



# Administrative Capacity for Effective Implementation of EU Law

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Article 197 of the Treaty on the Functioning of the European Union stipulates that effective implementation of Union law by the Member States shall be regarded as a matter of common interest. This article considers how Member States may improve their administrative capacity to apply EU law effectively. A law or policy is effectively implemented when it can be confirmed that its objectives, targets or results are actually achieved. It is proposed that effective implementation in the EU is a 'collaborative project'. This is not only because Member States benefit when others correctly implement common rules, but also because they learn from the experiences of other Member States. It follows that the public authorities responsible for implementation of EU law need to benchmark their performance against that of their peers in other Member States and therefore need to develop the institutional capacity for assessing and adjusting their own performance.

## Introduction

A law is a set of rules that prescribe or proscribe in order to regulate the behaviour of persons or organisations<sup>1</sup>. This regulatory responsibility is normally the prerogative of the state. In practice, however, it is the agents of the state that ensure that laws are applied correctly. These agents are the various components of the civil service or public administration.

Article 197 of the Treaty on the Functioning of the European Union provides that

- '1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.
2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. ...'

Article 197 TFEU makes two connections: one explicit, the other implicit. It explicitly concatenates the proper functioning of the EU and effective implementation of its law; and it implicitly links the achievement of effective implementation to the administrative capacity of Member States.

6 The purpose of this article is to explore the second connection and consider what kind of 'administrative capacity' may be necessary for effective implementation of EU law. This is not an easy task, given that there appears to be no definition of effective implementation in primary or secondary legislation or in the case law of EU courts<sup>2</sup>. Therefore, this article proposes, first, a definition of effective implementation of law or policy and, then, relates the achievement of effective implementation to administrative capacity.



The main propositions developed in the article are the following. A law or policy is effectively implemented when it can be confirmed that its objectives, targets or results are actually achieved. Since policy objectives can be overly general and legal obligations can be vague or ambiguous, effective implementation must start with the 'operationalisation' of general or vague objectives. This operationalisation derives tangible goals from general or vague objectives. For example, the general objective of 'raising national well-being' can be translated into the tangible goal of 'access to health services'.

But this process of operationalisation encounters another problem: it is rarely obvious what kind of tangible goals can or should be derived. This requires interpretation either on the basis of theory and analysis, or on the basis of experience and comparison with similar situations. If the implementing authority chooses the latter approach, it may ask what a peer authority would do in the same situation. It should not choose

arbitrarily from the range of possible options; it needs to make a reasonable case.

A comparison of decisions made by similar authorities provides guidance not only in cases of vague policy objectives, but also in cases where the effects of policy instruments are uncertain. The overall objective may, in fact, be very clear and measurable but it may not be easy to define *ex ante* the most effective instrument for achieving that objective. For example, the objective of reducing road fatalities, which is measurable, may be achieved by different means such as reduction of speed limits, installation of more speed cameras, increasing fines for speeding, improvement of roads or compulsory re-training of drivers. These means may vary significantly in terms of their cost, deterrent effect and gestation period.

Because comparison of policy performance or legal enforcement is an indispensable component of assessing the effectiveness of implementation of policy or law, this article argues that in the context of the EU, effective implementation becomes a 'collaborative project'. This is not only because each partner country benefits when others implement fully or correctly common rules, but also because each partner country cannot be absolutely certain that it has implemented fully or correctly unless it compares its efforts to those of others. Effective implementation of EU law requires continuous benchmarking of the performance of national authorities against those of their peers in other Member States. All these considerations have implications on how public administrations function<sup>3</sup>.



## The nature of the problem

Before defining the meaning of effective implementation, it is instructive to provide examples of the problem of ineffective implementation so that the reader gains a better understanding how it affects the 'proper functioning of the Union', in the meaning of Article 197 TFEU. This section presents two recent cases. The first highlights the challenge of correct policy application, while the other demonstrates how incorrect legal interpretation impacts on institutional structure.

### The policy side

Since July 2004, the Council of the EU has been recording that Hungary's budget deficit exceeded the allowable threshold – 3% of GDP – and has been issuing successive recommendations to Hungary to take appropriate measures. On 24 January 2012 the Council again examined Hungary's response and concluded that it was inadequate. Hungary claimed that it had turned the budget deficit into a surplus, but in fact that was merely a temporary change. It was the result of a one-off increase in revenue. There was no effective correction. More specifically, the Council Decision noted that 'Hungary had not taken effective action'. 'While Hungary formally respected the 3% of GDP reference value, this was not based on a structural and sustainable correction. The budget surplus in 2011 hinged upon substantial one-off revenues of over 10% of GDP and was accompanied by a cumulative structural deterioration in 2010 and 2011 of 2.75% of GDP compared to a recommended cumulative fiscal improvement of 0.5% of GDP<sup>4</sup>'. Hungary claimed the facts vindicated it, but the Council looked beyond the headline numbers.

In the end, after eight years of warnings and recommendations, the patience of the Council was exhausted. On 13 March, the Council decided to withhold, as of 1 January 2012, €495 million from the money that had been provisionally earmarked in the EU's Cohesion Fund for Hungary<sup>5</sup>.

This case illustrates the difference between formalistic implementation and effective implementation. On the surface, the dispute between the Council and Hungary is about numbers. In reality, however, it is about the real impact of Hungary's measures to reduce its deficit. Hungary maintained that it had formally conformed to the deficit requirement. The Council saw no real compliance with the spirit of the rule on sustainable public finances. The Council was right, of course.

### The legal side

Recently the Court of Justice was asked to rule on the interpretation of Article 6(3) of Directive 2001/42<sup>6</sup>. This Directive lays down rules on environmental impact assessment and requires, *inter alia*, that public authorities prepare reports on the likely environmental effects of their measures. An authority that prepares such a report has to consult widely, since, 'as a rule, the inclusion of a wider set of factors in decision-making will contribute to more sustainable and effective solutions'<sup>7</sup>. Article 6(3) of the Directive provides that 'Member

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States shall designate the authorities to be consulted... 'In the *Seaport* case<sup>8</sup>, the question arose as to what happens when the authority that prepares an environmental report is also the sole designated authority for consultation<sup>9</sup>. Must it consult itself? In this situation must the Member State concerned – the UK in this case – designate another authority?

The Commission and the UK argued that the Directive was silent on this point and that it was therefore up to the Member States to decide what to do. The Advocate General disagreed in his opinion. He stated that even though it was not explicitly required by the Directive, Member States had to designate a separate authority to be consulted. The Court of Justice in its judgement of 20 October 2011 adopted an intermediate, and more reasonable, position.

According to the Court, the reason that the consultation of the relevant authorities was included in the procedure is to take 'due account' of environmental effects and for alternatives to be 'objectively considered'. The provisions of Directive 2001/42 would be 'deprived of practical effect if in circumstances where the authority designated... is itself also required to prepare or adopt a plan or programme'<sup>10</sup>. 'However, in such a situation, Article 6 does require that, within the authority usually responsible for consultation on environmental matters, a functional separation be organised so that an administrative

entity internal to it has real autonomy, meaning, in particular, that it is provided with administrative and human resources of its own and is thus in a position to fulfil the tasks entrusted to authorities to be consulted as provided for in that directive, and, in particular, to give an objective opinion on the plan or programme envisaged by the authority to which it is attached'<sup>11</sup>.

The outcome of this case was unpredictable. Opinions among the most senior legal professionals diverged significantly. The Court reached its conclusion by asking what the objective of the Directive was and how it could be most effectively achieved. Different judges could have drawn different conclusions. The point here is not that conclusions could differ, but that effective implementation always requires assessment of whether what is achieved corresponds indeed with the objectives defined in law or policy.

### Effective implementation: theoretical considerations

The dictionary definition of the verb 'to implement' is 'to put into effect according to or by means of a definite plan or procedure'<sup>12</sup>. This implies that in order to implement anything you need first to set an objective or goal, and then draw up directions on how to reach that objective or goal. The addition of the adjective 'effective' to the noun 'implementation' connotes that the act of implementation is not mechanical, formalistic or perfunctory. Rather it highlights the intention to achieve fully the desired objective or goal. The focus of the action is not on the process but on the result.

Therefore, at the heart of the concept of effective implementation is an implicit but indispensable ability to determine whether the desired objective has been achieved: to put it differently, you need to know whether you have reached your goal. This in turn entails that the objective or goal can be measured or quantified and that there are ways to verify that the results of the implementing action or actions correspond to the desired objective.

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To understand why policy implementation is more likely to follow a circular rather than linear path, one needs to appreciate the 'root problem' of policies. The word 'root' here has two meanings. First, it indicates a problem which is at the core of any policy formulation and application. Second, it is a pictorial representation of the nature of that problem. It very much looks like the root system of plants.

The root problem has two aspects. First, a policy objective can normally be achieved through multiple instruments. It follows that the right instrument has to be selected according to certain desirable features such as efficiency or cost.

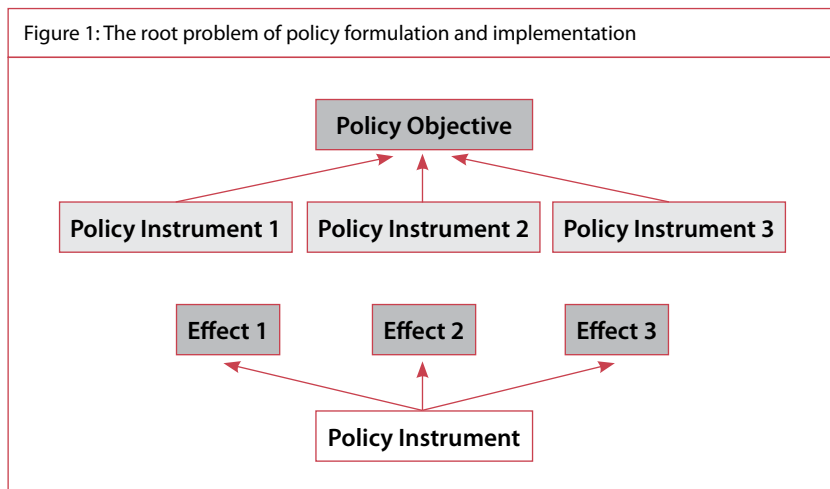


For example, the economic integration of migrants can be achieved through training courses to help them develop new skills or through a more interventionist measure involving actual placement of migrants in selected jobs. Protection of consumers from abusive selling practices by energy providers can be achieved directly through price regulation or indirectly through market liberalisation and entry of more providers. The choice of the right instrument is dependent on factors such as availability of information on costs, the need to incentivise market operators to invest and offer cost-efficient services and the administrative costs of supervision.

The second aspect of the root problem is the mirror image of the first. The same instrument may have multiple effects some of which may be undesirable. These side-effects can be costly and counter-productive.

For example, as is now well understood, price regulation of energy utilities can keep prices at an affordable level for consumers by preventing energy suppliers from charging excessively above cost. That, however, comes at the expense of not inducing sufficient investment which can lead to lower prices in the long term. Companies can be incentivised to make long-term investments only if there is a prospect of adequate profit, which implies that in the short-term, prices may have to remain considerably above costs.

The figure below depicts the two aspects of the root problem.



The root problem entails the results having to be constantly monitored and assessed. Failure to reach pre-determined targets should lead to adjustment of policy application of legal enforcement. In a world of informational imperfections, policy makers can never be sure that what appears feasible can indeed be achieved, and if it is eventually achieved, that it is the best that could be achieved. The act of implementation itself generates information which is useful and has to be fed back into the design of the implementation process and the choice of right instruments. Since, however, the information that the act of implementation generates is partly shaped by the efforts of the implementing or enforcing authority, one can never be certain about the extent to which such information reflects the objective state of the world or the subjective efforts of the authority.

One way of making sense of the feedback is to compare what that authority achieves or how it performs with the

performance of other similar authorities. Peer comparison is a valuable 'reality check'.

To summarise so far, policy implementation means purposeful action. It means that authorities: a. define *ex ante* one or more operational targets; b. carry out *ex post* checks to confirm that the targets are achieved; and c. benchmark their own performance against peers to ensure that targets are credible and achievements are within the boundaries of what is reasonable.

### Necessary administrative capacity and the usefulness of comparative assessment

Let's consider how this formulation of effective implementation can be translated into administrative capacity<sup>13</sup>. A public authority such as a ministry or agency that is responsible for enforcing a law or implementing a policy and, as a consequence has to act purposefully towards that end, must obviously have: a. knowledge about what has to be achieved (*i.e.* expertise); b. ability or capacity to reach its objectives (*i.e.* legal empowerment and human and material resources); and c. motivation to reach them (*i.e.* incentives, which can be inducements or penalties). Let's call these the 'three pillars of institutional capacity'.

A timely and rather sad reminder of the indispensability of these three pillars of institutional capacity has been provided by the Second Quarterly Report of the Task Force for Greece, which was issued in March 2012. The Report observes that 'preparatory work shows that in certain areas the Greek administration lacks the monitoring, reporting or control systems needed to ensure effective policy implementation.' [p.4] In other words, Greece does not have the requisite administrative capacity because public authorities do not have sufficient information on the impact of the policy instruments they deploy and, even worse, they are not able to steer those instruments towards the objectives they seek to achieve.

Of course, Greek public authorities must be aware of these deficiencies. So the inevitable question is why do they not take remedial action? The First Quarterly Report<sup>14</sup> of the Task Force referred to structural weaknesses such as 'no accountability of the results' and 'lack of supervision' [p.15]. In order to implement effectively, public authorities have to be incentivised to do so. Accountability mechanisms do provide such an incentive. Examples of accountability mechanisms are obligations to follow transparent procedures and to explain and motivate policy decisions.

In addition, the implementing authority has to be accountable to a principal for its actions. Otherwise there can be no assurance that it will try as hard as it can to achieve the objectives of the policy for which it is responsible. The principal should be able to exercise at least minimal control<sup>15</sup>.

But, there is another problem here. The 'root problem' suggests the existence of inherent uncertainties and informational imperfections in policy-making and policy implementation.



How would those who oversee performance of agents be satisfied that it is good enough, if they are not sure how overall policy objectives can be operationalised in specific targets, what policy instruments are the rights ones or how the effects of those instruments can be measured, for example?

Therefore, a different approach to raising accountability and offering incentives for better results is to benchmark organisational performance against those of peers. Benchmarking here is another way of asking what a comparable organisation would do in similar circumstances in order to find out whether both the operational policy targets set by the organisation in question and the outcomes it achieves are reasonable.

## Peer or comparative assessment is an indispensable component of administrative capacity for effective implementation.

The need to assess whether performance is satisfactory stems from the fact that any law and any policy has to be interpreted in the sense that it has to be decided by those who apply a policy or enforce a law as to whether it fits the specific circumstances of each particular instance of implementation<sup>16</sup>. Recent empirical research has also shown the importance of asking what someone else would do in the same situation. Apparently, when different persons are asked to interpret the same piece of legislation, their answers vary depending on their personal preferences and ideological inclinations. By contrast, when the same persons are asked to bear in mind what the average person would do in the same situation, their answers converge<sup>17</sup>.

Peer or comparative assessment is an indispensable component of administrative capacity for effective implementation and has to be built in the structure of any implementing or enforcing organisation through institutionalised regular self-reviews or external reviews.

Comparative assessment of performance is both, more feasible and more important in the context of the EU. It is more feasible because there are at least 27 authorities responsible for the same task. It is more important for the EU than



for individual countries because of the significant degree of discretion that Member States have to determine their own methods of implementation of EU law and policies. Such discretion exists not only in the case of directives, but also in the case of regulations. The important point here is that effective implementation becomes a collaborative project. We all benefit by learning from each other.

However, if cross-border comparison is to generate valuable information, policy outcomes and institutional performances across the different Member States need to be assessed systematically. This comparative assessment is the natural task

of the Commission or more specialised European agencies. In this connection, there is a gap in the text of Article 197 TFEU. It does not provide for this type of assessment. It limits itself to action that 'may include facilitating the exchange of information and of civil servants as well as supporting training schemes'<sup>18</sup>. Exchange of information and training is indeed very useful; but unfortunately 'no Member State shall be obliged to avail itself of such support.'

### Effective implementation of EU rules: the 'reality check' performed by the European Court of Auditors

The previous sections considered how effective implementation could be understood and what kind of administrative capacity was necessary to achieve that kind of implementation. This section examines how this concept has been applied in practice in the assessments carried out by the European Court of Auditors.

The main task of the ECA is to audit the annual accounts of EU institutions and agencies and the accounts of national authorities which receive and disburse EU funds. In addition, it conducts, on its own initiative, assessments of EU policies, of the application of EU law and of the corresponding administrative procedures and management performance of Member States. The results of these assessments are then published in so-called 'special reports'. This section summarises the main critical findings of a sample of special reports drawn from the publications of the past few years. The sample is not random; rather it was chosen in such a way so as to cover diverse policy areas.

The following reports have been examined [references indicated in brackets]:

- **The EU Transit System** [11/2006]
- **Are Simplified Customs Procedures for Imports Effectively Controlled?** [1/2010]
- **The Audit of the SME Guarantee Facility** [4/2011]
- **Are the School Milk and the School Fruit Schemes Effective?** [10/2011]
- **Do the Design and Management of the Geographical Indications Scheme allow it to be Effective?** [11/2011]
- **Does the Control of Customs Procedure 42 Prevent and Detect VAT Evasion?** [13/2011]
- **Has EU Assistance Improved Croatia's Capacity to Manage Post-Accession Funding?** [14/2011]
- **Effectiveness of EU Development Aid for Food Security in Sub-Saharan Africa** [1/2012]
- **Financial Instruments for SMEs Co-financed by the European Regional Development Fund** [2/2012]

What can we learn from the ECA special reports? The ECA reports can be read and understood on two levels: that of the methodology adopted in each report, and that of the substance and findings of each report. The precise methodology naturally varies from report to report. But what is striking about it is that despite using different words and methods of framing it, in essence the ECA always asks the same question: how can institutional performance and policy results be measured? The ECA always tries to define measurable indicators before it carries out its audits.

The findings of the reports, of course, also vary. But in general, the ECA identifies faults in implementation largely where:

- a. performance cannot be measured;
- b. what can be measured does not correspond to the desired targets as defined in the relevant legislative acts; or
- c. Member States apply the rules formalistically.

They are concerned more about following the prescribed procedure rather measuring the actual impact of those rules.

With respect to the problem of measuring performance, the reports suggest that it is caused by vague definitions of the overall legal or policy objectives. Member States do not always bother to operationalise more meaningfully those vague definitions.

Concerning the discrepancy between policy objectives and actual performance, the reports indicate that this is caused by the failure of authorities to adopt implementing instruments that can reach the pre-set policy objectives. Instruments are chosen from those readily available rather than specifically designed for the purpose at hand.

Regarding the formalistic application of the rules, the reports criticise the Member States for not acting intelligently when focusing their enforcement efforts in high-risk areas, high-risk market operators or on those with the greatest need.

In all of these cases, implementation is ineffective because it cannot be verified whether the pursued policy objectives are indeed achieved. Member States make claims but do not back these up with tangible evidence.



These faults in implementation reflect institutional weaknesses and constraints on administrative capacity. Implementing authorities do not always have the requisite expertise. They do not seem to set verifiable goals, nor do they appear accountable to define and reach such goals. They also appear unable to learn and adjust, possibly because they are not sufficiently empowered and endowed and, apart from the audit by the ECA, their performance is not regularly assessed.

## Conclusions

No law or policy is laid down in such precise terms that interpretation and elaboration at the stage of implementation become unnecessary. The implementing authority must always translate broad objectives into operational targets, adopt rules and procedures and utilise the right instruments.

The term 'effective implementation' implies that there is: a. a definition of feasible and verifiable objectives; b. continuous measurement of the results or impact of rules, procedures and instruments; and c. continuous assessment of whether the actual effects match the desired or stated objectives of the law or policy.

To succeed in these tasks, implementing authorities must have the capacity to learn and assess the impact of their actions and adjust their rules, procedures and instruments appropriately. They must be sufficiently empowered and endowed. They must also be accountable; they have to explain and justify their decisions. Indeed, accountability is indispensable for self-assessment and learning.

Accountability is also an important component of institutional capacity for effective implementation in the context of integrating economies. Comparison of performance against peers in partner countries strengthens accountability. Comparison is useful because often there is no standard of performance that can be set *ex ante* with an adequate degree of certainty. Good results can only be 'revealed' *ex post* through comparison of the performance of those authorities that attempt to reach the same policy objective.

In conclusion, the essence of effective implementation is that the actions of public authorities have an actual impact that corresponds to the aims defined by law or policy. Public authorities can act purposefully to achieve those aims only by establishing a certain institutional capacity.

In the context of the EU, effective implementation becomes a collaborative project because of the diversity of implementing instruments and procedures adopted by the various Member States. Comparative analysis of implementing or enforcement performance is a necessary component of determining whether Member States apply EU rules as best as they can.

## Notes

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<sup>1</sup> See **Dworkin, R.**, *Law's Empire*, (Cambridge, MA: Harvard University Press, 1986); **Hart, H.**, *The Concept of Law*, (Oxford: Oxford University Press, 1994) 2<sup>nd</sup> Ed.

<sup>2</sup> There seems to be no definition of 'effective implementation of EU law' either in the jurisprudence or secondary legislation. See **Nicolaides, P.** and **M. Geilmann**, *What Is Effective Implementation of EU Law?* *Maastricht Journal of European and Comparative Law*, forthcoming 2012.

<sup>3</sup> There is abundant literature on the performance of Member States in applying EU law and policies and the factors that determine that performance. On the whole, the literature is empirical and does not propose remedies that address weaknesses in administrative structures. By contrast, this article focuses on the normative issue of how effectiveness may be understood and how institutions can be structured so as to have the capacity to apply policies and enforce law effectively. See, for example, **Falkner, G., M. Hartlapp** and **O. Treib**, *World of Compliance: Why Leading Approaches to European Union Implementation Are only Sometimes-True Theories*, *European Journal of Political Research*, 2007, vol. 46(3), pp. 395-416; **Borzelt, T., T. Hofmann, D. Panke** and **C. Sprungk**, *Obstinate and Inefficient: Why Member States do not Comply with EU Law*, *Comparative Political Studies*, 2010, vol. 43(11), pp. 1363-1390; **Haverland, M., B. Steunenberg** and **F. van Waarden**, *Sectors at Different Speeds: Analysing Transposition Deficits in the European Union*, *Journal of Common Market Studies*, 2010, vol. 49(2), pp. 265-291; **Kaeding, M.** and **K. Voskamp**,

Better Implementation of EU Legislation is not just a Question of taking Member States to Court: SOLVIT, working paper, EIPA, 2010; **Kaeding, M.**, Better Regulation in the European Union: Lost in Translation or Full Steam Ahead? The Transposition of EU Transport Directives across Member States, (Leiden: Leiden University Press, 2007); **Kaeding, M.**, Administrative Convergence Actually: An Assessment of the European Commission's Best Practices for Transposition of EU Legislation in France, Germany, Italy, Sweden and Greece, *Journal of European Integration*, 2007, vol. 29(4), pp. 425-445. **Versluis, E.**, Even Rules, Uneven Practices: Opening the 'Black Box' of EU law in Action, *West European Politics*, 2007, 30(1), pp. 50-67; **Versluis, E.**, Explaining Variations in Implementation of EU Directives, *European Integration online Papers*, 2004, vol. 8(19).

- <sup>4</sup> Council Decision 2012/139/EU of 24 January 2012 establishing whether effective action has been taken by Hungary in response to the Council recommendation of 7 July 2009, OJ L 66, 6 March 2012, p. 6.
- <sup>5</sup> Council Implementing Decision 2012/156/EU of 13 March 2012 suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013, OJ L 78, 17 March 2012. p. 19
- <sup>6</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21 July 2001, pp. 30-37.
- <sup>7</sup> Case C-41/11 *Inter-Environment Wallonie* (Judgement 28 February 2012).
- <sup>8</sup> Case C-474/10,
- <sup>9</sup> Case C-474/10 *Seaport* (Judgement 20 October 2011)
- <sup>10</sup> *Ibid.*, Para. 39.
- <sup>11</sup> *Ibid.*, Para. 42.
- <sup>12</sup> See [www.dictionary.com](http://www.dictionary.com).
- <sup>13</sup> I have explored this issue in more detail in a recent book entitled *Managing the European Union: Microfoundations of Policy Implementation*, EIPA/Routledge, forthcoming 2012.
- <sup>14</sup> SI(2011) 399/3.
- <sup>15</sup> **McCubbins, M.** and **T. Schwartz**, Congressional oversight overlooked: Police patrols versus fire alarms, *American Journal of Political Science*, 1984, vol. 28, pp. 16-79; **Kiewiet, R.** and **M. McCubbins**, *The Logic of Delegation*, (Chicago: University of Chicago Press, 1991).
- <sup>16</sup> On the connection between application and interpretation of law, please see **Farnsworth, W. et al**, Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation, *Journal of Legal Analysis*, 2010, No 2, p. 257; **Farnsworth, W.**, *The Legal Analyst* (Chicago: University of Chicago Press, 2007).
- <sup>17</sup> **Farnsworth, W. et al**, *Ambiguity About Ambiguity*, op. cit.
- <sup>18</sup> It appears that so far Article 197 TFEU has only once been used as a legal basis for a Commission proposal. See Commission Proposal for a Regulation of the European Parliament and of the Council Establishing for the Period 2014 to 2020 the Rights and Citizenship Programme, COM(2011) 758 final, 15/11/2011.