

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

Citation for published version (APA):

Polak, J. J. C. (2015). *What works to make EU law work? An analysis of the usefulness of national, transnational, and supranational compliance instruments*. [Doctoral Thesis, Maastricht University]. Maastricht University. <https://doi.org/10.26481/dis.20151016jp>

## Document status and date:

Published: 01/01/2015

## DOI:

[10.26481/dis.20151016jp](https://doi.org/10.26481/dis.20151016jp)

## Document Version:

Publisher's PDF, also known as Version of record

## Please check the document version of this publication:

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# Summary

## **Purpose, relevance, theory, and methodology (Chapters 1-3)**

What works to make EU law work? This may be one of the most important questions facing the European Union, in view of the nearly axiomatic implementation deficit with which it is confronted; a deficit that is problematic not only because it prevents the beneficiaries of EU measures from enjoying the rights granted to them by these measures, but also because the Union's credibility and legitimacy greatly depend on the effective implementation of EU measures throughout the Union. Problems with the implementation of EU law do not only concern the transposition of EU directives into national measures, but also the consecutive application and enforcement of such measures on the ground. In view of the adverse consequences of problems in the application of EU law, the EU institutions have attached great priority to ensuring that EU law is applied effectively throughout the Union. EU documents show that there is a clear recognition that the application of EU law is often inadequate and that continuous attention to application issues is therefore needed. They also show that the approach towards solving application issues requires review and, where necessary, improvement.

This study addresses the question posed at the beginning of this summary, by studying the usefulness of compliance instruments in supporting the correct application of EU law by the competent authorities of the member states. With its focus on application rather than transposition, this study clearly departs from the majority of EU implementation research. The research in this area offers insight into the manifold variables that may cause transposition problems, but the phase during which EU measures must be applied to concrete situations on the ground is understudied. This study is novel, too, given its concentration on solutions rather than problems that member states may encounter in the implementation of EU measures. While knowledge about variables explaining implementation problems may be relevant for practitioners who are attempting to close implementation gaps, it seems that these same practitioners may benefit from knowledge on 'what goes wrong' in the implementation of EU law, as well as from knowledge on 'what goes right' in this regard. More concretely, they may benefit from insight into the usefulness of tools that may be helpful for making EU law work better.

The compliance instruments that were selected for study are categorised as belonging to the supranational, transnational, or national governance level. On the supranational level, we find monitoring and sanctions (including EU agency inspections, naming and shaming, and the infringement procedure) and post-legislative guidance. Net-

works for administrative cooperation amongst member states are understood to be transnational instruments. In view of the lack of a veritable European civil society and the entrenchment of non-governmental organisations at the national level, civil society activism belongs to the national level. The same concept applies to national case law and preliminary rulings. While preliminary rulings are issued by the Court of Justice of the European Union, they are requested by national courts, and they acquire meaning within the national implementation context by virtue of the compliance of national courts with such rulings.

The usefulness of the selected compliance instruments was studied using a case-study methodology that involved three EU directives, each regulating different policy issues (general product safety, integrated pollution prevention and control, and safety assessment of foreign aircraft) and three EU member states, each featuring different implementation processes (the Netherlands, Poland, and Portugal). These cases were analysed using an interdisciplinary approach that combines perspectives from legal science with those pertaining to political science, particularly public administration. Case law, literature, and policy document analysis are required to obtain insight into the design of compliance instruments and into the conceptual, practical, and political frameworks in which these instruments exist. A survey and qualitative interviews were required to acquire insight into the perceptions of actors involved in the (street-level) application practice. Studying perceptions is useful not only because it is impossible to evaluate the usefulness of compliance instruments objectively (by establishing causal relationships between concrete compliance instruments and application practices), but also because the perceptions of the 'target group' of compliance instruments play an important mediating role in how these instruments are used and the impact they have on implementation practices.

### **Empirical findings (Chapters 4-8)**

The first main finding of this study 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, and a lack of norm internalisation), and because compliance instruments are interdependent (which means that they require each other in order for each of them individually to function effectively). Flexibility is necessary 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 gained regarding the functioning of existing compliance instruments; this calls for attempts to make such instruments work better. The conclusions of the empirical chapters as to what works to make compliance instruments work are summarised below.

## **A. Monitoring and sanctions (Chapter 4)**

Included in Chapter 4 on monitoring and sanctions, are inspections of national competent authorities conducted by EU regulatory agencies, naming and shaming exercises, and infringement proceedings.

### *a. EU agency inspections*

Inspections conducted by EU regulatory agencies primarily aim to monitor the implementation performance of member states and correct existing instances of noncompliance detected in the course of inspections. In the context of this study, such inspections are conducted only in the area of air safety; here, the national competent authorities responsible for daily implementation are subject to regular standardisation inspections conducted by the European Aviation Safety Agency. While Commission officials maintain that such inspections offer them a precise insight into the application performance of national authorities, EASA officials argue that inspections have a monitoring and an educational function. Thus, they are intended for the enforcement of EU law and the facilitation of national authorities in their work.

The usefulness of EU agency inspections for officials involved in the application process appears to vary across and within member states, and across professional positions. For such inspections to work as compliance instruments, they should have a monitoring function and aim to offer learning opportunities for inspected authorities. Second, members of the inspection team should possess sufficient knowledge and expertise to act as teachers in relation to national officials. Finally, the (organisational) culture of inspected authorities should enable learning to occur. The case studies included in this study suggest that, in particular, meeting the two latter conditions is not a matter of course.

### *b. Naming and shaming*

Naming and shaming consists of benchmarking the implementation performance of member states and showcasing countries whose performance is substandard. Naming and shaming can occur in public, in reports published by the Commission, or by an EU agency. Naming and shaming can also be a 'secretive' exercise, when information on the implementation performance is shared 'amongst intimae', namely, with national representatives gathering in Council working groups, expert groups, or implementation networks.

This study suggests that EU reports are rarely useful for supporting national officials in the application of EU law, and that naming and shaming 'amongst intimae' may be more useful in this regard. For naming and shaming to work, information about the implementation performance of member states should be meaningful: it should be objective, enable truly comparative and comprehensible insight to be gained, and indicate

the quality of implementation. Second and partly related to the first condition, information must bite. It is only when this is the case that member states may fear the potentiality of reputational costs, or that scoreboards may be used as safeguards in relation to managers who may want to cut resources. Third, where positive domestic change needs to come ‘from above’, the relevant policy issue must enjoy salience amongst those who are in a position to bring about such change. If these conditions are met, naming and shaming could be a powerful instrument for supporting the application of EU measures. Since these conditions are not met as a matter of course, the effect of naming and shaming is considered erratic and its usefulness for implementing actors varies.

### *c. Infringement proceedings*

Infringement proceedings, which the European Commission may start against member states under Article 258 TFEU, primarily aim to correct (alleged) violations of EU law. These violations may have come to the Commission’s attention by virtue of its police-control oversight mechanisms, which include member state reports on the implementation of specific EU measures, expert studies, and agency inspections. Fire-alarm oversight, which consists of the submission of complaints to the Commission, may also identify EU law violations. When agreement on infringement and corrective action to be taken does not ensue during the administrative stage of infringement proceedings, the Commission may address the matter with the CJEU. When member states fail to implement a subsequent CJEU judgement requiring them to take the necessary measures to comply with EU law, the Commission may, under Article 260 TFEU, bring the matter before the Court once again; this time, to demand the imposition of financial sanctions on the culprit member state.

Perceptions of the usefulness of (the threat of) infringement proceedings in supporting the daily application of EU law are generally negative. What may improve the infringement procedure is, first, a reduced period of time between the Commission finding an infringement, and the imposition of sanctions. Second, for the Commission to be perceived as an impartial and reasonable guardian of the treaties, it should have access to more objective and more relevant information about the quality of implementation in member states. Note that this study is not alone in putting forward this call. Third, it seems that there is much to be gained, too, if existing competencies – of both the Commission and the Court – were used more consistently, vigorously, and wisely.

## **B. Post-legislative guidance (Chapter 5)**

Post-legislative guidance is aimed first and foremost at facilitating the administration of EU measures by the competent authorities of the member states. It intends to do this by clarifying how EU law must, or will, be applied. Guidance may broadly come in three forms: as interpretative rules, as decisional acts, and as compliance templates. The benefits of post-legislative guidance for implementing actors vary with the type of guidance

at stake. Decisional rules may be useful for these actors, since they stipulate how the Commission or another EU body will make use of its implementing powers. Familiarity with these rules allows member states to anticipate the behaviour of the issuing body and to adapt to it when necessary. Interpretative rules and compliance templates, on the other hand, inform member states of how EU measures are to be applied by the national competent authorities. Interpretative rules do this either by making a legislative framework more accessible through consolidation of the relevant rules and existing CJEU case law, or by clarifying legislative terms by interpreting them. Compliance templates concretise legislative provisions. Guidelines may support national competent authorities in daily law application practice, and contribute to a quick resolution of infringement cases by smoothing infringement proceedings. Finally, guidance may have a ‘reassurance function’; when authorities comply with guidance, these authorities are assured that they are also acting in conformity with the underlying norms.

Guidance is generally seen as one of the most useful compliance instruments, both across member states and across policy domains. At the same time, it is clear that it is not easy to make guidance work equally well for everyone. Certainly, guidelines should be qualitatively adequate for them to be useful in the implementation process. For such adequacy to be attained, inclusive deliberation in the guidance development process is essential. However, adequacy is easier to attain in some policy areas than in others; in policy areas that are highly politicised or where scientific objectivity is difficult to attain, arriving at adequate guidance is challenging. Moreover, what works for some officials may not work for others; here, what is particularly relevant is whether or not guidance should be ‘binding’. It is in view of the fault lines across member states that a flexible approach differentiating amongst member states seems, from a utilitarian point of view, desirable. However, it is unclear if such a flexible approach is feasible; for example, it is uncertain whether or not guidance can be ‘binding’ for member states that indicate a preference for binding, and be emphatically nonbinding for others. When there are objective reasons that enable differentiation between member states – for example, the existence of unequal implementation performances of member states – flexibility may be possible, legally speaking. However, when such objective reasons are absent, a flexible approach seems difficult to justify. It is particularly in these situations that it may be difficult for the European Commission to serve all member states equally well.

### **C. Transnational networks (Chapter 6)**

Networks may be conceptualised as structures of interdependence involving horizontal cooperation of multiple, operationally autonomous actors pursuing common public goals. The adjective ‘transnational’ implies that these networks constitute a vehicle for national officials to act directly with their counterparts in other countries. In this study, the focus is on networks that enable practical cooperation (rather than the ‘mere’ exchange of information) amongst national authorities. From a theoretical point of view,

the virtues of networks for supporting the implementation of norms are diverse. Cooperation through networks may facilitate mutual learning and resource sharing, both of which reduce information and transaction costs for participating authorities. Networks may also increase mutual trust amongst participating authorities, which leads to a decreased risk of defection and stimulates further cooperation. Finally, networks may socialise national officials into shared norms; this facilitates norm internalisation and conflict resolution.

Transnational networks appear to be one of the most useful compliance instruments. For transnational networks to work there must, first, be an intrinsic motivation for officials to engage in cooperation. This motivation should ideally follow from the perception that authorities are interdependent in the implementation of EU measures, or from awareness of the virtues (other than those that most directly relate to interdependence) that cooperation may bring for the network participants. Second, for cooperation to be useful and continue, networks must deliver. They must increase mutual trust amongst the participating authorities and, depending on the needs of the participants, facilitate mutual learning, resource sharing, and the resolution of conflicts. Third, the key to making networks deliver these virtues seems to lie in ‘informality in formality’; that is, in a hybrid structure featuring interstate cooperation within a facilitating EU institutional framework. It seems that particularly when all of these conditions are met, networks can be useful compliance instruments.

#### **D. Civil society (Chapter 7)**

In this study, civil society is understood to be comprised of civic organisations and members of the general public. Civil society may support national authorities in the administration of EU measures through (one of) two avenues: cooperation with the authorities, or the exercise of multi-level pressure on these authorities. Cooperation may come in the form of political support or in the provision of specialist knowledge and expertise. The exercise of pressure requires civil society to act as a watchdog to the administration, by scrutinising the activities of the competent authorities, and attempting to bring non-compliers into line. Pressure may be exercised at the domestic level, for example by means of the initiation of court proceedings against the administration. Civil society may also ‘take the European route’ and generate pressure on national governments ‘from the outside’, for example by submitting complaints about the implementation performance of member states to the European Commission. Both cooperation and pressure may have the effect of strengthening the capacity of the state to engage in implementation.

Perceptions regarding the usefulness of civil society vary greatly across countries and policy domains. For civil society to be a useful compliance instrument, a policy issue must be societally salient; meaning that society should be aware of the issue and attach a degree of importance to the state’s efforts towards making implementation

work. Second, civic actors must be capacitated to act as credible challengers and useful partners of the state. Finally, state authorities must consider civic actors ‘rightful actors’ in the implementation process. While the input of both civil society and state actors is required for these conditions to be met, it seems that the key to making civil society a useful compliance instrument lies with the government. This is the case, because of the important tasks for the government of strengthening the capacity of civic organisations, socialising lower-level officials to a civil society friendly discourse, and providing the administration with the practical resources required to deal with civil society as a partner rather than an adversary. As perceptions on civil society are culturally entrenched and thus ‘sticky’, a flourishing civil society cannot simply be conjured up, with a positive evolution of the relationship between the state and civil society occurring over time. If civil society functions well, it may be a useful compliance instrument; if it still does not, the path ahead may be challenging and problematic.

### **E. Case law (Chapter 8)**

Chapter 8 on case law includes two compliance instruments: domestic case law and preliminary rulings given by the Court of Justice of the European Union.

#### *a. Domestic case law*

Of interest to this study is domestic case law that is intended to solve disputes between the public administration and natural or legal persons. It is particularly case law that focuses on the compatibility of the behaviour of the public administration with legal provisions – rather than the grievances that applicants claim to suffer – that is relevant, since it is from a judicial evaluation of this issue that public authorities may draw lessons which may be useful for law administration practice. Given that case law may have the effect of undoing wrongs committed by the public authorities, its effect is primarily *ex post* and corrective. Case law may, however, also have the effect of preventing instances of noncompliance. This may be the case when the court declares a certain decision to be in violation of, or in compliance with, applicable legal provisions, and particularly when judgements include clarification of legislative provisions.

The usefulness of domestic case law varies across countries and across policy domains. Determining what works to make domestic case law work as a compliance instrument seems easier to answer than to implement because, similar to civic activism, case law is not an instrument that can be created at will. First, for case law to exist, a considerable number of (partially interdependent and not always makeable) conditions must be met. Second, for court judgements to be truly useful, it is required that judges solve the dispute at stake and provide a clarification of legal provisions that authorities deem unclear. In order for this to happen, judges should possess sufficient expertise, procedural rules should allow judges to examine the merits of the case, and litigants should challenge more than the administration’s compliance with procedural rules ini-



tially. Finally, authorities must be able to ‘do something’ with these judgements, which, given the resources that authorities might have to put to use, is not a matter of course. If the above conditions are not met, the usefulness of case law as a compliance instrument is expected to be suboptimal; if they are met, case law can be a powerful compliance instrument, as the empirical findings of this study suggest.

*b. Preliminary rulings*

Preliminary rulings, which are governed by Article 267 TFEU, are meant to clarify the interpretation of EU law (or the validity of acts adopted by the EU institutions). They are delivered by the CJEU, upon the request of a national court or tribunal from a member state. Unlike domestic case law, the effect of preliminary rulings on national administrative authorities is rather indirect. This is the case, since interpretations given by the CJEU are first and foremost meant for national courts, which are to use them in domestic court proceedings to decide issues of fact or to resolve any differences of opinion regarding the interpretation or application of national law. Preliminary rulings may clarify issues that authorities have struggled with in the administration of the relevant legal provisions. These authorities may have asked the court to submit preliminary questions to the CJEU in the first place.

With existing preliminary rulings inadequately addressing the core issues that actors struggle with in the application process, the preliminary ruling system is underused as a compliance instrument. How the preliminary ruling system can be made to work better seems difficult to determine because obvious solutions (for example, ‘judges should refer more questions to the CJEU’) would be overly simplistic. One may argue that where national case law does exist and competent administrative authorities are aware of cross-country variation in the interpretation of (core) EU law provisions, it may be advisable for national officials to outline their concerns before national judges, and for these judges to resort to the CJEU if they deem these concerns appropriate. In order for this suggestion to move forward, it seems that authorities and courts should be aware that preliminary rulings may be beneficial for them, and be prepared to cast aside their pride or their confidence as to the rightfulness of their own interpretation.

**Conclusions and recommendations (Chapter 9)**

Chapter 9 recaps the purpose, relevance, and methodology of this thesis and summarises the findings of the empirical chapters (as above). Since this study is of an interpretative nature and extensive use has been made of theory (notably in Chapter 2 and in each empirical chapter), the chapter also reflects on the links between this study and scholarly thinking about implementation and compliance. It examines the links between the empirical material and the tenets of the three schools of international relations studies (rationalism, managerialism, and constructivism), and it suggests that implementation research should clarify how these tenets interconnect and what this means for the design

of the EU compliance management system. It also reflects on the links between the empirical material and the variables that EU implementation research proposes as explanatory for variation in application, and it argues that research should aim to gather them under a 'theoretical umbrella'. This theoretical section concludes by providing suggestions on how researchers could, from a practical perspective, approach the subject of the application of EU law.

The thesis concludes by providing recommendations that the European Commission and the member states may consider in order to make the application of EU law work better. It recommends that the Commission gains insight into the functioning of compliance instruments 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. In relation to the latter point, it is suggested that (and how) the Union's enforcement strategy must be further reformed, that the Commission should be more of a guide (and not only a guardian) of the treaties, and that the Commission should facilitate informal transnational cooperation. Finally, it argues that since they are the target group of compliance instruments, it is also up to the member states to take responsibility and make use of such instruments. 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 also in this respect.