

What works to make EU law work? An analysis of the usefulness of national, transnational, and supranational compliance instruments

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Annex I Valourisation

1. Societal relevance

This study aims to provide insight into what works to make EU law work. It does this out of awareness that EU law does not always work as it should; member states do not always comply with EU measures, as a result of which policy objectives are not always achieved, and the beneficiaries of EU measures do not always enjoy the rights granted to them by these measures. While all legal systems are bound to suffer from a certain rate of noncompliance – achieving full compliance is therefore an illusion and, one may argue, even undesirable – the relatively novel nature of the EU as a political system makes compliance problems more urgent. This is the case, since the Union still needs to prove its credibility as an effective problem-solving system, and the effective implementation of EU measures throughout the Union is essential in this regard. Indeed, there is no added value of the EU if its measures do not benefit those whom they are intended to benefit.

In view of their adverse consequences for the credibility of the EU and for society, compliance problems are serious enough to merit political and scholarly attention. In fact, both in the political and in the academic world, the idea that the EU has a compliance deficit – and the related idea that compliance problems must be solved – has become a platitude. The past two decades have seen the appearance of numerous EU documents outlining the need to improve the implementation of EU law. Focusing primarily on the transposition phase of the implementation process, the increasing body of scholarly literature has shown that compliance problems exist, and identified a variety of structural and circumstantial factors underlying such problems.

While EU implementation research has delivered valuable insight into the problems encountered by member states in the transposition of EU directives, two lacunae that limit its practical relevance – for national and EU officials involved in ‘making EU law work’, and resultantly for citizens and businesses in the internal market – seem to exist. The first, which is hinted at above, concerns the fact that in contrast to the emphasis that EU institutions have put on the issue of (effective) law application, the phase during which the provisions of EU measures are applied to concrete cases on the ground has remained understudied in EU implementation studies. The weak presence of application studies is understandable, given that reliable information regarding the application performance of member states is difficult to gather. However, since applying EU rules is essential, if these rules are to achieve their full effect, and since we cannot under-

stand member state behaviour in the implementation of EU law by examining the transposition of directives alone, this lack of attention is a cause for concern.

The second factor that reduces the relevance of EU implementation research for practitioners and citizens alike is its excessive focus on implementation failure – as though all policies are bound to fail and all member states act in a vacuum when implementing EU rules. The majority of studies seem to overlook the fact that instruments that are designed to offer solutions to compliance problems, or that may otherwise be expected to support member states in the implementation of EU measures do exist. While knowledge about variables that explain implementation problems is certainly relevant for practitioners attempting to close implementation gaps, it seems that practitioners may benefit from knowledge about ‘what goes wrong’ in the implementation of EU law, *as well as* from knowledge about ‘what goes right’ in this regard. More concretely, they may benefit from insight into the functioning of tools that may be helpful for making EU law work better.

In view of the considerations outlined in the previous paragraphs, this study suggests that it may be valuable, from a relevancy point of view, to reverse the perspective on implementation and compliance in the EU. In the context of this study, this ‘reversed angle’ means the following. First, instead of focusing on the transposition phase of the implementation process, this study has directed its attention to the phase during which EU measures must be applied in concrete situations on the ground. And second, rather than concentrating on problems that member states may encounter in the application of EU measures, this study takes a solution-oriented approach by evaluating *the usefulness of compliance instruments for supporting the competent administrative authorities of the member states in the application of EU law*. Yielding insight into the usefulness of the studied compliance instruments for supporting national actors in the application of EU rules on the ground and providing recommendations on how the application of EU rules can be improved, this study is helpful for national and EU practitioners who are directly involved in the application of EU law and for those who are set to benefit from the rights and obligations outlined in this law.

2. Target group

The focus of this study on the usefulness of compliance instruments for supporting the application of EU law makes the research results interesting for practitioners involved in the implementation of EU law. The first and most important target group of this study is EU officials, in particular those officials who are assigned implementation-related responsibilities within the European Commission. Commission officials may benefit, first, from the finding that the effectiveness of compliance instruments depends to a great extent on the perceptions of their usefulness held by the target group of these instruments; that is, (the competent authorities of) the member states. This finding, and the finding that perceptions often vary across member states and across policy domains,

may be valuable for the Commission to account for in considerations regarding the design of compliance instruments in relation to individual member states and regarding specific policy domains.

Second, Commission officials may also benefit from the insight offered by this study into the conditions that may make specific compliance instruments work (better),¹ and from the relevant recommendations that this study presents.² Suggesting how the Commission could make better use of the compliance instruments that it has at its disposal as guardian of the treaties (e.g. the infringement procedure) and how it could facilitate the functioning of others (e.g. transnational networks), these recommendations aim to provide concrete ideas as to how the Commission could exercise its supervisory tasks more effectively and efficiently. In view of the shift in the EU, away from law making and towards implementation, these recommendations may be timely.

In addition to being potentially useful for EU officials, this study may be beneficial for national officials involved in the street-level implementation of EU rules (e.g. inspectors or civil servants responsible for licensing activities), and for those officials who are responsible for the coordination of implementation tasks at higher government levels (e.g. ministerial officials). This study may have an awareness-raising effect with regard to the variety of compliance instruments that exist – which may lead to a better use of such instruments by national authorities – and may shed light on the different ways that national authorities make use of compliance instruments and the motivations underlying the relevant dynamics. This type of knowledge may be valuable for enhancing mutual understanding and mutual trust amongst member states, both of which are not self-evident in a Union that is ‘united in diversity’.

3. Research products

At the time of writing, the most tangible products of this study are the recommendations that it has arrived at as to how the application of EU law on the ground can be improved. These recommendations, which are presented in Chapter 9, follow from two findings that the empirical research has given rise to. The first of these findings is that a mix of compliance instruments must be employed in a manner that is flexible towards member states when possible and harmonised when needed. A mix must be implemented because compliance problems may have different roots (namely, unwillingness, a lack of capacity, or a lack of norm internalisation) and because compliance instruments are interdependent (which means that they require each other in order for each of them to individually function effectively). Flexibility is needed because a one-size-fits-all approach to compliance management may not fit anyone (which means that uniformity towards member states may be counterproductive rather than supportive in terms of ensuring compliance). The second main finding of this study is that much is to be

¹ See Sections 4 of Chapters 4 until 8 of this study.

² See Chapter 9, Section 5, of this study (and see Section 3 below for a synthesis).

gained regarding the functioning of existing compliance instruments, which calls for attempts to make such instruments work better.

The remainder of this subsection briefly recaps the recommendations on how this twofold conclusion can be implemented by practitioners involved in the implementation of EU law presented in Chapter 9 of this study.

A. The Commission should gain more insight into the functioning of compliance instruments

This study suggests that the Commission must gain more insight into the functioning of compliance instruments, in order to ascertain where flexibility towards member states is possible and where a harmonised approach is needed, and to verify how the functioning of individual compliance instruments can be improved. Gaining more insight into what works to make EU law work better in different situations has both a practical and a legal component. Regarding the former element, while this study provides some initial insight into what may work to make EU law work better, an examination of this issue should ideally take place in each policy domain where improvements are needed. Any such examination should be framed by the general principles of EU law; notably, the general principle of equality of member states before the treaties. It seems that it may be useful for the Commission to first identify situations in which application would benefit from discrimination between member states, and then to assess whether discriminatory treatment could be implemented within the limits of the treaties.

B. The functioning of existing compliance instruments should be improved

Besides these general recommendations and based on the findings of each empirical chapter included in this study, this research provides concrete recommendations on how the functioning of the compliance instruments examined in context can be improved. These recommendations are briefly recapped below.

a. The Union's enforcement strategy must be reformed

The empirical chapters of this study suggest that the effectiveness of the infringement procedure and the manner in which the Commission uses its powers under this procedure are inadequate. This suggestion is not novel; it has been put forward in other research as well. Despite the fact that reforms to the infringement procedure have been introduced recently, these reforms do not seem sufficient to ensure the effective functioning of the procedure. Thus, this study recommends the implementation of further reforms to the Union's enforcement strategy.

First, while the establishment of an independent enforcement agency may be out of reach, the Commission could increase the transparency of its enforcement strategy, which is likely to lead to a degree of de-politicisation of the manner in which the Commission exercises its tasks as guardian of the treaties. This would increase the acceptance

rate, within society and amongst member states, of the Commission's exercise of its tasks as guardian of the treaties. Given the current discussions about bringing the EU closer to the citizen, such increased transparency seems important.

Second, it seems that it may be advisable for the Commission to rethink the 100% compliance standard that is formally used in relation to member states. There are practical and normative reasons for such advice. Practically speaking, one may argue that a smart enforcement policy overlooks instances of noncompliance that are minor. From a normative point of view, it seems generally accepted that full compliance is an illusion; a notion that seems to question the reasonableness of the 100% compliance standard. In view of the practical problems associated with the 100% compliance standard and the relevant normative reservations, a discussion on the reasonableness of the rather radical stance of the Commission that full compliance should nonetheless be attained, seems an important endeavour to undertake.

Third, it seems that improvements regarding the excessive duration of infringement proceedings may be sought in the implementation of binding time limits for member states, and for the Commission to act in infringement proceedings. Moreover, Article 260(3) TFEU – which makes it possible for the Commission to seek financial sanctions against member states that have failed to notify measures transposing a directive at the stage of infringement proceedings initiated pursuant to Article 258 TFEU – should be extended to include 'bad application' cases. In order for reforms along those lines to bear fruit, the Commission should use its competencies effectively. If the necessary reforms are undertaken and complied with, the infringement procedure could gain much credibility in the eyes of implementation actors, who may use it to their benefit in the application of EU law.

b. The Commission should be more of a guide of the treaties

The Commission as 'guide of the treaties' seems pivotal for the daily administration of EU law. It is also in relation to the functioning of the Commission in this latter role that much seems to be gained. This is the case, for example, since the Commission may not answer calls for guidance (or do so fast enough), and since guidance may confuse rather than clarify. Straightforward recommendations to improve matters are not always easy to provide, since what works to make post-legislative guidance work is case dependent. What may work for one member state may not work as well for another, and what is desirable in one policy domain may be counterproductive in another. Since guidance is amongst those instruments that implementation actors need and appreciate most, it is the case-specific considerations that account for the recommendations outlined in this study that seem essential to make guidance work optimally for supporting the application of EU law on the ground.

c. The Commission should facilitate 'informal' transnational cooperation

The emphasis that national officials put on the usefulness of transnational cooperation for supporting the application of EU legislation on the ground calls for recommendations on what type of cooperation to pursue. This study strongly suggests that such cooperation should be perceived of as informal. Legally formal networks – networks that are consolidated in EU legislation and subject to publicly sanctioned exchanges – seem poorly suited to this purpose. What seems more effective is cooperation in legally and materially informal networks or in materially formal networks. While networks of the former type are member state only configurations that function outside of the EU institutional order, networks of the latter type are materially embedded in the EU institutional framework and are characterised by a strong presence of the European Commission or an EU agency. For materially formal networks to be perceived as informal it is essential that the Commission is not present as a guardian, but as a facilitator.

Whether and how this is possible is likely to depend on the nature of the policy domain, which means that Commission participation in a network may be a difficult matter to 'get right'. The Commission may need to stimulate member state participation in networks by outlining participation thresholds and by (financially) facilitating participation when necessary; the latter is an important mechanism to get the 'willing but unable' involved in cooperation. Finally, at a time that is brimming with belief in the virtues of quantitative measurement, awareness should exist that networks may deliver outputs that cannot be measured, and that networks encompass much more than meets the observer's eye.

d. Member states should take responsibility and make the most of compliance instruments

It is too simplistic to place responsibility for making compliance instruments work on the Commission alone. As the users of compliance instruments, it is also up to the member states to indicate what they need and improve the functioning of compliance instruments that they say work well. This is not to say that the necessary efforts are not being undertaken by the member states. However, it seems that member states are quick to place responsibility on the Commission (or on other member states) when it comes to making application work better, and that they should examine themselves before others. Good faith effort from individual member states is as indispensable for making compliance instruments work as effort from 'the others'. This study suggests that there is much to be gained in this respect as well.

4. Innovation

While firmly set within the context of EU implementation research, this study departs from this research – thus, it is innovative in relation to it – for four reasons. The first is that EU implementation studies have focused primarily on explaining divergent performance records of member states regarding the transposition of EU directives. The