

Your Complaints

For Strong Implementation of the Energy Efficiency Directive

*A practical guide for using complaints
to the European Commission to support
national implementation*

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Table of contents

1. Complaints: a powerful tool not yet used for energy efficiency	3
2. The many faces of infringement	4
3. The specific role of complaints	5
4. How to make a successful complaint	6
5. The EED Article 7 case	9
6. Good accompaniments to complaints	13
7. Useful references	13



1. Complaints: a powerful tool not yet used for energy efficiency

Respect for the rule of law is the fundamental principle of the EU. But it is a long and difficult path for EU legislation, like the Energy Efficiency Directive (EED), to be correctly applied and thus fully respected. Directives require, as a first step, legal transposition at national level, this includes interpretation of the legal requirements - which do not always have a straight-forward wording due to difficult negotiations - in light of the provided purpose and objectives in the law.

The experience so far from the implementation of EU's energy efficiency legislation has not been very promising. Either legal provisions were rather weak, like the Energy Services and Energy Performance of Buildings Directives, leading to low ambitions; or enforcement is not given sufficient attention or capacity, as it is the case with market surveillance to ensure that minimum efficiency requirements under the Ecodesign Directive are respected. The Energy Efficiency Directive provides a better opportunity as it sets substantive requirements backed up by targets to be met by Member States. But this does not make it a self-fire success and it will be vital that stakeholders and the European Commission closely follow Member States and check whether they correctly apply the Directive.

As the guardian of the EU treaty the European Commission is central to ensure the correct application of EU laws. Over the last four years the European Commission had in average some 2,000 infringement cases open against Member States. Given that the number of infringements is limited by the Commission's restricted staff capacities, it may well be only the tip of the iceberg of possible infringements of EU law. The majority of infringements are in the field of environmental protection (about 20%), followed by transport and taxation, and only about 5% in the field of energy.

But the Commission needs the support of stakeholders. Complaints from stakeholders or citizens are the most important trigger for infringements, with more than half of all infringements originating from complaints, and only a third is based on Commission's own initiative, while the rest result from Parliamentary questions or petitions. But not all complaints are successful. Over 3,000 complaints are registered each year, suggesting that about two-thirds of complaints are not successful.

Currently the area of energy efficiency is not targeted by complaints. Only around 60 complaints were registered annually (2010-2011) in the field of energy policies, mostly in the area of renewable energy and internal market.

The objective of this document is address this and help and advise stakeholders on how to make use of complaints in order to support a strong implementation of the EU Energy Efficiency Directive in order to realise energy savings to achieve the EU's 2020 energy efficiency target and pave the way beyond.

The Coalition for Energy Savings' Guidebook for strong implementation of the EED began this by providing advice on how stakeholders should get involved in implementation, and the Coalition's recent assessment of the national plans for implementing Article 7 provides useful insights into the challenges ahead and potential directions for complaints.

Our practical guide for complaints builds on this work and should encourage stakeholders, both at national and EU level, to make best use of complaints to the European Commission in order to tackle poor or lacking implementation.



2. The many faces of infringement

Member States are responsible for implementing EU law, and the European Commission is responsible for ensuring that law is correctly implemented. If a Member State fails to implement EU law as prescribed and, therefore, does not comply with its obligations, the Commission can take action to correct this infringement of the law. This procedure is commonly called "infringement proceedings", see Figure 1 for a timeline and step-by-step outline of the process.

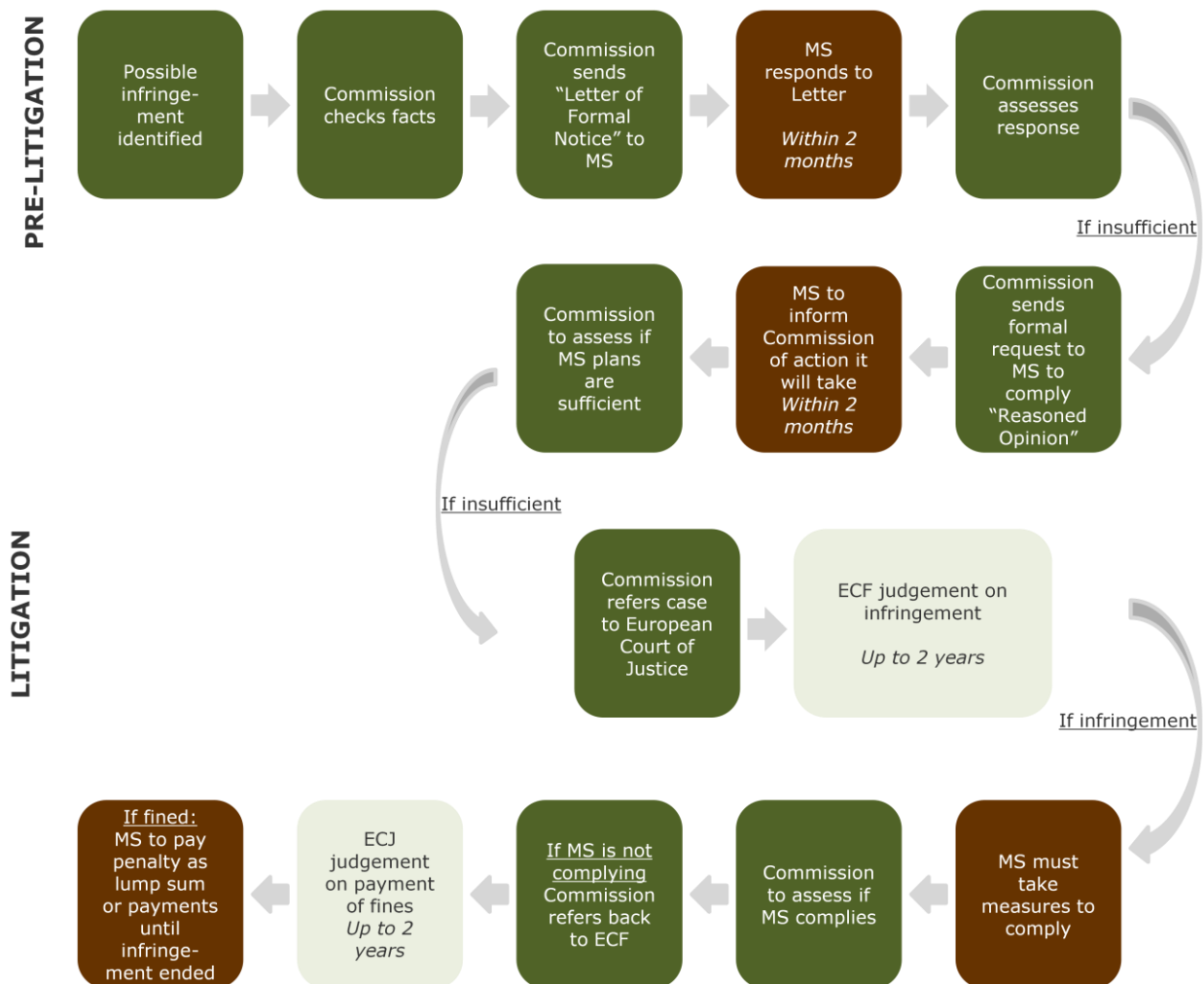


Figure 1 – The infringement process

There are three types of infringements:

1. Non-communication of measures transposing Directives
2. Non-conformity of national measures, where the Directive has been transposed but not correctly
3. Bad application of EU law : the national texts are correct, specific application is not compliant

In the case of non-communication this leads automatically to the Commission commencing the infringement process. For non-conformity or bad application this is where complaints can have a role in initiating the infringement process



3. The specific role of complaints

Not all failures to correctly apply EU laws are subjected to infringements and the infringement process can take a long time and may not necessarily result in Member States correctly applying the laws or being brought in front of the European Court of Justice. The procedures are subject to political priorities. For example the decision of referring a case to the European Court of Justice is usually taken by the College of Commissioners, except for non-communication cases, i.e. a Member States does not respect reporting deadlines.

Therefore, complaints have an important role in exposing non-compliances and setting political priorities. Complaints provide information to the European Commission that it may not have previously received or analysis it might not have undertaken, without complaints from stakeholders the European Commission relies solely on information it receives from Member States.

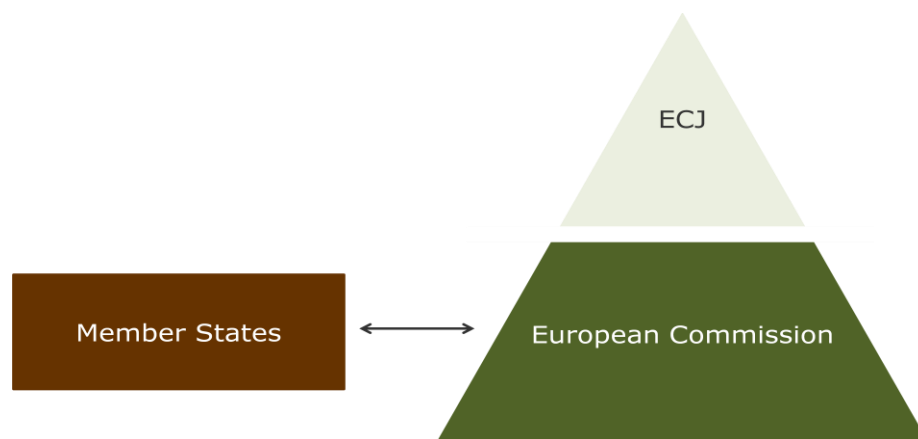


Figure 2 – European Commission relies on Member States information

Complainants help setting priorities, provide another channel for information and a useful dialogue may be established.

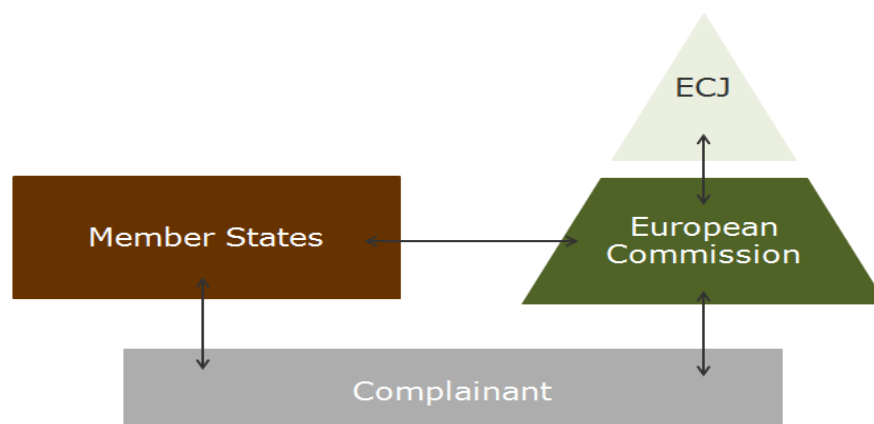


Figure 3 – Complainants provide another channel for information

There are three main questions which are central to assess whether there is any infringement:

- Communication: Has the MS communicated the requirement by the deadline?
- Completeness: Is this complete including all the required details?



- Compliant application: Does this comply with the requirement delivering its purpose?

Where the reply to any of these questions is no, a complaint from a stakeholder could be appropriate.

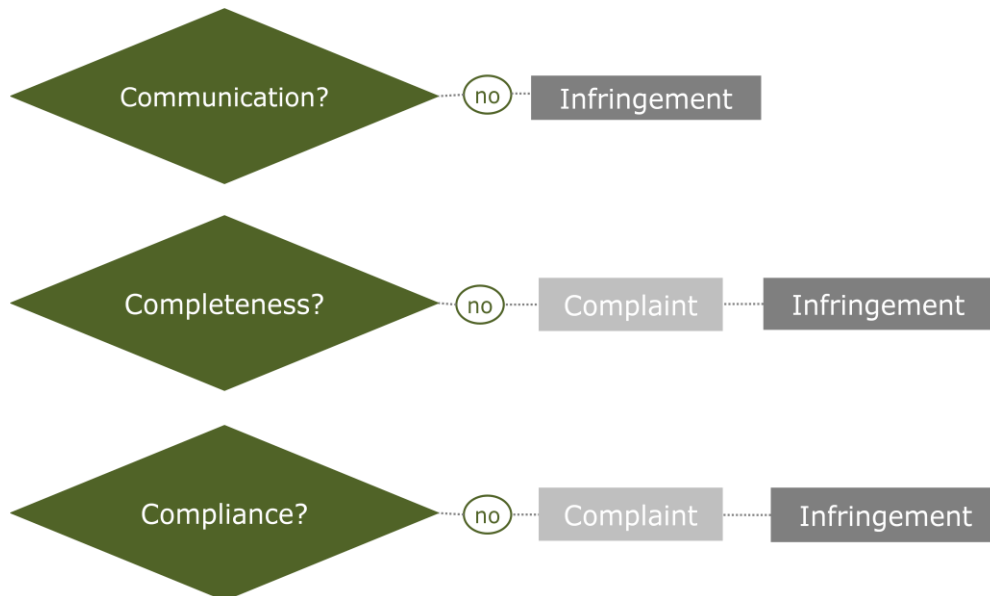


Figure 4 – Three questions to assess if a complaint is appropriate

4. How to make a successful complaint

Anyone can file a complaint with the European Commission against a Member State about any measure (law, regulation, or administrative action), absence of a measure or practice by a Member State which they consider incompatible with EU law. Complainants do not have to demonstrate a formal interest in the subject of their complaint or prove they are concerned by the measure or absence of the measure. However, there are some criteria that must be met to ensure the complaint is investigated:

1. It must be written in one of the official languages of the EU
2. It must be submitted in writing (letter, fax or email)
3. The sender must be identified, not anonymous with a full address for further correspondence
4. It must refer to a Member State
5. It must not relate to the acts or omissions of private person or body, unless the complaint reveals the involvement of public authorities or alleges their failure to act in response to acts or omissions of private person or body
6. It must set out a grievance
7. It must not set out a grievance upon which the Commission has already adopted a clear and public position
8. It must set out a grievance within the scope of EU law



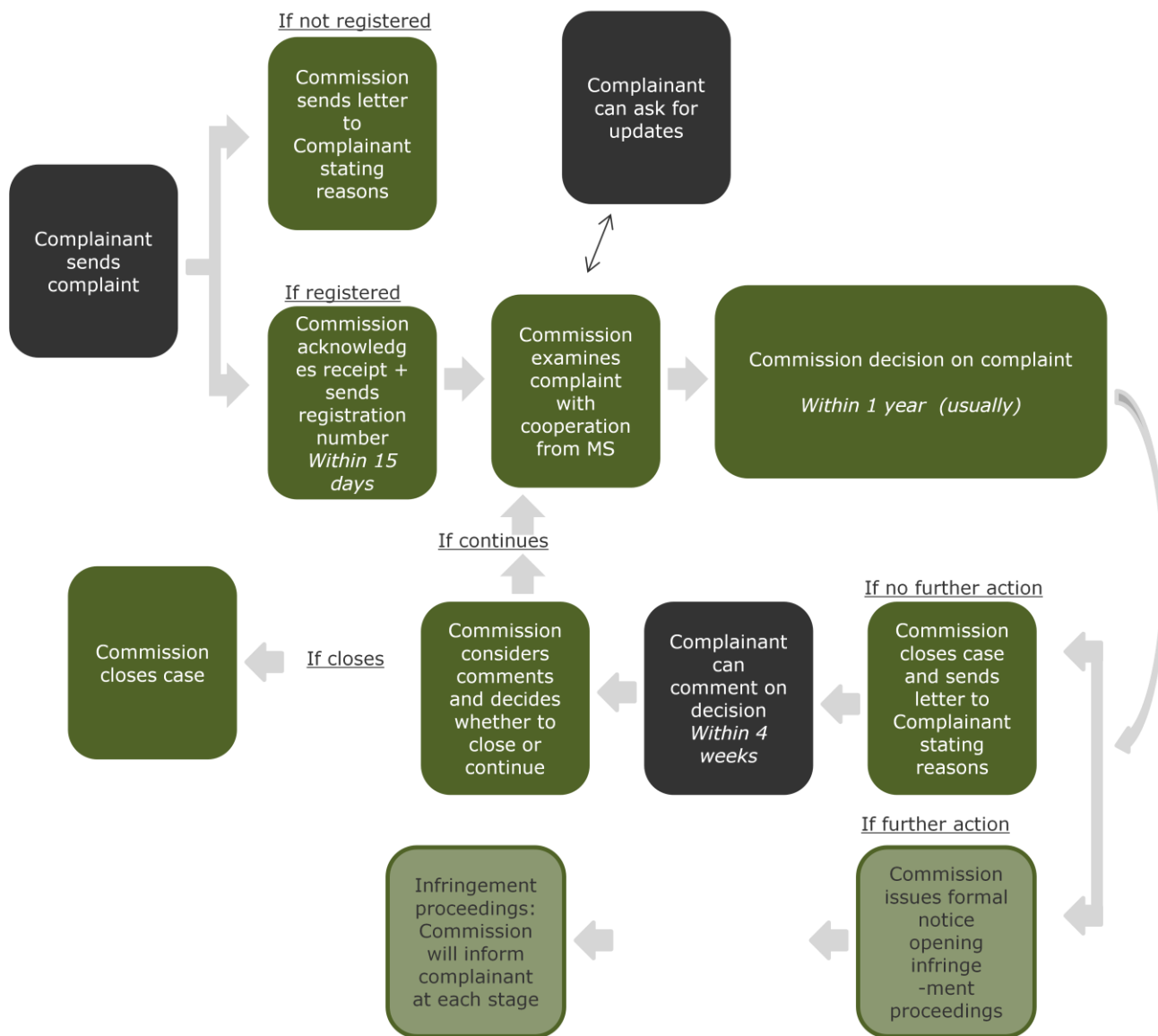


Figure 5 – The complaints process



It is also advisable to send the letter to the Secretary General, rather than via the DG or Unit within the Commission, as this ensures the letter enters the proper complaints process directly and reduces time delays.

The European Commission has published guidance on the complaint procedure in terms of the basic requirements for a complaint to be registered. However, for a successful complaint leading to investigation by the Commission, and thus potentially infringement proceedings or at least discussion with Member States, it is also necessary to build a robust case.

Fact and figures - A clear explanation of how the law, and the spirit of the law in terms of the objectives of the law, is being infringed including references to national and EU legislation (directives, decisions, treaties, acts, etc) and guidance, with evidence is vital. The evidence should include a detailed description of the facts which show that the complaint is valid, this should be mentioned in the main content of the letter with, if appropriate, more detail as an annex to the letter.

National action - Contact with national governments prior to making a complaint to the European Commission is advised by the Commission and an insufficient response by that government strengthens the need for the Commission to be involved. Therefore, details of contact (including copies of correspondence) with national governments on the topic of the complaint should be included in the complaint.

Strategic Complaints / Multiplication - A series of complaints from complainants in different Member States about actions, or lack of, by their governments on the same topic, may also lead to greater consideration by the Commission. The Commission says in its guidance that it may group complaints on similar issues. Therefore, contacting stakeholders in other Member States about the complaint you are submitting may strengthen your own complaint, as well as, encourage more complaints to drive stronger implementation. Examples of what other national governments are doing, particularly in terms of where implementation is better, can also provide the context and a contrast for comparison with poor implementation.



5. The EED Article 7 case

Article 7 of the Energy Efficiency Directive provides a good basis to make use of complaints as it sets out not only detailed procedural requirements but also the necessary results, the 1.5% annual savings. Annex V of the EED sets out methods and principle for calculating the impacts of energy efficiency obligation schemes or policy measures under Article 7. More information on Article 7 and how it is being implemented can be found in the Coalition for Energy Savings' report "Analysis of Article 7 Member States' reports".

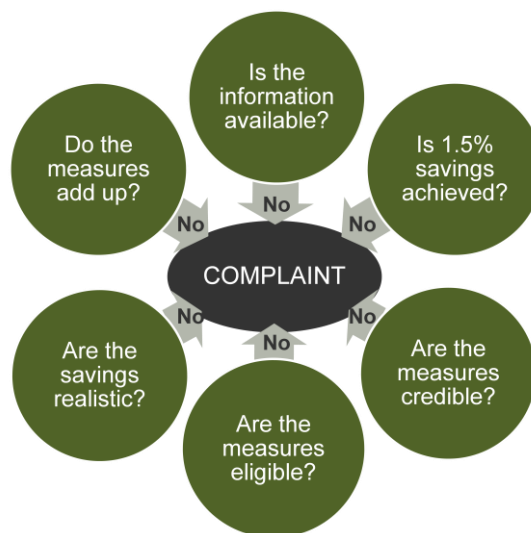


Figure 6 – Article 7 requirements

As shown in figure 6, key questions about how Member States are implementing Article 7 can help establish the content of a complaint.

Using these questions as a basis, the following example letter of complaint shows how a complaint could be structured and example of issues and elements to include for a successful complaint. The example builds on the complaint template form provided by the Commission, but goes beyond the basic requirements to ensure the complaint is registered, striving for a successful complaint leading to investigations by the Commission and possible infringement proceedings. This example is only provided for guidance and has not been checked by lawyers. Each complaint needs to be looked at on a case-by-case basis from a legal and technical point of view to include more details specific to the national situation.



"Exemplary complaint"

Ms Catherine Day, Secretary General, European Commission

Complaint to the European Commission concerning failure of MY COUNTRY to comply with the provisions of the EU Energy Efficiency Directive 2012/27/EU ("EED") Article 1, 3, 7 and Annex V

Dear Ms Day,

I hereby complain to the European Commission concerning the failure of MY COUNTRY to comply with the provisions of the EU Energy Efficiency Directive 2012/27/EU ("EED") Article 7 and Annex V.

I believe that full compliance with the EED is urgently required in MY COUNTRY to substantially increase energy efficiency and tap the huge cost-effective energy savings potentials.

I therefore support the implementation of EED, but identified several problems in MY COUNTRY, in particular concerning compliance with Article 7 requirements. It requires MY COUNTRY to achieve 1.5% new energy savings each year in the period 2014 to 2020, which will deliver the largest share of savings resulting from the EED.

Based on my assessment of the reports to the European Commission under EED Article 7, MY COUNTRY has failed to comply with the legal requirements of Article 7 and failed to credibly demonstrate how the 1.5% energy savings target can be achieved by the measures planned.

In addition to that MY COUNTRY is not showing sufficient consideration for the purpose of the EED to increase energy efficiency improvements and to contribute to reaching the EU's 2020 efficiency target. The implementation of the EED in MY COUNTRY has been done without public consultation or possibilities to provide input. I have asked the ministry responsible to respond to my concerns, without success so far.

I expect the European Commission to do everything in its powers conferred by the Treaty to ensure that MY COUNTRY correctly applies and is in full compliance with EED requirements.

If such failures are not corrected rapidly, Europe will miss its 20% energy efficiency target by 2020 and industry and households will continue to waste huge amounts of energy and money for their energy bills.

Please find attached the evidence and legal justification for my complaint (Annex I) and the copies of my exchange with MY COUNTRY's implementing authorities.

[Confidentiality clause]

Yours Sincerely,

[NAME]

[ADDRESS]

Annex I - Legal justification and evidence of non-compliance

- Member States must credibly demonstrate with their Article 7 reports that energy end use savings target equivalent to 1.5% new energy savings per year between 2014 and 2020 can be achieved with the EEOs or policy measure planned



- 1) *Article 7.9 requires MSs to report by 5 December 2013 to the European Commission the policy measures planned and how they would achieve the required savings, demonstrating how the criteria of Article 7.10 are met and providing information according to Annex V, including:*
 - a. *the calculation and amount of energy savings equivalent to 1.5% new energy savings a year*
 - b. *List of eligible measures categories and expected savings*
 - c. *Methodology for testing additionality and materiality*
 - d. *M&V system*
- *MY COUNTRY failed to comply with the legal requirements under article 2.18, 7.7, 7.9 7.12 and Annex V.4 and cannot demonstrate in a credible way how the energy end-use savings target will be reached.*
- 2) *Article 7 report of MY COUNTRY lists five categories policy measures, a combination of EEOs and alternative measures, and the estimated savings, which are added up to supposedly reach the overall savings required, but*
 - a. *the 'road charge' measures is not-eligible;*
 - b. *the savings from 'energy taxes' is exaggerated;*
 - c. *the saving from 'building standards' are not additional;*
 - d. *early and late savings from the planned EEO are not eligible to count toward the overall target;*
 - e. *savings from expired EEOs are not eligible; and*
 - f. *double counting of savings is not addressed and the methodology for testing additionality and materiality is missing.*
- 3) *Current 'road charges' in MY COUNTRY are not formally put in place in order to support uptake of energy efficiency measures and thus does not meet the definition set out in Article 2(18) and is not be eligible to count towards reaching the end use savings target. The report estimates that 10% of the required savings will be delivered by 'road charges'.*
- 4) *Substantial savings, 20% of the overall target, are estimated to be delivered via energy taxes, without providing details including*
 - a. *how tax levels would evolve in future;*
 - b. *calculation methodology for estimating the savings and price elasticities are not explained/not used correctly.*
- 5) *Substantial savings, 20% of the overall target, are estimated to be delivered from building standards from 2005, which are far below the cost-optimal standards based on the methodology provided by the European Commission for implementing the EPBD, thus appear not to be additional and thus do fail to comply with Article 7.9d.*
- 6) *Savings, 5% of the overall target, are realised by the planned EEO before and after the 2014-2020 period and are counted toward the overall target, although Article 7.7 states that such banking and borrowing of savings are only allowed for obligated parties within an obligation scheme. This means that those savings outside the period cannot be used to count for the overall target.*
- 7) *Savings, 5% of the overall target, are estimated to result from the old EEO period, which terminated in 2009. Those savings are not new as required by EED Article 7.1 and are thus not eligible.*



- 8) *Several policy measures overlap in scope. For example energy taxes overlap with renovation programme. MY COUNTRY has not provided any estimates for double counting and simply added up the estimated savings of the different policy measures.*
- 9) *As a result of these failures to fulfil the EED requirements it is to be expected that at least 60% of the estimated savings are either resulting from non-eligible measures or are not new and additional and that therefore the end use savings target cannot credibly be achieved.*

Further considerations

- Member States should consider the impact of reducing the energy end use savings target under Article 7 by using exemption on achieving the overall national target (Article 3) and thus the EU target.
 - 10) *Article 3 requires Member States to set indicative national energy efficiency targets for 2020 by 30 April 2013 taking into account inter alia that the Union's energy consumption has to be no more than 1483 Mtoe of primary energy or 1086 Mtoe of final energy and the measures provided by the EED.*
 - 11) *Article 7 requires Member States to put in place an EEO (Article 7.1) and / or policy measures (Article 7.9), which in total have to deliver the equivalent of 1.5% new energy end use energy savings each year from 2014 to 2020.*
 - 12) *Article 7.1 allows MS to exclude the sales of energy used in transport from calculating the target and Article 7.2 and 7.3 allow a further reduction of the target by maximum of 25% under certain conditions.*
 - 13) *The EU wide energy savings resulting from Article 7 are estimated to deliver 4 - 8% points of the EU's total 20% target for 2020 and are therefore having a significant impact in closing the EU target gap, which stood at 10% before the EED was adopted (see EED guidebook second edition 2013, figures 6 and 14 and table 1).*
- MY COUNTRY does not honour the main objective of the EED to achieve the EU's 2020 target by failing to take the EU target into account in setting a national target and by applying maximum exemptions to reduce the energy end use savings target making the achievement of the national target unlikely.
 - 14) *Article 3 report of MY COUNTRY sets an indicative target of 100 Mtoe final energy consumption for 2020, but does not explain in how far it takes into account neither the EU target nor the measures provided in the EED. A 20% energy efficiency improvement for MY COUNTRY against the European Commission used 2007 baseline would result in 95 Mtoe final consumption, which is significantly lower than the indicative target.*
 - 15) *Article 7 report of MY COUNTRY uses the maximum exemptions to reduce the energy end use savings target for 2020 from 10 to 5 Mtoe, by excluding all transport energy sales and reducing further by 25% by discounting sales to ETS covered industries and claiming early actions, without considering the impact this would have on reaching the Article 3 target. It would mean that final energy consumption is projected to reduce to only 105 Mtoe rather than 100 Mtoe if the 2009 PRIMES energy projections are used. MY COUNTRY has not provided further information about additional energy savings which would show how the indicative target of 100 Mtoe would still be reachable.*

Annex II - Copies of my exchange with MY COUNTRY'S implementing authorities

[xxx]



6. Good accompaniments to complaints

As shown through document, making strategic complaints can significantly improve implementation and encourage Member States to be more ambitious. In addition to complaints other routes can be used to drive ambition or raise awareness of issues of implementation:

Letters to and meetings with Commissioners and Director Generals

Letters to MEPs and parliamentary questions to the Commission – the Commission's response to parliamentary questions is a public statement, which may be desirable for communication and advocacy purposes, but is unlikely to be detailed.

7. Useful references

Coalition for Energy Savings, [EU Energy Efficiency Directive: Guidebook for Strong Implementation](#), September 2013

Coalition for Energy Savings, Analysis of Article 7 Member States' reports, April 2014 [link to be added when published]

European Commission, Application of EU law: [Making a complaint](#), January 2013

European Commission, Application of EU law: [Infringements](#), June 2011

European Commission, [EU Energy Efficiency Directive](#) 2012/27/EU, October 2012

European Commission, [Guidance notes to the Energy Efficiency Directive](#)

European Commission, [Updating the handling of relations with the complainant in respect of the application of Union law](#) - COM(2012) 154 final

