goods and services, political dialogue, investment-related issues such as intellectual property and company rules, and cooperation ranging from transport to higher education, agriculture, and combating illegal activities.

The PCAs are designed to play an increasingly important role in expanding trade and investment. All include an article that defines areas of environmental cooperation using similar language to the Community Treaty, referring to sustainable development and to the integration of environmental protection requirements into other areas of cooperation.

Box 2.3

Environmental Dimension of PCAs

The underlying environmental dimension in PCAs is to:

- Include the notion of fostering harmonious and sustainable development towards a market economy and ensuring environmental protection and sustainable development;
 - Define sectoral obligations to respect the environment, for example in legislation covering mining, agriculture, or industrial cooperation;
 - Refer to international agreements binding the NIS and the EU which incorporate obligations for environmental improvement, such as the European Energy Charter and the Environment for Europe process;
 - State that environmental cooperation shall aim to combat the deterioration of the air and water quality, waste, industrial safety and biodiversity protection.
-

Although the PCAs share a similar level of integrity, they are quite a diverse set of documents. Each is tailored to the individual partner country, reflecting the differences within the NIS. Moldova has taken implementation of the PCA particularly seriously and is attempting environmental approximation in some areas. The Ukraine has decreed that henceforth, all environmental legislation shall be in compliance with EU law as part of the PCA commitment. The situation in Belarus is somewhat contrasting, where negotiations on the PCA have been in suspension for a number of years.

Each PCA is an agreement not just between the EU and the NIS partner, but also between all of the EU Member States and the partner, bilaterally. So far, PCAs have been signed with all the NIS with the exception of Tajikistan.

Box 2.4**Convergence of Legislation in the Russian PCA**

The Russian government has expressed interest in harmonising its environmental legislation with the corresponding EU legislation⁷. The 1997 Russian-EU Partnership and Cooperation Agreement states in Article 55 that:

'the Parties recognize that an important condition for strengthening the economic links between Russia and the Community is the approximation⁸ of legislation. Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community. The approximation of laws shall extend to the following areas in particular:...the environment'.

In addition, Article 69 on Environment states:

'...The Parties shall develop and strengthen their cooperation on environment and human health...Cooperation shall take place particularly through:...improvement of laws towards Community standards'.

Box 2.5**Convergence of legislation in Ukrainian PCA and the EU integration strategy**

A Brief Guide⁹ to the Agreement on Partnership and Co-operation between the EU and Ukraine states that:

'Ukraine and the European Union recognise that approximation of economic law and related social, environmental and standards law is an important condition for closer economic links. Ukraine will endeavour to gradually make its legislation compatible with that of the European Union, which will make it much easier for companies from the European Union and Ukraine to invest and operate on each other's territory'.

The Strategy of Ukraine's integration to the European Union¹⁰ (1998) defines principal directions of Ukraine's cooperation with the EU and includes convergence of legislation:

'Convergence of Ukraine's legislation to that of the EU...would ensure development of political, business, social, cultural activities..., economic growth of the country within the EU framework, as well as facilitate gradual improvement of the quality of life... This process assumes reforming the legal system and its gradual convergence with the requirements of the European standards. It covers private, customs, labour, financial, tax, intellectual property and labour protection law, as well as legislation that deals with health care, environment, consumer's rights, technical standards, transport and other industries...'

⁴ See PCA Russia -EU

http://www.europa.eu.int/comm/external_relations/ceeca/pca/pca_russia.pdf

⁵ Note that the word "approximation" is sometimes also used to describe "convergence" when it is used in its literal meaning in the English language instead of being linked to the accession process. e.g. in the Russian and Ukrainian PCA agreements.

⁶ See the Guide to PCA Ukraine at http://www.delukr.cec.eu.int/en/Data/what_is-eng.pdf

⁷ See Strategy at the site of the Ukrainian Ministry for Foreign Affairs at <http://www.mfa.gov.ua/eng/diplomacy/?ua-eu>

2.2.3

Donors and international organisations involved in convergence activities

European Commission (DG Environment and Tacis)

The European Union is a key player in the convergence debate and is supporting various efforts in this field. For example, DG Environment has supported a project focused on harmonisation of industrial pollution control and waste management legislation towards EU environmental legislation for Moldova (see *Box 2.7*) and currently Tacis is supporting a project in Russia focused on convergence of industry related legislation. DG Environment is supporting the development of this report and will be working with DG Relex and EuropeAid on the development of possible future projects to be implemented in this field. In addition, the EU water initiative, led by the Commission, will play an important role in promoting concepts such as river basin management in the NIS, in line with the EU Water Framework Directive.

Box 2.6

DG ENV project: Preparatory Work on Approximation of IPC and Waste Management Requirements in the Republic of Moldova 2000

This project was designed to assist the Republic of Moldova in carrying out preliminary work in developing a strategy for implementation of EU industrial pollution control requirements, with an emphasis on IPPC, and for implementation of EU waste management requirements. The wider objective of the project was to harmonise Moldovan legislation with EU requirements, in accordance with the PCA ratified in 1998. This included the following tasks:

- A detailed legal gap analysis was conducted of relevant Moldovan legislation, including the draft Law on IPPC
- Examination and assessment of the institutional capacity to implement and enforce Moldovan environmental law in the fields of IPPC and waste management at all levels
- Modification of existing legislation, and proposals for new legislation, where appropriate
- Prioritisation for harmonisation.

Following the completion of the detailed legislative gap analysis, options for amendments/new legislation were proposed, along with prioritisation for harmonisation.

In addition, a strategy document was prepared detailing options for change for implementation of an IPPC regime in Moldova. It was important to ensure that any changes in the Moldovan regulatory regime fitted the current economic and other conditions. The requirements for institutional strengthening to ensure effective implementation of any new IPPC regime were also discussed.

Source: REC Moldova and Milieu Ltd

Box 2.7***EU Water Initiative, NIS Component (DG Environment and DG Development)***

The Ministerial Declaration adopted in Almaty October 2000 by economic/finance and environment ministers from the NIS and selected OECD countries documents the serious situation of the urban water supply and sanitation sector in the NIS and includes an endorsement of a set of guiding principles for its reform.

In response, the EU water initiative, originally focussed on Africa, has been given an NIS component to focus on the implementation of the water aspects of the NIS Environmental Strategy. It has the following targets and objectives: to halve the number of people without access to safe drinking water and sanitation by 2015; to balance the human needs with those of the environment by 2015; to provide support to ensure that water resource management strategies and plans are in progress by 2005; and to achieve the objective by implementing Integrated Water Resources Management based on a river basin approach.

Subject to agreement with NIS partners, there will be a focus on the following cross-cutting issues: awareness raising at all levels; exchange of knowledge and experience; identification of gaps and priorities; developing best practices and benchmarks; development of regional and sub-regional co-operation mechanisms; capacity building; and, promoting the implementation of demonstration projects.

For the World Summit on Sustainable Development in Johannesburg in August 2002, Denmark has taken the lead in developing the NIS component of the EU Water Initiative. It is expected to be launched at the WWWF-3 in Kyoto in March 2003.

Source: EU Water Initiative: Water for Life, working document, 2002

UK Department for International Development

The Department for International Development (DFID) is the UK Government department responsible for promoting development and the reduction of poverty. The central focus of the Government's policy is a commitment to the International Development Targets, to halve the proportion of people living in extreme poverty by 2015. In the transition countries of CEE/NIS, DFID is helping to ensure the process of change brings benefits to all people, particularly to the poorest.

Several recent DFID projects in the NIS have addressed legal and regulatory issues in environmental management.

Box 2.8***DFID: Water Services Legislation and Standards in Moldova, 1999***

The project was concerned with the provision of technical assistance for the definition, appraisal and presentation of options for reforming the policy and regulatory framework, institutional structure and financing arrangements for water and waste water services in Moldova. The project focused on the operations of the wastewater utility in the capital of Moldova, Chisinau, which was undergoing restructuring with assistance from, among others, an EBRD loan.

Source: ERM

Box 2.9***DFID: Obstacles and Opportunities to Commercialising Urban Water Services in the NIS (1999-2000)***

The objectives of this project were to:

- present an overview of the current status and common problems and features of urban water and wastewater management in the NIS which would affect commercialisation;
- identify some of the most significant policy, institutional and financial obstacles to and opportunities for commercialisation, including the types of reform which are likely to be most effective; and
- provide a basis for more effective NIS/donor/IFI dialogue and co-operation on the subject, including creating the conditions necessary for identifying investment projects and promoting public-private partnerships in the urban water sector.

The project identified the main obstacles for improving the extremely poor physical condition of the water and wastewater infrastructure, and reducing the consequent impact on environmental health conditions for the region's population.

An important barrier to increasing efficiency and overall performance in the water sector is the very strict and unrealistic environmental, health, and other service standards that are required to be met. There is an unwillingness from the side of environment and health ministries to discuss the reality of these standards and to lower them where appropriate. As a result, there is often a deadlock in the discussions on this issue. The NIS also need to improve strategic planning and co-ordination at both the national (policy and regulatory) and vodokanal (operational) levels for the urban water services sector. Generally, there are no strategy or policy documents that set long-term project planning or investment objectives for the water services sector and/or strategies that address water management in an integrated way. This results in a situation where decisions are often taken on an *ad hoc* basis without necessarily fitting within a wider policy context or meeting clearly set objectives. Finally, in most NIS, the responsibility to invest in water and wastewater infrastructure has been delegated to sub-national (mostly municipal) level. Investments are in theory largely subsidised by the government. In practice these subsidies are not, or are only partly, paid.

Source: Economic Instruments and Water Policies in Central and Eastern Europe. Conference Proceedings, REC. 2000

Danish Environmental Assistance to Eastern Europe (DANCEE)

The Danish Ministry of the Environment has been providing technical assistance in the environmental field to Eastern Europe since 1991. A project in the field of convergence, aimed at reforming water sector legislation in Russia, is due to start in 2003.

Box 2.10 ***DANCEE: Reform of water sector legislation in Russia (2003-2005)***

The objective of the project, is to draft the legislation targeting environmental protection in general and water sector in particular. The legislation should be harmonised with EU directives and practices.

Three laws are to be prepared: i) General Law on Environmental Protection related to Technical Regulations¹¹ and mainly focusing on water sector regulations, ii) Technical Regulation Law on Drinking Water, and iii) Technical Regulation Law for Urban Wastewater Treatment Plants.

The project will link directly to the legislative process of the State Duma (Parliament). It will be guided by a steering committee involving both Duma representatives and senior governmental representatives.

The new legislation will be coordinated with current legislation including the Water Code of 1995 and the Environmental Protection Act of 2002. It will be based on the principle of a simplified regulatory system primarily based on federal norms and standards, and a uniform and simplified permitting and enforcement system.

EAP Task Force for CEE/NIS

The EAP Task Force was established by the European Environment Ministers in 1993 to facilitate the implementation of Environmental Action Programmes and in particular to assist the countries of Central and Eastern Europe and the NIS in:

- Integrating environmental considerations into the process of economics and political reform;
- Upgrading institutional and human capacities for environmental management;
- Broadening political support for environmental improvement; and
- Mobilising financial resources, and their cost-effective use.

As such, it provides a useful regional framework for cooperation. During the early phases of EU approximation in the CEE, the EAP TF worked with governments on common approaches in environmental policy and financing that were later successfully used by those countries in their EU approximation efforts.

Since 1998, the EAP Task Force centre of attention has been gradually shifting towards the Newly Independent States, where its activities focus on the following:

- Implementation of environmental policies and national environmental action programmes (NEAPs);
- Environmental finance;

(1) ¹¹ The term 'technical regulation' is defined as 'An activity to establish mandatory requirements, voluntary rules, general principles, characteristics concerning products, processes of production, operation and recycling, works or service, as well as to control the adherence to mandatory requirements'. Therefore, it includes not only implementing regulations but also the use of other instruments such as voluntary rules.

- Urban water sector reform;
- Public involvement on environmental decision making;
- Assisting the NIS governments in the preparation of the next “Environment for Europe” meeting in May 2003 in Kiev where convergence of legislation will be one of the issues to be discussed.

Other donor activity

Several other donors, including the World Bank and non-european bilaterals, are providing technical assistance to NIS countries to assist in strengthening their legislation, institutional structures or implementing regulations. For example, in 1999 a World Bank financed project attempted for the first time to put figures on the potential costs for approximation (not convergence) with EU environmental legislation in the Ukraine (*see box 2.11*). Since the drive for convergence with EU legislation is not consistent across the countries, or even between ministries in the same governments, and in the absence of a clear road map for reform, not all of this effort is focussed on convergence with EU. The overall effort is at best ad hoc in its approach.

World Bank: Costs Of Ukraine's Prospective Approximation With two key Environmental Regulations Of The European Union, 1999

The World Bank study assessed the costs for Ukraine of approximation with the Directive on Urban Waste Water Treatment Plants and the Large Combustion Plant Directive. This was the first to attempt to develop recommendations for environmental convergence with EU laws for Ukraine.

The project was concerned with the development of a methodology for estimating costs of environmental policies, suitable for Ukraine. Original Ukrainian data were used in both cases. The process of development of the methodology, preparation and conducting estimates were facilitated by the two workshops -- one organized in Kraków and another in Kiev.

Some of the results were as follows:

- Costs of regulatory revisions: \$2-4 million for primary legislation and \$2-20 million for secondary legislation (implementing regulations).
- Costs of staff capacity improvements (training and office equipment): \$25-50 million.
- Monitoring system upgrade: \$50-100 million.

Source: Krakow University of Economics

European Union environmental legislation has developed over the last 30 years and comprises some 300 legal acts including directives, regulations, decisions and recommendations in addition to a large number of communications and other policy documents. However, the core environmental legislative framework, which makes up the environmental *acquis*¹², consists of some 70 directives and 21 regulations.

Still, this is an enormous body of legislation. Each piece contains concepts, standards or procedures that could be of value to the NIS. Hence, some prioritisation is required to provide guidance to NIS governments approaching reform, as well as to donors interested in supporting convergence activities.

There is, of course, more than one way to decide which pieces of EU environmental legislation will provide useful benchmarks for the NIS. Each approach used will identify a slightly different list. For example, if improvement of the economic situation and trade with the EU are the focus of convergence, then the list would focus on internal market related directives such as product standards. If, on the other hand, priority was given to directives which support the implementation of and fit into ongoing policy initiatives, such as the EU-NIS water initiative, or which aim to implement multilateral environmental agreements such as the Aarhus Convention, then a different list of directives would be proposed.

The approach adopted in this case is to identify those directives which offer concepts and approaches which address some key environmental policy instruments in need of reform, in order to effectively address the priority environmental problems in the NIS as defined in government policy statements. This approach has the advantage of focusing on providing mechanisms which will get to the heart of the principles behind approaches to environmental management in the EU, and which therefore help to provide a foundation for reform. It also has the advantage of providing the mechanisms for addressing issues which have been defined as priorities by the governments themselves, instead of by the EU or third country governments. Governments are more likely to put energy and resources behind reforms which address the issues which they believe to be the most important.

To do this, the report has focussed on the following questions:

- What are the NIS policy instruments/legislation in greatest need of reform to address the priority environmental problems?
- Which areas of the EU *acquis* can most readily address these issues?

(1) ¹² The *Acquis* is the body of legislation to which the accession countries have had to approximate

- Are there any obvious legal barriers to convergence?
- What are the main institutional problems and cost implications that will need to be faced in the process of convergence?

3.1

NIS POLICY INSTRUMENTS AND LEGISLATION IN NEED OF CHANGE

NIS governments and other stakeholders recognize that their countries face tremendous environmental challenges. A number of studies have been carried out to identify the root causes of environmental problems in the region and to suggest potential solutions. *Box 3.1* below summarises a view of the Ministry of Environment and Natural Resources of the Ukraine on the causes of environmental problems.

Box 3.1

Ukraine: Key causes of environmental problems

According to the assessment of the Ministry of Environment and Natural Resources of the Ukraine, the main causes of environmental problems in the country are:

- Out-of-date pollution production technologies and insufficient pollution control equipment;
- Too complex and ineffective a regulatory system used to control air emissions, including emissions norms and economic mechanisms;
- Absence of effective legislative and regulatory mechanisms to manage activities with high environmental risks;
- Low environmental awareness of the public;
- Absence of operational economic mechanisms (incentives) to encourage more responsible environmental management;
- Absence of continuous monitoring of the environment (particularly in the waste storage areas);
- Insufficient funding of environmental activities (“residual principle” of funding the environment);
- Absence of effective waste management system (separate collection, storage, recycling and disposal);
- Poor investment climate in the country.

Source: MENR web site at <http://www.menr.gov.ua>

A similar picture can be drawn for other countries in the region.

It is widely accepted that the main weaknesses in the development and application of policy instruments and legislation in the NIS include:

- Unrealistic environmental quality standard setting and the number of substances regulated;
- Legislation is often merely declarative and poorly designed;
- Legislation is too far removed from implementation goals;
- Lack of implementing regulations, procedures and guidance;
- The policy instruments are not focused on the creation of incentives for the regulated community to achieve better targets;

- Lack of public involvement in policy making and legislative development – the public is not encouraged to participate in the decision making;
- Insufficient awareness due to a lack of publicity and dissemination of the regulations that do exist;
- Overlap between laws, decrees and regulations, as well as responsibilities of government agencies;
- Weak institutional structures.

Boxes 3.2 and 3.3 below illustrate some of these issues with specific examples.

Box 3.2 ***Unrealistic environmental standards: an example of the water sector***

An important obstacle to water companies (vodokanals) in the NIS improving their efficiency and overall performance is the fact that they are required to meet very strict and unrealistic environmental, health, and other service standards. The existing standards have often been designed under the old Soviet system and are typically too strict and are very hard, if not impossible, to meet (and, indeed, too costly to enforce). There is an unwillingness from the side of environment and health ministries to discuss the reality of these standards and to lower them where appropriate. As a result, there is often deadlock in the discussions on this issue.

Source: Obstacles and Opportunities to Commercialising Urban Water Services in the NIS. DFID project implemented by ERM. Final Report, 2000.

Box 3.3 ***Poor economic incentives: inadequate system of pollution charges***

A system of pollution charges (fees) is one the few economic instruments currently used in environmental management across NIS. It is mostly geared towards payment of fees for air emissions, water discharge and waste disposal, based on a complicated and extensive set of standards and norms, often inflexible. It establishes payment for a 'right-to-pollute' and lacks incentives for industry to introduce environmentally friendly technologies. Although new legislation in some countries (such as Russia) already refers to the notion of the Best Available Technology (BAT), it is not clear how this principle will be implemented in further regulations and practice.

3.1.1 ***Standards***

There is a significant dislocation between the theoretical framework for environmental quality (ambient) standards in NIS countries, which tends to be comprehensive and ambitious, and the enforcement of and compliance with standards in practice, which often falls short of stated objectives. The standards apply stringent controls on hundreds of pollutants without any acknowledgement of the practical difficulties of meeting such standards. As a result, the regulatory agencies are unable to monitor or enforce the full range of standards. By the same token, the regulated community finds it technically unfeasible or financially prohibitive to meet these standards, and furthermore is reluctant to do so as they are perceived to be unjust and burdensome.

Given the difficulty of enforcing or complying with the environmental standards, 'temporary' (but routinely renewed), higher level discharge consents are used in practice. These consents are issued on a case-by-case basis by the regulatory agency, which has broad discretionary powers and is thereby vulnerable to corruption. Temporary standards often correspond to actual pollution levels, providing little incentive for improvement and meaning that overall, the system of environmental standards does not achieve the goal of reducing pollution levels over time.

3.1.2 ***EIA***

The environmental impact assessment process throughout the NIS is based on the Soviet system of State Environmental Reviews (SER, known in Russia as *State Ecological Expertise*), which must be undertaken for nearly all new industrial projects. This requirement places a strain on administrative resources, in turn reducing the effectiveness of the system, as each SER receives less attention from the environmental authorities.

The SER system tends to result in the outright approval or rejection of proposals, which gives limited scope for modifying projects to incorporate environmental considerations and mitigation measures. Cumulative or indirect impacts and alternative scenarios are rarely considered. Parallel to the SER process is the system of Public Environmental Review (PER), which provides an opportunity for public participation; however, this opportunity is restricted by the fact that only registered organisations can undertake a PER.

Most NIS countries have begun to reform their environmental assessment systems, for example by opening the process to greater public scrutiny. However, these reforms are generally quite minor. Where more extensive reforms have been attempted, for example in Armenia or Moldova, they have been hampered by a lack of institutional capacity and experience.

3.1.3 ***Permitting***

The broad scope of the environmental quality standards system (described above) has a knock-on impact on the permitting authorities whose resources are insufficient to cover the full range of pollutants. Frequently, different offices in the same authority (emissions to air, water, soil) or sometimes different authorities (water abstraction, technological safety) are responsible for issuing permits for different activities and communication between them is often poor. This makes it difficult to develop an integrated approach to regulation and results in emphasis being placed on pollution control rather than pollution prevention. Finally, the fact that permits are usually unavailable for public review reduces the transparency of the regulatory process and facilitates the spread of corruption.

3.1.4 ***Monitoring and Reporting***

Mechanisms for environmental monitoring and reporting in the NIS are extremely weak, especially in the Central Asian countries and the Caucasus. A key cause of the systems' weaknesses is the dispersal of functions between a range of different agencies. A large number of institutions involved in environmental monitoring creates inefficiencies (as some data are collected more than once, and may not be transferable across different agencies' databases) and reduces clarity and transparency. It also contributes to the difficulty of adopting an integrated approach to regulation (see above), as data may not be easy to collate and cumulative impacts may go unidentified. These problems are exacerbated by a lack of resources, manifested in poor quality equipment and laboratories, and in agencies' inability to monitor the extensive range of pollutants for which environmental standards exist.

There is no continuous monitoring even for those pollutants which do fall within the agencies' scope. There is limited reporting, and in practice what monitoring and reporting does occur tends to take place only at larger industrial facilities.

3.1.5 ***Enforcement***

The unrealistic scope and values of environmental standards, together with the complexity of environmental regulations, means that the regulated community is almost always in breach of the law and enforcement agencies face an impossible task in attempting to bring them into compliance. These difficulties are further compounded by the enforcement agencies' lack of resources to carry out their functions: they lose personnel (especially environmental lawyers) due to low salaries, and a lack of basic facilities and equipment prevents them from fulfilling their duties. In addition, they lack the skills and capacity to function effectively: staff receive no or inadequate training, and often have a poor knowledge of the regulated community.

Enforcement mechanisms are further weakened by enforcement agencies' lack of recourse to economic incentives to reward compliance, or to legal and financial sanctions to penalise non-compliance. Environmental enforcement agencies tend to have a weak standing in relation to local governments and industry, and receive little support from the court system which is ill equipped to address environmental cases. Fines tend to be imposed in the case of minor transgressions while major breaches go unpunished (due to political or economic pressures). In any case, the levels of fines are usually too low to act as a deterrent. Revenue collection is also a big problem (although performance rates range from negligible to around 80%) linked to the problems with environmental enforcement more broadly.

Finally, the effectiveness of enforcement efforts is not measured in the NIS in terms of their ultimate impact on environmental conditions. Rather, emphasis

is placed on activity indicators (numbers of inspections, etc.), which gives inspectors no incentive to engage in compliance promotion (see below).

3.2 EU DIRECTIVES THAT CAN MOST READILY ADDRESS THE ISSUES

Although almost all the EU environmental *acquis* could provide some useful guidance to address the problems described, specific pieces of legislation contain particularly useful concepts, standards or processes that can be effectively applied to improve some of the above mentioned priority policy instruments.

In addition, there are a large number of other useful policy frameworks such as multilateral environmental agreements or national environmental legislation from certain countries which could assist in further developing the NIS environmental policy instruments. Most NIS countries are parties to a number of international conventions and are already legally bound to implement their principles and standards. Therefore, this report does not claim that the EU *acquis* is the only useful framework for addressing the shortcomings of NIS policy instruments and legislation¹³. However, it goes beyond the scope of this report to address these other frameworks as well.

3.2.1 Prioritisation of Directives

Actions to remedy the shortcomings in the NIS should, in the short term, be focused on the key policy instruments listed in section 3.1 (standards, EIA, permitting, monitoring and enforcement). These are the fundamentals of effective environmental management for industry. There are of course other environmental policy instruments which could be introduced such as the use of voluntary agreements, and information based approaches such as pollutants registers. These, however, are not the focus of this report.

EU environmental legislation addresses environmental standards, EIA and permitting directly in a number of directives. The following paragraphs will look at the specific pieces of EU legislation and the benefits that convergence towards these directives might bring for the NIS. However, this report does not attempt to provide a full analysis of each directive described.¹⁴

Monitoring and reporting, and probably most of all enforcement are the other key policy instruments to be addressed in the short term. However, EU environmental legislation addresses these instruments mostly within the various directives and not as a separate issue. A Commission

¹³ In general, the EU environmental *acquis* itself of course also takes account of the concepts and requirements of multilateral environmental agreements.

¹⁴ There are numerous other publications which can provide such information, most notable the Handbook produced by the European Commission itself.

Recommendation on inspection offering useful guidance is described in section 3.2.5.

Criteria that have guided the choice for the list of priority EU environmental legislation for convergence include:

- focus on legislation that is either horizontal or deals with the industrial environment (as opposed to the nature protection), as the industrial environmental problems are at the forefront of issues to be addressed in the NIS;
- the appropriateness of a piece of EU legislation in relation to the level of sophistication or development in the NIS;
- focus on fundamental environmental legal provisions instead of e.g. technical requirements for infrastructure;
- focus on directives addressing procedures, general approaches and institutional frameworks such as framework directives.

3.2.2 *Priority EU Directives related to Standards*

The current NIS systems for regulation of industrial activities are geared towards payment of environmental fees for air emissions, water discharge and waste disposal, based on a complicated and extensive set of environmental quality standards and norms, often inflexible.

The methodology for environmental quality standard setting and the legal basis for standardisation in the NIS can be revised using the related EU directives as benchmarks. EU standards are developed using a risk management approach, instead of risk assessment (zero human exposure) as is usually used in the NIS. Standards should aim for enforceability based on technical and economic feasibility, moving away from the current scientific process of standard setting for a huge number of pollutants.

The EU framework directives for air and water quality, and waste management offer valuable concepts and benchmarks. Overall, these framework directives offer a balance between environmental objectives and enforceability. The framework directives have daughter directives providing specific standards for certain substances which can serve as useful guidance. However, instead of just copying the EU environmental quality standards offered in some of these directives, it is advised that the directives are used as benchmarks striking a balance between what is desirable from an environmental viewpoint and what is realistic in terms of enforcement, given the specific conditions in the NIS countries (see section 3.3). In addition, they provide useful guidance on monitoring and sampling procedures.

Air Protection

The Air Quality Framework Directive (96/62/EC) provides for the establishment of ambient air quality standards and objectives, the assessment

of air quality, the provision of information to the public and the development and implementation of programmes to maintain air quality. Limit values and alert values are to be established for various ambient air pollutants through daughter directives. The NIS could use the framework directive and its daughter directives as a benchmark for the development of new ambient standards for various locations. In addition, the number of regulated substances should be reduced.

Some specific useful concepts and procedures contained in the air quality framework directive include:

- Assessment of ambient air quality against limit values and alert thresholds taking into account the size of populations and ecosystems exposed to air pollution;
- Guidance on location and number of sampling points and reference methods for measurement;
- Requirements for precautionary measures to be taken when threshold values are met;
- Requirements to prepare plans for areas with particularly poor air quality determining technically and financially realistic approaches to reducing emissions to prescribed standards;
- Requirements of making adequate information on ambient air quality available to the public.

Box 3.4

Pollutants regulated within daughter directives to the Air Quality Framework Directive

The directive focuses on the maintenance and improvement of air quality with respect to the following thirteen pollutants:

1. sulphur dioxide;
2. nitrogen dioxide;
3. fine particulate matter such as soot;
4. suspended particulate matter;
5. lead;
6. ozone;
7. benzene;
8. carbon monoxide;
9. poly-aromatic hydrocarbons;
10. cadmium;
11. arsenic;
12. nickel; and
13. mercury.

Council Directive 1999/30/EEC establishes limit values and alert thresholds for the first six pollutants, Directive 2000/69/EC for benzene and carbon monoxide. The other pollutants will be regulated in two directives currently under development.

In addition, there are a number of product related directives that address air pollution which could be of value. In particular, the directive relating to the quality of petrol and diesel fuels (98/70/EC), as pollution from road traffic is increasing. This directive sets out technical specifications for petrol and diesel

fuels that influence the level of atmospheric emissions. Particularly important from the health and environment point of view are the concentrations of lead, sulphur, aromatics and benzene.

Water Protection

The Water Framework Directive (WFD 2000/60/EC), which recently entered into force, offers a comprehensive and revised water policy for the EU. It offers a range of benchmarks for the NIS, although full convergence would be unrealistic. Full implementation of the WFD is expected to encounter barriers even in the Member States. It also assumes a certain level of transparency in society, not yet evident in the NIS.

One of the most important aspects of the WFD is that it requires water resources to be managed on the basis of river basins, instead of administrative or political boundaries. Some experiments using this approach have been carried out in the NIS providing some possible momentum for further development of this approach. Most importantly, the WFD directive can provide some thought on how to streamline existing water management and its institutions. For each river basin, a management plan will have to be developed aimed at implementing the standards set in the legislation. Common methods of sampling and analysis are also required and it is possible in this way to avoid duplication of effort and to make savings by using samples for more than one purpose.

In addition, the WFD acknowledges water as an economic good and aims at getting the prices right, another area where the NIS can learn from the EU. Adequate water pricing acts as an incentive for the sustainable use of water resources and thus helps to achieve environmental objectives.

The classification system for water bodies in the NIS is inflexible and is not useful as a management tool. In addition, the Maximum Permissible Discharge (MPDs) limits of harmful substances set for each enterprise, or source of pollution, are based on ambient standards which are too stringent, so unrealistic, and fail to take economic or technological issues into account. The WFD offers a combined approach to pollution control with both limit values to control emissions from point sources and water quality objectives to limit the cumulative impact of emissions in water resources. Standards are set separately for different water uses. These standards can be used as benchmarks by the NIS.

For relevant pollutants and pollution sources of priority concern the WFD will require the establishment of Community emission controls and water quality objectives. Decision 2455/2001/EC established the list of priority substances. The Commission will now propose community-wide water quality standards and emission controls for the priority substances. Where environmental quality objectives or emission limit values have been set for particular dangerous substances under the Daughter Directives of the 1976 Directive on

Discharges of Dangerous Substances to Water (76/464/EEC), these will be reviewed and if necessary incorporated into the Framework Directive.

Waste Management

The *Framework Waste Directive* (75/442/EEC as amended by 91/156/EEC) requires the prevention of the production of waste and where waste is produced to encourage its recovery, including recycling, reuse or reclamation and the use of waste as a source of energy. Where this is technically and economically impossible, waste must be disposed of in a manner which avoids or reduces environmental impacts. This is the backbone of the EU waste policy and adoption of this approach in the NIS is recommended. Other useful concepts promoted by the waste framework directive are:

- the “polluter pays” principle to the disposal of waste, to ensure that the cost of disposing of waste is borne by the producer of the waste or by the holder of the waste who passes it on for collection or disposal;
- wastes should be disposed of as close to the source as possible;
- producer responsibility: economic operators, and particularly manufacturers of products, have to be involved in the objective to close the life cycle of substances, components and products from their production throughout their useful life until they become a waste;
- development of a ‘waste management plan’ is required consisting of two principal components – a strategy for managing wastes (an overall framework or ‘blueprint’ which stipulates what actions will be taken and by when) and a plan for implementing the strategy (containing the details of how these actions will be undertaken and by whom).

The *Hazardous Waste Directive* (91/689/EEC) can provide a start for the development of a comprehensive regulatory system for handling hazardous waste in the NIS. The directive introduces a precise and uniform definition of hazardous waste, and promotes the environmentally sound management of hazardous waste, taking into account the special nature of such waste. A number of controls, additional to those laid down in the Framework Waste Directive, are imposed in respect of the handling and disposal of hazardous waste.

For example, the directive requires that where hazardous waste is transferred, a country has to ensure that it is accompanied by an identification form containing the details specified in the relevant sections of a standard consignment note and at every site where tipping of hazardous waste takes place, the waste has to be recorded and identified. In addition, establishments and undertakings which dispose of, recover, collect or transport hazardous waste should not mix different categories of hazardous waste or mix hazardous waste with non-hazardous waste in the course of collection, transportation and temporary storage. Hazardous waste must be properly packaged and labeled in accordance with international and EC standards.

3.2.3

EU Directive related to EIA

Well functioning horizontal environmental policy instruments such as EIA provide one of the essential tools for effective environmental management anywhere in the world. Improvement of the related procedures and their implementation is an acknowledged priority for the NIS. Indeed, some NIS countries (Armenia, Moldova) have already started developing EIA legislation in line with EU requirements.

The EU regulates this process in its EIA Directive (85/337/EEC as amended by 97/11/EC). Useful concepts and procedures that the EIA Directive offers include:

- the introduction of screening provisions¹⁵ and related selection criteria;
- diversification of the level of assessment for different types of projects;
- guidance on implementation procedures for the competent authority to review applications for development consent and environmental information to ensure that the EIA has been undertaken adequately and that the report includes all the information as specified in the directive;
- ensuring that EIA addresses all environmental impacts instead of merely verifying compliance with sector- and medium-specific technical standards (cumulative and indirect effects);
- requirement of mitigation measures in the EIA;
- enhanced public participation and disclosure, and;
- consideration of transboundary environmental impacts in line with the Espoo Convention.

3.2.4

Priority EU Directives related to Permitting

As seen in *Section 3.1*, the current permitting process in the NIS is cumbersome and ineffective. There are a few EU directives which could offer new concepts to improve the process.

Indeed, there is already interest in the Integrated Pollution Prevention and Control (IPPC) directive (96/61/EEC). Some internationally funded projects have studied possibilities of implementing IPPC in Moldova (*see Box 2.6*) and a current EU funded project in Russia is developing a paper identifying different policy options for moving towards IPPC.

However, it should be noted that the results of these projects show that moving from the current NIS permitting systems directly into an IPPC approach would be unrealistic and undesirable for most of the NIS. Even

(1) ¹⁵ Some NIS have already introduced some screening provisions. For example Russia and Belarus follow the example of the Espoo Convention, while Armenia has a screening list which is too broad to serve its purpose in practice.

within EU member states, IPPC has proven a difficult concept to implement and it is very costly. For example, the institutional capacity necessary to implement and enforce true integrated permits is enormous. In addition, there is a danger of steering people away from focusing on the environmental standards to be reached in a cost effective way by promoting very advanced technological solutions through concepts such as Best Available Techniques.

Nevertheless, a number of NIS environmental framework laws now mention concepts such as improved integration and the use of Best Available Techniques. Implementing regulations for an improved permitting system are mostly lacking and the IPPC directive could provide useful concepts in this respect. These include:

- better co-ordination between permitting authorities;
- permitting to steer away from inflexible end-of pipe solutions;
- ensure that applications for permits contain specified information. In granting permits, take into consideration any relevant information obtained through the EIA procedure;
- the permit itself would contain more than just ELVs and include requirements for self-monitoring, reporting and accident notification as well as promoting prevention of pollution, waste minimisation and efficient use of resources including energy and water;
- the use of BATNEEC (Best Available Techniques Not Entailing Excessive Cost) for some large facilities could be beneficial and the development of NIS compatible BREFs (BAT reference documents) would guide the setting of appropriate ELVs;
- ELVs for each permit would be set based upon BATNEEC in combination with environmental quality standards;
- permits should be made available for public review and comment.

The permits themselves do not necessarily need to be fully integrated. It would be a tremendous improvement if a system of well functioning media specific permits, adopting a new approach for the setting of ELVs with improved coordination between the different institutions, was set up.

The permitting process is a critical element of the environmental management system and introduction of IPPC requires a tremendous change of approach. Therefore, any country choosing to reform its system using the IPPC directive as a benchmark, would be advised, as a first step, to develop a draft strategy and policy options paper including a series of consultation rounds with stakeholders (industry, regional authorities, regulatory bodies, the public) to define the potential difficulties and possible approaches for implementation.

It is important to note that permitting is addressed in other directives, as well, including:

- Waste framework directive;
- Hazardous waste framework directive;

- Dangerous substances to water directive, and;
- Groundwater directive.

These can also be used for guidance in improving permitting processes.

3.2.5 Other Priority EU Directives

In addition to above-mentioned directives, there are a few other areas of EU legislation which do not necessarily fit into the categories above but which nevertheless would be able to provide important benchmarks for the NIS:

Control of major accidents

The so-called Seveso directive (96/82/EC) regulates the control of major accidents involving dangerous substances in the EU. The Seveso Directive applies to large installations using dangerous substances and links health and safety issues to those of the environment. Because it also operates through regulatory control of the activities on a site, it is complementary to the operation of the IPPC Directive.

The Seveso Directive outlines a system for the notification of use of dangerous substances at certain establishments, for the assessment of notifications, approval of major accident prevention policies, safety reports and emergency plans. Aspects of this Directive which NIS governments will find useful include requirements for companies:

- to prepare and implement a major accident prevention policy;
- to prepare an internal emergency plan;
- to prepare a safety report;
- to review and revise the policies and plans referred to above;
- to take measures to prevent major accidents and limit their consequences;
- to provide information to competent authorities about their operations and their measures;
- to exchange information and co-operate with competent authorities and other establishments; and
- following a major accident, to inform and provide specific information to competent authorities and to take remedial measures.

Strategic Environmental Assessment

Although practical examples of its use are still scarce, strategic environmental assessment (SEA) will become an important environmental policy tool for the future. In 2001, the EU adopted a directive of procedural nature on strategic environmental assessment (Directive 2001/42/EC). In addition, a protocol on SEA is currently being negotiated in the framework of the UN/ECE Espoo Convention on EIA in a transboundary context. The NIS are active partners within this forum.

To build on the apparent interest in SEA and considering its potential for better-integrated environmental management and implementation of a preventative as opposed to end of pipe approach, NIS countries are advised to consider convergence in this area. Benefits would include:

- ensuring that the environmental consequences of plans and programmes are identified and assessed before they are adopted;
- actively promoting the concept of sustainable development and an integrated approach to environmental management;
- guidance on what information is to be included in the environmental report recording the environmental impacts of plans and programmes;
- providing the public with opportunities to express their opinions.

Enforcement

The EU Recommendation on environmental inspection provides some useful guidance for improved enforcement for the NIS. It describes minimum criteria and guidelines for inspection tasks which could serve as useful benchmarks for the NIS to improve their enforcement performance.

It lists what inspection entails, it requires that inspection plans are developed (and made available to the public) according to minimum criteria, it provides guidance on site visits and reporting as well as investigation of serious accidents, incidents and occurrences of non-compliance.

3.2.6 *Legislation in the area of transparency and public involvement*

Public access to information and public involvement in environmental decision making is a crucial aspect of improving environmental management. All NIS governments address it in their legislation but practical implementation is often lacking.

As seen above, it plays an important role throughout the environmental acquis. However, current EU legislation specifically addressing this issue is not the best NIS model. The EU is still in the process of developing directives to implement the Aarhus Convention in full (Com (2000) 402 which will repeal the current directive 90/313/EEC on public access to environmental information and Com (2000) 839 on public participation) and the final versions of those directives are not likely to differ much from the Convention itself. Hence, the Aarhus Convention, ratified by all NIS except Uzbekistan and Russia, and guidance documents developed by the Convention Secretariat, would serve as better guidance.

3.3

POTENTIAL CHALLENGES AND BARRIERS

3.3.1

General Obstacles to Convergence

Convergence with the environmental *acquis* will be challenging for NIS countries. EU legislation requires major institutional reform which places a significant burden on implementing authorities. As indicated in Table 3.1 below, some of the legislation also has significant infrastructure implications requiring a high level of investment to achieve full compliance.

Some of the main obstacles to convergence can be summarised as follows:

- **Low government priority:** the present economic climate in the majority if not in all of the NIS is such that any potential government expenditure not viewed as immediately beneficial for economic regeneration is regarded as low priority;
- **Insufficient awareness of environmental issues:** government and industry lack the will to tackle environmental issues because awareness of the long-term economic cost of ignoring them is low. Despite the appearance of environmental NGOs in some countries, the pressure from civil society for effective environmental management remains piecemeal. In addition, while EU law now has a strong focus on public participation in decision making, this is a concept which remains poorly understood in the NIS;
- **Inherited pollution and standards:** there are major difficulties in meeting EU-type environmental standards stemming from the history of the Soviet system which left (a) a legacy of historic pollution and (b) a system based on high standards which were always unenforceable. The first imposes a major cost burden for clean up and for setting quality objectives while the second creates a political problem in adapting to more pragmatic and enforceable standards. One of the few sources of pride for many 'environmental professionals', given the obvious legacies of the Soviet era, is that in most cases their written or legal standards are much higher than those in place in the western world;
- **Scarce financial resources:** a large subset of the body of EU legislation requires significant financial investment to ensure that its standards are met and its procedures are conformed with;
- **Inadequate management capacities and local financial resources:** monitoring, testing and reporting procedures and practices have largely collapsed through lack of funding. Where procedures exist, there is limited, if any, equipment available for undertaking testing, and that which is undertaken would normally be to standards which are unrealistic for industry. New management structures need to be established, supported by the requisite equipment and processes, within a system with realistic standards;
- **Unclear designation of responsibilities:** a multitude of government departments at national and local/regional level have management

responsibilities which are often in conflict with each other or which leave gaps in management needs. This has caused a lack of credibility of regulatory institutions;

- ***Paucity of well trained staff in key institutions:*** while the numbers of trained environmental professionals is increasing in NIS countries, there remains insufficient quality and/or experience available in most government institutions to implement the types of institutional changes required to underpin legislative reform. The continued problems with government salaries ensure that the brightest and best may move on quickly into more lucrative private sector employment as soon as the opportunities arise;
- ***Legal systems in need of reform:*** effective enforcement frequently requires recourse to the legal system to enforce the payment of fines on large companies who flout regulations. In many NIS countries, the legal systems remain inadequate to meet environmental enforcement needs.

Successful convergence will require, *inter alia*, revised and realistic standard setting, integrated environmental policy development, improved EIA, permitting, monitoring, and enforcement, enhanced public involvement and cooperation of authorities not only on paper, but in practice. Almost all directives described in *Section 3.2* entail such requirements. For example, the WFD requires the set up of river basin management agencies and a system of public involvement in decision-making with regard to the river basins. Although some NIS countries have already experimented with the river basin management approach, and policy frameworks such as the EU-NIS water initiative strongly promote this approach, creating a favourable environment for further developing these efforts will require a tremendous institutional change for it to happen in practice.

3.3.2 *Specific Barriers to Convergence*

A number of specific barriers to convergence can be identified in relation to the each of the directives listed in *Section 3.2*. It goes beyond the scope of this report to analyse each of these in detail. However, the Handbook for Implementation of European Union Environmental Legislation (see Annex A for reference) provides useful guidance in this respect. Identification of specific barriers should be a key part of any convergence effort in the NIS and they are likely to vary from country to country. A small selection of specific barriers is provided in *Box 3.3*.

Selected Specific Barriers to Convergence

EIA Directive

- Need to take into account the inter-relationship between EIA and permitting procedures, related to the need to decide whether to introduce one single procedure or whether to have two separate systems;
- Need to plan for institutional requirements to introduce new systems, especially in terms of public participation;
- Need for co-ordination of technical expertise between the competent authority and other authorities with environmental responsibilities to ensure that EIAs are adequately reviewed.

IPPC Directive

- Major change in permitting philosophy required;
- Great cost associated to its implementation: application of BAT will require significant input of technical resources and a high degree of support for both the regulator(s) and industry;
- The production of comprehensive advice and guidance notes will be essential for effective implementation of the integrated pollution control regime, this is expensive and will take a long time to develop;
- Scope for political tension where bodies currently charged with regulating particular installations or media fear loss of power as a result of new arrangements for IPPC.

Water Framework Directive

- Adoption of suitable institutional structures to implement the river basin management approach will be a major challenge;
- Change to EU methods of water quality objective setting requires a major shift in policy.

Air Framework Directive

- Substantive changes to monitoring system will be required and different standard setting will require a major shift in policy;
 - High cost for local and regional government and industry.
-

3.3.3***Potential Legal Barriers***

Convergence towards these directives might raise certain legal issues in the NIS. These potential barriers will need to be identified by national legal experts in each country where an interest in convergence in certain areas of legislation exist.

Convergence can only be carried out successfully where conflicts between different laws have been resolved. For example, while the Russian law on environmental protection provides tax benefits for companies when BATs, non-traditional types of energy, use of secondary raw materials and waste recycling are introduced, the tax legislation does not include corresponding provisions. The ambitious lawmaking process that has been taking place over the last 10 years has been largely unsystematic and resulted in gaps and contradictions between new laws, decrees, and regulations. As a consequence, it is not always clear which regulations apply in a specific case. Many important sections of the legal framework still need to be redefined and brought into line with national legislation relating to other fields. Without solving these conflicts, much convergence would be ineffective.

In addition, lack of clarity in the delineation of responsibilities or authority often makes implementation impossible. These institutional inconsistencies and overlapping legislation will have to be tackled for any convergence to be effective.

Furthermore, the framework legislation in the NIS rarely defines implementing procedures. It is mostly dependent on implementing regulations to have effect. Convergence needs to focus, mainly, on the development of this secondary legislation, but within the environmental framework legislation currently in place. Where there are clear gaps or inconsistencies between the new regulations and the framework legislation, the framework legislation may have to change as well. The latter may be more difficult and take more time.

In general, it is important to acknowledge that where new legislation or regulations will be drafted in the future in the context of convergence, better legislation could be developed if the decisions on actual implementation and enforcement can be made beforehand by the responsible authorities. This would include taking account of the situation and experience of all those stakeholders which will be affected by the legislation such as regional authorities, industry and the public.

3.3.4 *Potential Institutional Barriers*

Convergence implies not only the adoption, but also the implementation and enforcement of the new legislation, in particular it entails reinforcing the administrative capacity to apply new requirements.

The issue of institutional structure and administrative capacity needs to be tackled along with alignment of the legislation. The experience of the accession countries has clearly demonstrated the necessity to take this into account. A recent study on 'the Administrative Capacity for Implementation and Enforcement of EU Environmental Policy in 13 Candidate Countries' identifies the main EU legislation requirements for institutional roles and responsibilities as:

- The development of planning and general management programmes under directives such as air, waste and water framework directives;
- The establishment of an integrated permitting process under the IPPC Directive;
- Close coordination between inspectors, authorities in charge of monitoring and the permitting authorities, in particular in terms of information sharing;
- Monitoring functions which require technical expertise and equipment;
- Interaction with the public involving presentation and communication skills.

Although the degrees vary according to individual countries, a number of common institutional barriers which will hinder full convergence (i.e. the effective implementation and enforcement of the legislation concerned) can be identified in the NIS as follows:

- Bodies in charge of environment protection usually lack political influence, financial and human resources;
- The few resources available are generally inappropriately allocated, due to inadequate designation of responsibilities;
- Unclear designation of competencies in legislation leads to overlaps of responsibilities which, in turn, causes duplication of efforts and feed in conflicts between the different bodies concerned. It may also involve gaps in the allocation of responsibilities;
- As a consequence of the conflicts noted above, there is a lack of information sharing between different responsible bodies;
- A low level of enforcement, due in particular to the insufficient number of inspectors, corruption practices, the lack of monitoring data and equipment, and conflicts in allocation of regulatory responsibilities, plus a culture of producing data for data's sake instead of for management purposes;
- Very limited level of consultation and negotiation, if any, with stakeholders by the management and regulatory authorities, limiting space for trade-off, the introduction of incentive, consensus building and encouraging stakeholder buy-in often leads to the development of unworkable policies and unrealistic standards.

As shown above, the current institutional structures and lack of administrative capacity prevent effective or innovative approaches to environmental management. Therefore, support for institutional reform is essential. Where possible, such reform should be focussed on filling in the gaps and resolving conflicts between departments and agencies, supported with extensive and focussed training of staff involved in environmental management and regulatory functions. In addition, legislative and institutional reform needs to be backed up by a minimal level of equipment to ensure people can carry out their new functions, though it is essential that the equipment is the final and not the first piece to be put in place.

3.3.5

Cost Issues

The table below provides a qualitative indication of the infrastructure needs and administrative implications of NIS 'harmonisation' with the EU environmental acquis. The table is based on the European Commission Report prepared by AEA Technology Environment (UK) consultants for the Ukrainian National Workshop on Solid Waste Management and Disposal, held on June 5-6, 2002.

Table 3.1 Cost Implications of Harmonisation with Environmental Acquis on Public Budget

Areas of EU Legislation	Major Infrastructure Investments	Major Administrative Implications
Air		
Air quality framework	X	X
Large Combustion Plants	X	
Fuel Quality	X	
Water		
Water Framework Directive	X	X
Drinking water	X	X
Dangerous Substances	X	X
Urban waste water treatment	X	X
Bathing water		X
Nitrates	X	X
Waste		
Waste Framework Directive		X
Incineration	X	
Shipment of waste		X
Hazardous waste	X	X
Landfill	X	
Packaging	X	X
Industrial Pollution and Risk Management		
IPPC		X
EMAS and Ecolabel	X	X
Industrial accident prevention		X
Horizontal		
EIA		X
Public Access to information		X

In general, legislation which gives the greatest benefit to the cost of implementation should be given a higher priority than that producing lower cost/benefit ratios. For example, implementation of the Urban Waste Water Treatment and Large Combustion Plant Directives rank amongst the most expensive as they are infrastructure intensive. Therefore, these directives are less useful as benchmarks for the NIS in the short term.

Nevertheless, directives such as IPPC (expensive on institutional development) and the water framework directive (expensive on infrastructure requirements for full implementation) still provide useful benchmarks for the NIS in terms of concepts, procedures and principles to steer the reform. Full implementation is not necessary to obtain many of the benefits.

Overall, it is difficult to set a price on convergence as the NIS can choose to implement only a part of the acquis or a certain directive, using the most cost-effective way of reaching the greatest environmental benefits. In this respect, the convergence effort in the NIS will be very different from the approximation process in the accession countries, where initial estimates of the cost of all investments needed to comply with the EU environmental

requirements for drinking water, wastewater management, large combustion plants and waste were around 120 billion Euro for the ten CEE countries¹⁶.

3.3.6 Ways to Overcome the Barriers

It is difficult to provide clear solutions to tackle the barriers to convergence. First and foremost, they will depend on whether there is high-level political support from the NIS governments and whether there will be a focused interest from the donors to assist in the process.

So far, donor assistance to the NIS in this area has been relatively insignificant, unfocused and uncoordinated. This is mostly due to a lack of clearly defined objectives in comparison with the accession countries where the goal was approximation was clear. The NIS and donors will have to decide together where the road map for convergence should go in the future with clearly identified and measurable goals and priorities. It is important that the assistance programmes take account of the regional specifics and differences amongst the countries in order to prevent serving the wrong audiences and providing unwanted services.

The following list provides some ideas to tackle the barriers:

- Make use of lessons learnt in accession countries;
- Ensure that the focus of reform is in line with the environment strategy of the country in question;
- Focus on cost benefit;
- Make use of practical pilot projects stimulating the copying of successes in other regions, and actively seek to replicate success in different countries while taking the specificities of each into account;
- Strengthen progress in activities under ongoing policy frameworks such as the NIS network on Environmental Compliance and Enforcement and the EU-NIS water initiative;
- Make use of the momentum created by international commitments that the governments have signed up to through the ratification of multilateral environmental conventions: where EU legislation promotes similar concepts, standards and principles, there will be a bigger chance of success;
- Develop implementation and enforcement strategies for new or revised instruments before legislation is drafted, with a strong focus on the institutional mechanisms required, plus the qualifications required of key personnel, and the financing necessary to ensure effective implementation, including for critical equipment needs (especially for monitoring/testing procedures). Do not start with the equipment as

¹⁶ European Commission, Communication from the Commission, *the Challenge of Environmental Financing in the Candidate Countries*, COMM(2001) 304 Final.

this can provide perverse incentives and without adequate training and institutional reform frequently breaks down or becomes obsolete;

- Tap into the strong scientific and technical tradition of the NIS to identify and develop cost-effective new methods of implementing environmental requirements;
- Focus on staff training, especially on medium length exchange programmes which allow NIS staff to spend extended periods learning on the job in EU countries in local and regional government as well as EPAs and national ministries. This supports integration of new techniques into daily tasks and supports cultural change;
- Identify funding mechanisms which can be used to feed into this process – e.g. World Bank TACIS, EU, environmental funds etc;
- Identify key persons/individuals/groups/fora to coordinate these activities.

The list outlined in *Box 4.1* is a preliminary list of EU environmental legislation suitable for convergence for the NIS. It is based on those directives that provide particularly suitable benchmarks or solutions to the priority NIS policy instruments in need of reform. Criteria that have further guided the choice include:

- focus on legislation that is either horizontal or deals with the industrial environment, as opposed to the nature protection related legislation since the industrial environmental problems are at the forefront of issues to be addressed in the NIS;
- the appropriateness of a piece of EU legislation in relation to the level of sophistication or development in the NIS;
- focus on fundamental environmental legal provisions instead of technical requirements for infrastructure;
- focus on directives addressing procedures, general approaches and institutional frameworks such as framework directives.

Box 4.1 ***Priority EU Directives for Convergence***

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- Air Framework Directive (96/62/EC) and its daughter directives (1999/30/EC and 2000/69/EC)
 - Directive on Fuel Quality (98/70/EC)
 - Water Framework Directive (90/2000/EC)
 - Waste Framework Directive (75/442/EEC as amended by 91/156/EEC)
 - Hazardous Waste Directive (91/698/EEC)
 - EIA Directive (85/337/EEC as amended by 97/11/EC)
 - IPPC Directive (96/61/EC)
 - Seveso Directive (96/82/EC)
 - SEA Directive (2001/42/EC)
 - Recommendation on Environmental Inspection (2001/331/EC)
-

Further prioritisation of this list should be based on the particular circumstances of individual NIS countries and existing relevant initiatives.

All these directives provide useful procedures, mechanisms and benchmarks for the NIS to improve their environmental policy instruments. This list is not exhaustive and is focused on priorities for the next 3-6 years. The EU *acquis* offers a large number of legislative documents that could serve as benchmarks and ultimately it is the countries concerned who should decide their priorities. In addition, priorities for convergence will vary from country to country.

There are a number of potential legal, institutional and cost barriers to convergence which need to be addressed in greater detail, country by country, when the decision for future convergence efforts are made by the NIS and the donors. In addition to the opportunities to tackle some of those barriers offered in *Section 3.4*, a few general recommendations can be made for the convergence process.

EU environmental law can provide a series of benchmarks to assist the NIS in more effective implementation of environmental goals. It is strongly advised though, that the NIS aim at convergence using the general approach of EU directives but not necessarily adopting all the EU legislation in detail. Convergence must ensure that the general approach is effectively implemented and not limited to policy declarations. Hence, it must be backed up by implementing regulations and institutional reform.

The various framework directives provide particularly valuable guidance in terms of philosophy, general approaches and institutional frameworks. EU legislation can be used to streamline and focus the NIS policies and the plethora of current legislation, and subsequently to design programmes to meet the goals set. These programmes should be based on a cost effective approach i.e. tailored to local circumstances. For instance, the setting of tariffs for domestic water charges which must be such that the population can afford them. The selection of effective economic instruments could benefit from the extensive experience of using such instruments in EU countries, and take into account the use of the economic instruments already in place in the NIS.

Environmental quality objectives will only ever be achieved in the NIS using **cost-effective** methods. It is more important to pay attention to the percentage of objectives met in relation to the percentage of investment. In other words, if a US\$ 20 investment allows for an improvement of 80% but an improvement of 90% involves an additional investment of US\$ 100, these US\$100 may be better spent elsewhere in the environmental sector. This is particularly important given the chronic lack of financial resources in this area, and the emphasis of some directives on major infrastructure improvement.

More in-depth regional **consultation** processes should be developed with the NIS governments on this issue.

- Lessons can be learnt from accession countries but one has to keep in mind that the approximation process took place in an entirely different political and financial context from the one which exists between the EU and the NIS. For instance, the gap analysis approach with tables of concordance used widely in the accession process has only a more limited use for the NIS as the NIS are not obliged to fully transpose legislation. In this respect, perhaps the experience from the Baltic states is most interesting for the NIS, as these countries have moved towards approximation from a Soviet rather than a CEE based heritage.

Box 4.2***Suggested principles of convergence***

When planning convergence activities, the following principles should be considered:

- Adhere to the ***spirit*** of the EU directives rather than aim to fully copy them
 - Consider the ***costs*** of implementing the changes in legislation, and take those pieces which are most cost effective
 - Ensure clear reference to the ***national circumstances*** (environmental priorities, national policies, initiatives, customs, existing reform base etc.)
 - Ensure full ***engagement of all stakeholders***
 - Ensure understanding that Convergence is NOT simply a technical or legislative exercise but an ***interplay*** of technical, legal, sociological, economic and institutional issues. Therefore, integrated implementation plans are required for each aspect of convergence.
 - Ensure legislative reform is backed by ***institutional reform*** and training
 - ***Use a phased*** approach. Convergence is not Approximation
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