

## 5 Regulation, Implementation, and European Integration

*Analyzing the Evolving Institutional Framework for Enforcing EU Law*

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This is a pre-print version of the chapter in the book (eds.) Steunenberg, B., Voermans, W. and Van den Bogaert, S., *Fit for the future: Insights on the European Union*. Leiden: Eleven International Publishing, pp.89-102.

### 5.1 Introduction

Effective implementation of laws and policies is a necessary requirement for good governance. The European Commission has been emphasizing that improving the effectiveness of implementing EU legislation, in the field of the Single Market and beyond, should be a priority for a while now, and the topic remains a core component of the 'Better Regulation' agenda. In its preparation for the forthcoming 2016 presidency of the Council of the European Union, the Dutch government recognizes the importance of implementation and identifies several areas for concrete actions.<sup>1</sup> The government's agenda considers the topic of how EU policy should be implemented an additional priority (p. 3); it notes that improving the governance of the internal market in the services sectors in particular will be sought (p.10); and mentions the forthcoming implementation fitness check for some directives in the field of environment (p.13). More generally, the Dutch presidency seems committed to working towards enhancing good governance and smart regulation in the EU.

The focus on implementation is welcome as, for quite some time now, implementation and enforcement of EU legislation have been considered a weak link in the process of EU governance, and even the Achilles heel of the entire integration process.<sup>2</sup> That

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<sup>1</sup> Letter of 28 January 2015 from the Minister of Foreign Affairs to the House of Representatives on substantive preparation for the 2016 Dutch Presidency of the Council of the European Union', Ministry of Foreign Affairs of the Netherlands, AVT15/BZ114271.

<sup>2</sup> See, in particular: W. Voermans, 'Implementation: The Achilles Heel of European Integration', *The Theory and Practice of Legislation*, Vol. 2, 2014, pp. 343-359; M. Kaeding & F. Voskamp, 'Better Implementation of EU Legislation Is Not Just a Question of Taking Member States to Court', *EIPA working paper 2011/W/01*, 2011, European Institute of Public Administration; E. Versluis, 'Even Rules, Uneven Practices: Opening the 'Black Box' of EU Law in Action', *West European Politics*, Vol. 30, 2007, pp. 50-67. For general overviews of the social-scientific literature on the topic of compliance with and implementation of EU law, see M. Angelova, T. Dannwolf & T. König, 'How Robust Are Compliance Findings? A Research Synthesis', *Journal of European Public Policy*, Vol. 18, 2012, pp.1269-1291; O. Treib, 'Implementing and complying with EU governance outputs', *Living Review of European Governance*, Vol. 9, 2014; D. Toshkov, 'Taking Stock: A Review of Quantitative Studies of Transposition and Implementation of EU Law', *Institute for European Integration Research Working Papers*, No. 1, 2010; and, D. Toshkov, M. Knoll & L. Wewerka,

being said, it is doubtful whether sheer attention to the topic and small adjustments to the current institutional and organizational framework that the EU has for handling implementation, oversight, and enforcement will be sufficient for dramatically improving the state of affairs. While recent reforms at the EU level have managed to reduce the severity of some problems (for example, delayed transposition or the overburdened system of infringement procedures), systematic deficiencies remain (for example, when it comes to the timely detection of incorrect or incomplete implementation). This chapter reinstates the importance of regulatory governance for the case of the EU, considers the challenges of implementation and enforcement in a multilevel system of governance, and offers some tentative recommendations about improving the current EU system.

## 5.2 The EU as a Regulatory Community

Implementation is especially important for regulatory systems. And the EU remains primarily, if no longer exclusively, a regulatory community.<sup>3</sup> Its influence is exercised mostly through the application of its laws and regulations, rather than through redistribution, sheer force, or the provision of common goods. Despite advances in areas like monetary integration, common foreign and security policy, and economic coordination, most EU efforts remain focused on developing and enacting regulations that support the four freedoms of movement of goods, capital, services, and people. When we look at what the EU actually does in day-to-day policymaking instead of what media coverage of the EU is about, we would find that the bulk of the daily policy output of the EU concerns rather mundane matters like the size of the rear-view mirrors for agricultural vehicles<sup>4</sup> or the design requirements for single-hull oil tankers.<sup>5</sup> Occasionally, one gets a blockbuster directive like the Services Directive<sup>6</sup> or REACH,<sup>7</sup> or an

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'Connecting the Dots: Case Studies and EU Implementation Research', *Institute for European Integration Research Working Papers*, No. 10, 2010.

<sup>3</sup> G. Majone, *Regulating Europe*, Routledge, London, 2006.

<sup>4</sup> Directive 2009/59/EC of the European Parliament and of the Council of 13 July 2009 on rearview mirrors for wheeled agricultural or forestry tractors, OJ 2009 L 198/9.

<sup>5</sup> Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers and repealing Council Regulation (EC) No 2978/94, OJ 2002 L 064/1.

<sup>6</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376/36.

<sup>7</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ 2006 L 396/1.

expansion into a new policy domain, like the Fiscal Compact<sup>8</sup> signed in 2012, and the budget for redistributive policies is growing slowly but steadily.

But the EU budget remains small compared to national budgets and the GDP of the participating states. For example, for 2015 the EU budget is slightly over 145,463 million euros, which amounts to a little over 1% of the GNI of the 28 Member States.<sup>9</sup> Redistribution of resources under the heading of 'Economic, social, and territorial cohesion' (49.2 billion euros in 2015) accounts for a significant proportion of the budget (33.8%), but it is still small in relative terms. Transfers from one societal group to another (e.g. support for farmers through the Common Agricultural Policy) is also limited in scope and increasingly tied with regulatory policies and objectives, like support for the environment. Altogether, the direct redistributive capacity of the EU is, and is likely to remain, small.

In addition, the EU does not possess the power and legitimacy to dictate policy and institutional choices to the national capitals. The recent disputes with Hungary and Romania<sup>10</sup> show that even small countries can resist requested reforms (if there is no clear treaty basis for the demands) and that the power of the Commission to intervene in domestic political affairs is very limited. In fact, the Commission is often put on the defensive by the national capitals due to its purported lack of democratic legitimacy. Similarly, in international relations the EU rarely speaks in one voice and its influence is exercised through opaque channels and mediated by other international institutions. Even if we conceptualize power in normative norms, the EU certainly lacks the normative power to *dictate* policy change within its limits and beyond.

Nor does the EU have the prerogatives and the capabilities to provide public (social) goods like common defence (although it increasingly contributes to the defence policies of the Member States), education (although it encourages educational exchanges and co-operation), or social welfare (although it has non-binding, soft law programmes that aim to encourage cooperation and coordination between the Member States).

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<sup>8</sup> Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed on 2 March 2012 by all Member States of the EU with the exception of the United Kingdom and the Czech Republic.

<sup>9</sup> European Commission, 'Budget 2015 in Figures', available at: [http://ec.europa.eu/budget/figures/2015/2015\\_en.cfm](http://ec.europa.eu/budget/figures/2015/2015_en.cfm) (last accessed 25 September 2015)

<sup>10</sup> The 2012 conflict between the Commission and Hungary was triggered by the Hungarian constitutional reforms that, among other things, limited the independence of the national bank governor, reduced the power of the Constitutional Court, etc. Later in the year, the Commission entered into another row with Romania over the efforts of the Romanian government to impeach the then-president Basescu and curb the powers of the constitutional court. In both cases, while the EU eventually managed to influence Hungarian and Romanian policies, the changes came after prolonged bickering and attacks on the legitimacy of the Commission launched by the national governments in Budapest and Bucharest.

Finally, despite some recent developments, for the moment the EU falls short of being a policymaking state<sup>11</sup> in the sense of directly devising and steering programmes and strategies for governing the economies, finances, and administrations of its Member States. Because of the debt crises in Greece and the conditions attached to the Greek financial bailouts, EU officials and representatives are deeply involved in drawing up and monitoring economic strategies and reform plans that touch upon various aspects of the Greek economic, financial, and administrative systems, sometimes at a rather operational level. As significant as these developments are, for now they are confined to the case of Greece. Plans for common economic policy making for the members of the Eurozone exist, and the European Semester already provides an institutional framework for discussion and coordination of economic policies. However, these do not amount yet to a full-fledged capacity for supranational management of national economies that would have made the EU into a real policymaking state.

In summary, the influence of the EU is not mediated by money or power, but by laws and regulations. And these laws and regulations are often very detailed, technical, and narrow in scope. The day-to-day policymaking in the EU is dominated by problems of regulation and not of pork barrel/redistributive bargains. Even today, by and large, it is the dense network of treaties, laws, regulations, and their corresponding national implementing acts that **is** the EU.

But laws and regulations only have impact if implemented and enforced.<sup>12</sup> And the EU is a multi-level system of governance<sup>13</sup> in which the *adoption*<sup>14</sup> of new rules happens at a different level than the *implementation* of these rules. While it is the Council of Ministers and the European Parliament that adopt EU rules,<sup>15</sup> it is, in general, the national administrations

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<sup>11</sup> Cf. J. Richardson, *Constructing a Policy-Making State? Policy Dynamics in the EU*, Oxford University Press, Oxford, forthcoming.

<sup>12</sup> In fact, sometimes the mere fact of promulgating a law can have influence by signaling attention to a cause, symbolic commitment to a norm, or expressing a desire for belonging to a certain community. But in most cases, some form of implementation and enforcement of the law would be necessary for the law to have real impact.

<sup>13</sup> On the concept, see L. Hooghe & G. Marks, *Multi-Level Governance and European Integration*, Rowman & Littlefield, Boulder, 2002.

<sup>14</sup> On a side note, it seems that over the last 15 years the increase in the EU legislative output is stagnating. The numbers of directives, the average number of important new legislation adopted per year is comparable to the early 1980s (D. Toshkov, 'Public Opinion and Policy Output in the European Union: A Lost Relationship', *European Union Politics*, Vol. 12, 2011, pp. 169-191; see also the EUPOL dataset collected by Frank Häge (available at <<http://frankhaege.eu/data/eupol>>— a period in EU history which is generally considered as 'incremental progress' at best. The Eastern Enlargement, and the Better Regulation Programme might be related to the drop in legislative output, but are unlikely to be a major cause of the stagnation (see D. Toshkov, 'The Impact of the Eastern Enlargement on the Legislative Output of the EU', *MAXCAP Working Paper*, 2015).

<sup>15</sup> The Council and the EP co-legislative in the ordinary legislative procedure (former 'codecision'), which is nowadays the most-often used decision-making mode in the EU.

that have the responsibility for transposing, implementing, applying and enforcing<sup>16</sup> these rules. This separation of decision-making and implementation is a defining, and a rather unique, feature of the EU system of governance. It creates specific institutional conflicts and tensions; it offers potential for flexibility and accommodation; and it embodies an inherent instability that altogether define the unique challenges of European integration. The adoption of EU laws and regulations is only but a part of the process that provides the EU with real impact. It is a necessary, but not a sufficient condition for influence. Implementation and enforcement are also required, and these are conducted, generally speaking, by national authorities. The next section of this text will focus on the interactions between the European and the national levels in implementing EU law.

### **5.3 Problems at the Heart of Policy Implementation**

The EU lacks monopoly over the legitimate use of force so compliance with its rules and regulations needs to be achieved through different means. In general, compliance is left in the hands of the national governments with the supranational level having only weak capacity to oversee and enforce national implementation. This is a rather peculiar arrangement. In unitary states, local and de-concentrated regional authorities do implement national laws and policies, but they are held in much more direct control by the centre. The capital controls their budgets, often the appointments of the managers, etc. Ultimately, the centre can legitimately use force to implement the policy if a sub-national unit refuses to do so. In international organizations where the threat of force is also absent (like in the EU), compliance is made easier by the fact that the all parties have voluntarily entered into the contractual relationship and agreed to arbitration. Despite the missing ‘shadow of force’, compliance with judgments of international courts, arbitrators, and other similar institutions is usually very high, but this all occurs in settings where reputation matters: social ostracism can replace the threat of force but for that to work, a certain degree of community needs to exist.

In the EU, countries need to implement policies which they might have openly opposed (if they have been outvoted). With the expansion of the use of qualified majority

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<sup>16</sup> Transposition is the process of adaptation of a directive to the national legal and social context. As such, it is the formal, legal part of the process of implementation that also encompasses practical aspects (like setting up required agencies, adopting the necessary administrative rules to make the legislation work, etc.). Application is the process of compliance with the EU rules by public and private actors, while enforcement is the efforts put by the state (or supranational bodies) to make sure that the rules are complied with. The use of these terms within the social science literature is not standardized and often confusing. See G. Falkner *et al.*, *Complying with Europe? The Impact of EU Minimum Harmonisation and Soft Law in the Member States*, Cambridge University Press, Cambridge, 2005; and D. Toshkov, *Between Politics and Administration. Compliance with EU Law in Central and Eastern Europe*, PhD thesis, Leiden University, 2009. Available at <<https://openaccess.leidenuniv.nl/handle/1887/13701>> (last accessed on 1-2-2016).

voting and successive EU expansions, such situations are likely to be only more common. But different preferences between Brussels and the nation-states are not the only reason why compliance with EU rules is not trivial.

Compliance in a multi-level system of governance can be conceptualized as a collective action problem. Even if it is in the individual self-interest of any single country to implement the EU rules and standards, when acting collectively, a strategic incentive to shirk appears. For example, even if a country values a clean environment but cares about local industry as well, once a common European environment regulation is in place, an incentive appears to free ride on the efforts of others and delay or block the implementation of the supranational legislation at the local level. Similarly, even if asylum protection is something a country values but which comes at a cost, a common European asylum regime might present a prisoner's dilemma in which standards of protection unravel when each state tries to enjoy the benefits while avoiding the costs of protection.

Moreover, an incentive to free ride appears even for countries which would have implemented the policy if acting on their own. An example of this paradox is the budgetary policy in the context of a monetary union. While outside a monetary union, a tight budgetary policy can be almost self-enforcing (or the credit markets make sure that it is enforced); within a monetary union countries acquire incentives to shirk on their commitments because their relative contribution to the financial health of the club is much smaller.

While collective action problems often loom large in the background, not all cases of compliance in a multi-level system of governance have the structure of a prisoner's dilemma. Some cases are games of pure coordination in which compliance is automatic once a certain common decision has been made. The EU's role in facilitating the adoption of GSM standards<sup>17</sup> is such a case: once the standards are set, all national and private actors have an incentive to follow them – individual deviation brings no benefits. In such cases, the added value of European regulation is easier to sustain, and less fragmentation of the market is expected. But in many situations, individual (national) and collective (supranational) rationality clash and the conflict plays out at the stage of law implementation.

#### **5.4 The Institutions for Enforcing Implementation in the EU**

How is this problem solved in the EU? If compliance cannot be taken for granted, how is the necessary monitoring and enforcement organized? Currently, a variety of arrangements exist, but in general the Commission, as guardian of the treaties, is entrusted with the function of

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<sup>17</sup> J. Pelkmans, 'The GSM Standard: Explaining a Success Story', *Journal of European Public Policy*, Vol. 8, 2001, pp. 432-453.

monitoring states' behaviour, detecting and pursuing infringements. In the context of the rather Byzantine 'infringement procedures',<sup>18</sup> the Commission can take non-complying Member States to the European Court of Justice (ECJ) which decides the case, and can ultimately impose a fine on the infringing Member State. The fine, however, comes only at the end of a second procedure and altogether the two stages can take more than two years. In several policy areas, like state aid and the Stability and Growth Pact, various institutional arrangements exist, but the infringement procedures remain the main general tool available to enforce compliance.

The functioning of the system of monitoring and enforcing EU law has generated a number of empirical puzzles. Once the Commission turned its attention towards the problem of rampant non-transposition during the 1990s, formal transposition rates have improved markedly, national transposition delays have been shortened, and currently the average 'transposition deficit' of the EU stands at less than 2% of all directives.<sup>19</sup> These figures appear reassuring when it comes to the state of integration of the internal market, but they should be taken with a grain of salt. Certainly, the Member States have become more diligent in reporting their national transposition measures within the deadlines. They have adapted to the targets and objectives set by the Commission, and even the new Member States have learned to play the game well.<sup>20</sup> The extent to which the formal transposition is translated into actual practical implementation is, however, unclear.<sup>21</sup> The Commission lacks the capacity to conduct detailed investigations in all policy areas in all 28 Member States of the EU. As a result, many of the official figures on compliance are based on self-reporting by the Member

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<sup>18</sup> For recent studies of the infringement procedures from a legal perspective, see M. Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU*, Routledge Cavendish, London, 2009; M. Smith, 'The Evolution of Infringement and Sanction Procedures', in A. Arnulf & D. Chalmers (Eds.) *The Oxford Handbook of European Union Law*, 2009, pp. 350-360; M. Cremona (Ed.), *Compliance and the Enforcement of EU Law*, Oxford University Press, Oxford, 2012; and S. Andersen, *The Enforcement of EU Law: The Role of the European Commission*, Oxford University Press, Oxford, 2012. For studies from a social-scientific angle see T. König, & L. Mäde), 'The Strategic Nature of Compliance: An Empirical Evaluation of Law Implementation in the Central Monitoring System of the European Union', *American Journal of Political Science*, Vol. 58, 2014, pp. 246-263; T. Börzel *et al.*, 'Obstinate and Inefficient: Why Member States Do Not Comply with European Law', *Comparative Political Studies*, Vol. 43, 2010, pp. 1363-1390; B. Steunenberg, 'Is Big Brother Watching? Commission Oversight of the National Implementation of EU Directives', *European Union Politics*, Vol. 11, 2010, pp. 359-380.

<sup>19</sup> See the Single Market Scoreboard, available at <[http://ec.europa.eu/internal\\_market/scoreboard/index\\_en.htm](http://ec.europa.eu/internal_market/scoreboard/index_en.htm)> (last accessed on 1 December 2015); and European Commission, 'Report from the Commission. Monitoring the application of Union law. 2014 Annual Report', COM(2015) 329 final, 9 July 2015.

<sup>20</sup> D. Toshkov, 'Embracing European Law: Transposition of EU Directives in Central and Eastern Europe', *European Union Politics*, Vol. 9, 2008, pp. 379-342.

<sup>21</sup> T. Börzel & A. Buzogany, 'Governing EU Accession in Transition Countries: The Role of Non-State Actors', *Acta Politica*, Vol. 45, 2010, pp. 158-182; A. Dimitrova & B. Steunenberg, 'Living in Parallel Universes? Implementing European Movable Cultural Heritage Policy in Bulgaria', *Journal of Common Market Studies*, Vol. 51, 2013, pp. 246-263; Falkner *et al.*, 2005; Toshkov *et al.*, 2010.

States, and these reports may be biased. Apart from some special policy areas, like fisheries, the Commission has no own inspectors who can independently and regularly monitor national compliance.

While the improvement in the speed and comprehensiveness of transposition reporting by the national authorities is welcome, we cannot assume that it represents a significant improvement in actual domestic implementation practices and law application routines. The focus on the timeliness of transposition reporting makes sense from the point of the Commission because it provides concrete and quantifiable<sup>22</sup> targets and benchmarks for monitoring and reporting on the performance of the Member States. But the downside is that Member States adapt their compliance behaviour only to the extent that they formally fulfil the specific targets and meet the benchmarks, without a more fundamental transformation of their overall compliance and implementation behaviour. The problem with specific quantified targets is that they easily become a substitute for the overall concept they try to measure, both for the enforcer and for the implementing agents. Ultimately, the process can result in a 'paper implementation' culture (in the words of Wim Voermans), laws as 'empty shells' (Antoaneta Dimitrova) or a 'world of dead letters' (Gerda Falkner and Oliver Treib).

It is even more intriguing that the total number of infringement procedures initiated by the Commission in the EU is rather low, and is in fact declining despite the expansion of the EU in Central and Eastern Europe. Given that the Commission relies mostly on signals from citizens, interest groups or the EP to detect infringements related to non-application of EU law, these low numbers do not necessarily imply that Member States comply correctly and on time with their commitments. What is truly puzzling, however, is that less than 10% of all cases started by the Commission go through the phases of 'letter of formal notice' and 'reasoned opinion' to reach the ECJ. And of those, close to 90% are decided in favour of the Commission. At face value, this appears to be a staggering success of the system of infringement procedures but this is not necessarily the case. The Commission enjoys a great degree of discretion regarding which cases to pursue and which cases to drop. Given that it is rather secretive in its conduct of negotiations during the 'management phase'<sup>23</sup> of the proceedings, we do not know in what proportion of the cases the Member States actually yield to the demands of the Commission, and whether the high 'resolution rate' does not imply that

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<sup>22</sup> W. Voermans, 'To Measure Is To Know: The Quantification of Regulation', *The Theory and Practice of Legislation*, Vol. 3, 2015, pp. 91-111.

<sup>23</sup> J. Tallberg, 'Paths to Compliance: Enforcement, Management and the European Union', *International Organization*, Vol. 56, 2002, pp. 609-643.



the Commission is only choosing to pursue cases that it is certain to win. Since its resources are limited, the latter seems plausible, but more research is needed.

What is also worth noting about the functioning of the infringement procedures is that Member States almost never take each other to the ECJ, although formally they have this opportunity. On the contrary, they often join defendant countries in their disputes with the Commission at the Court.

Altogether, reviewing all the evidence from the official Commission and the ECJ reports, and the social-scientific literature on implementation and compliance, we are faced with a paradox. On the one hand, the official statistics and reports by the institutions indicate that the supranational enforcement system seems to function successfully overall. On the other hand, more comprehensive reviews of the substance of Member States' implementation of the EU rules too often find significant shortcomings, patchy implementation, and long delays until the norms are enforced, often only after intervention by the Commission. The paradox results from the weak capacity of the Commission for thorough monitoring of Member State practices in all policy areas, and the uneven capacity of societies across Europe in signalling domestic non-compliance. And there is no easy institutional fix to this problem. As Wim Voermans notes, signalling implementation problems is self-incriminatory for the Member States, so they cannot be relied on to flag existing problems. And it should be reminded that policy implementation is difficult, even in the context of unitary nation-states, as long as different institutional actors face different incentives in the process, as they practically always do.

Theoretically, a number of challenges to the design of a proper enforcement system in the EU remain. The ultimate (and so far very rarely used) weapon of the infringement procedures is the imposition of a fine. It is unclear whether the threat of financial sanctions (and their size) matters for compliance. Before the Treaty of Maastricht, financial sanctions were not foreseen and the infringement procedures were still largely successful. Currently, the process leading to a sanction is so time consuming that a Member State has plenty of leeway before it has to take the threat seriously. Reforms introduced with the Treaty of Lisbon have somewhat shortened the necessary steps before a fine can be imposed,<sup>24</sup> but the procedure is still rather lengthy. Furthermore, it is actually unclear what would happen if a country decided to defy the judgment of the ECJ and not pay an imposed fine for non-compliance.

Another theoretical as well as a normative question raised by compliance in multi-level settings is why would you punish (financially) a country which is not complying, possibly (at

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<sup>24</sup> For the details, see for example, D. Chalmers, G. Davies & G. Monti, *European Union Law. Second Edition*. Cambridge University Press, Cambridge, 2010.

least partly) due to resource deficits? And how credible is such a sanction? The problem arises in the context of the infringement procedures but also looms large in the design of the recently agreed Fiscal Compact where countries that do not comply with the balanced budget requirements face financial sanctions. Why would you take money from a country that is already in deep financial trouble? Of course, it is the threat of sanction that is supposed to work and, if the system functions as intended, fines would never have to be imposed in practice, but what if they actually need to be applied? Would Brussels really appropriate part of the GDP of a Member State which has failed to balance its budget due to a financial shortage? How would that help? But if the threat is so normatively suspect and difficult to realize, is it credible at all? Experiences in the EU with the enforcement of the Stability and Growth Pact have shown that these are not purely theoretical musings: proceedings against the transgressions of France and Germany were never started; the rules of the pact were renegotiated instead. It is also important to ask whether only big countries, like Germany and France, can avoid compliance and whether certain actors are in a structurally disadvantaged position.

Even if they are theoretically possible, financial sanctions are difficult to apply in a real-world setting; much of the work of enforcement systems is carried by the impact on reputation. But what if the reputational credit of a country runs dry? In the EU, certain countries like Greece and Italy are so often suspected of infringements, and have so many judgments imposed against them, that it is unlikely that they have any ‘compliance’ reputation left to protect at all. Perversely, because reputation no longer plays a role, compliance with supranational rules in these countries needs to rely even more on the threat of financial sanctions, but these are also the cases where financial sanctions can be objected on normative grounds.

Finally, it is worth considering the incentives of the spider in the web of EU enforcement – the European Commission. As a guardian of the treaties, the Commission can be expected to pursue with equal zeal each and every possible infringement, but given the practical constraints of limited resources, it is impossible.. How does the Commission prioritize cases of non-compliance? Although this question is central for the integrity of the internal market and the sustainability of European integration in general, we know precious little about the incentives and motivations of the central enforcer. Organizationally, the Commission has no centralized unit dealing with infringements, and it has only a weakly coordinated strategy. Sectoral Directorate-Generals follow their own strategies, and their capacity to do so differs a lot. For example, in food safety, telecommunications, and

environment, the Commission conducts regular and very detailed reports on the national implementation of the European legislation. While reports by the national administrations still form the basis of the reviews, onsite visits by Commission officials and the input of interest organizations make sure that the reports reflect to a large extent the state of practical application of the EU rules. In other areas, like social policy, this is less so.

Although the Commission has not officially complained that it lacks the resources to properly monitor compliance in 28 Member States, several recent developments are indicative of its strategies to cope with the burden of enforcement. First, it is increasingly using voluntary dispute resolution mechanisms like SOLVIT<sup>25</sup> and the EU Pilot.<sup>26</sup> A scientific assessment of these programmes is still not available but according to the Commission itself, these dispute resolution platforms are extremely effective and party responsible for the reduced number of initiated formal infringements. Second, in many areas monitoring and enforcement is delegated (practically, if not officially) to committees composed of representatives of the Member States bureaucracies (e.g. in the field of work safety). These committees interpret the rules, develop standards and guidelines for implementation and, in the process, acquire detailed information about the state of transposition and implementation at their peers. A related trend is using EU agencies to participate in the process of implementation and monitoring.<sup>27</sup> All of these developments are problematic from a normative point of view.

Voluntary dispute resolution mechanisms might be effective but they crucially rely on the activity of citizens and civil society to detect and bring cases to the system. National bureaucracies and European agencies cooperating in the implementation of EU law are useful, but the network can quickly become insulated from the broader system of governance and pursue goals of its own. Despite these concerns, such mechanisms for decentralized importance will only become more prominent in the future in view of the limited capacity of the EU institutions themselves to detect and pursue non-compliance.

### **5.5 Instead of a Conclusion: Improving Implementation in the EU**

Compliance and implementation in multi-level settings allows numerous opportunities for flexibility and accommodation. In fact, directives as a legal instrument have been designed with such flexibility in mind. It can be argued that flexibility in implementation has allowed

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<sup>25</sup> See <<http://ec.europa.eu/solvit/>> (last accessed on 1 December 2015)

<sup>26</sup> See <[http://ec.europa.eu/eu\\_law/infringements/application\\_monitoring\\_en.htm](http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm)> (last accessed on 1 December 2015)

<sup>27</sup> Voermans, 2014.

European integration to proceed as far as it has. Especially before the end of the twentieth century, 'selective compliance' resulted in a fragmented legal environment but also allowed integration to progress. Transposition delays have been greatly reduced since, but practical implementation shortcomings are (according to the academic literature if not official statistics) still widespread and likely systemic.

The theoretical challenges of compliance and implementation in a multi-level system of governance bring to the fore the question whether a feeling of attachment (community) is necessary for governance in Europe. Enforcement based on the threat of sanctions is not sustainable on its own. Reputation and socialization have to be present in order for the system to function. In the absence of shared norms and a feeling of community, enforcement is not likely to be effective. A certain degree of community is necessary even for successful *monitoring* of national compliance with supranational commitments. It is a myth that German inspectors can get so deep into Greek accounts as to uncover all possible mischief. And it is a myth that German inspectors will be left monitoring Greek accounts in the absence of a basic level of trust and solidarity. One of the big lessons of the pioneering work of Elinor Ostrom<sup>28</sup> and her numerous collaborators has been that communities *can* often find ingenious ways to solve collective action problems in managing common-pool resources. The future of European integration will show whether a community *needs* to exist for solving these problems.

But community-based enforcement cannot be the sole tool for effective oversight of policy implementation (in the same way that a confrontational sanctions-based system cannot be sufficient). What is needed is a balance between effective and efficient top-down sanctions and powerful community-based bottom-up enforcement which build on the commitments of Member States.

In more practical terms, several institutional changes can be introduced to the system of supranational enforcement that can enhance its effectiveness and legitimacy. First, having two separate infringement procedures before an offending Member State is faced with financial sanctions for violating EU law is redundant. It gives the Member States too much time to delay compliance and it creates an unnecessary administrative burden for the Commission and the ECJ. Unfortunately, streamlining the infringement procedures would require treaty change, so it remains unlikely in the short term.

Secondly, greater transparency in the way the Commission handles the infringement procedures could be beneficial both for their effectiveness and legitimacy. In its letter outlining its plans for the presidency, the Dutch government states that 'transparency in decision-

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<sup>28</sup> E. Ostrom, 'How Types of Goods and Property Rights Jointly Affect Collective Action', *Journal of Theoretical Politics*, Vol. 15, 2003, pp. 239-270.

making is key' (p. 5), and transparency is even more important when it comes to implementation. EU citizens, members of the EP, and affected organizations have the right to know why certain cases of suspected non-compliance have been closed before the judicial stage. They should be able to scrutinize the Commission in its function as a guardian of the treaties. Transparency could also incentivize the Commission to be more zealous and uncompromising in enforcing the implementation of EU rules, which could be beneficial for the overall state of law compliance in the EU. Once citizens and organizations are confident that the Commission is handling their signals and complaints about Member State non-compliance in a serious and transparent way, they would be more likely to provide such signals. This would not only improve the general level of compliance throughout the EU, it would also be particularly welcome for countries and policy sectors where there are currently very few complaints (and, potentially, serious shortcomings).

Thirdly, as important as complaints and signals from citizens and organizations are for detecting non-compliance, strengthening the internal organizational capacity of the Commission to discover and pursue suspected infringement of EU law is recommended as well. The current system that gives sectoral directorates the leading role, and reserves for the Secretariat-General coordinating, monitoring, and legal representation functions, could be strengthened by committing more human resources to enforcement issues, and perhaps centralizing to some extent these tasks so that the Commission as a whole is capable of adopting a more strategic approach to enforcement.