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**Enlargement of the EU
and Effective
Implementation of
Community Rules:
An Integration-Based
Approach**

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Introduction

The internal market is undoubtedly the “heart” of the European Union. Although the legislative basis of the internal market is very much in place, the task for the completion of the internal market is not over yet. The European Commission has launched several initiatives over the past few years to “ensure a common understanding of the rules and build a shared commitment to enforcement”. Effective implementation and enforcement of EU rules is the “last frontier” in the process of creating a single European market without any impediment or barrier, which began more than thirty years ago.

By contrast, it is rapidly becoming the “first frontier” for the countries that aspire to join the EU. In June 1993 the Copenhagen European Council defined four political and economic requirements that had to be satisfied by any European country that wished to apply for membership of the European Union.¹ Since then, a fifth requirement has emerged as a more stringent and, some argue, less tangible criterion of membership. This new criterion concerns the capacity of prospective members to comply effectively with the obligations they assume in order to accede to the Union.

Although during the past two-three years, the European Commission has been assessing informally the administrative capacity of the countries that have applied for membership of the EU, in its Regular Report² of October 1999 on the progress of the applicant countries it proposes the introduction of a new procedure in the on-going accession negotiations. This procedure will make it commensurately more difficult for the applicants to conclude the negotiations. The Commission has outlined a new strategy based on the principle of “differentiation”: each applicant will move at its own pace; the pace will be determined by the rate at which negotiating chapters are closed; chapters will be closed only when the applicants are able to demonstrate not only the existence of adequate capacity but also sufficient progress in implementing the relevant “acquis communautaire”³; previously closed chapters will be re-opened. Differentiation is bound to increase comparisons between the candidates and, for this reason, will in all likelihood intensify competition among them.

The problem for the candidate countries is that developing and demonstrating effective implementing capacity is something for which the EU does not have clear and ready criteria or benchmarks. This is partly the result of the fact that the EU does not have competence over the administrative structures and procedures of its members. Consequently, it lacks any formal rules on the meaning of the concept of effective implementation and/or enforcement capacity. Nonetheless, there are many measures, criteria, indicators and guidelines on how to apply EU rules which are scattered in directives, regulations, recommendations and notices. In addition, the European Commission uses several informal criteria, such as best-practice benchmarks, to assess the record of member states in implementing EU directives.

¹ For a detailed review of the conditions for membership of the EU and of the process of enlargement see P. Nicolaidis et al, *A Guide to the Enlargement of the European Union (II)*, (Maastricht: EIPA, 1999).

² *Enlarging the EU: Regular Report from the Commission on Progress towards Accession by Each of the Candidate Countries*, COM (1999) 500, 13 October 1999.

³ The body of EU law and practice, known as the *acquis communautaire*, comprises acts, the Courts’ jurisprudence, informal practices and political positions and declarations.

These criteria, indicators and guidelines, however, have not been developed within a cohesive framework of analysis and they are certainly not all legally binding on the member states. Therefore, the countries that have applied for membership, have to determine first what effective implementing or administrative capacity means in each area of the *acquis communautaire*, develop that capacity and, then, persuade the EU and the Commission that they indeed possess it.

Not unexpectedly, officials on the EU side have tended to stress the significance of implementation and enforcement capacity, while officials on the applicants' side have tended to play it down. Although it is perhaps premature to make predictions about the ongoing accession negotiations, the issue of implementation capacity has the potential of causing considerable friction between the two sides. This is because it can be interpreted by each side in multiple and opposing ways.

For their part, the applicants have had two kinds of reaction to demands by the EU to provide tangible proof of their capacity to implement EU rules effectively. On the one hand, they have claimed that they already possess that capacity (or are in the process of establishing it) and that they see no major problem in that respect. On the other hand, they have asked to be told precisely how effective capacity can be established in order to take the required measures. Both of these responses are unsatisfactory. Establishment of this type of capacity is a deceptively difficult task. Moreover, it is virtually impossible, for example, to transfer enforcement mechanisms that have worked in one country to another. Not only do institutional conditions and policy-making traditions vary significantly from country to country, but as will be argued later on, successful application and enforcement of rules ultimately depend on organisations which are capable of learning and adjusting. Exact recipes or quantitative prescriptions, therefore, are bound to suppress those much needed learning and adjustment processes.

However, the impossibility of offering simple recipes to the applicants does not mean that there is nothing that can be done to guide them. Given the experience that the Commission has gained in assessing the efforts of existing member states as they grapple with the problem of effective implementation of Community rules in their markets, it makes sense for the EU to begin identifying in more tangible terms the various meanings and dimensions of implementing capacity.

The purpose of this paper is threefold. It makes a first attempt to define what may be thought as the basic components of effective implementation capacity. The second purpose of the paper is to explore the limits of implementation capacity and in particular the trade-off between the effectiveness of the various policy instruments and the efficiency of utilising available resources. When existing and prospective member states choose the particular means of applying EU rules, variations inevitably emerge among them. It is not obvious when such variations are acceptable or tolerable and when they are not. Thirdly, the paper argues the case against the view that there can be a single model of effective capacity to apply and enforce EU rules. This kind of effectiveness partly reflects existing national conditions and institutions. Applicant countries should be given guidance and assistance but

they should not expect precise blueprints. They cannot but innovate. Innovation, although necessary and unavoidable, is not without risks. Deviating from traditional or familiar methods and models will provoke the scrutiny, if not the outright suspicion, of the EU. Therefore, proving to the EU that indeed they have that capacity will be to them as important as establishing it.

If the definition of the basic components of effective capacity is to be of any practical value to the candidate countries, it must be broad enough so that it can fit many areas of the acquis. At the same time, however, it must possess sufficient detail so that it can have operationally useful in each of those areas. General prescriptions must be applied with caution and with full understanding that they have to be supplemented with sector- or area-specific measures. Although it is virtually impossible to set detailed quantitative indicators of effective implementing capacity, there are criteria for assessing capacity needs, strengths and weaknesses.

The root of the problem is that it is not always clear in the various Directives how compliance can be achieved either with the letter or the spirit of the Community's policy. This, of course, does not mean that there is nothing to be said about how effective implementation capacity can be built. On the contrary, as shown in this paper there is much to be said. At the same time it should be emphasised that, first, it becomes progressively more difficult to define precise prescriptions that remain valid across fields as one gets closer to particularities of the application of the rules in any given field. This is because the specific institutional and market conditions vary from one field to another. As in almost everything else in life, description which is widely applicable and general enough sacrifices detail and immediate relevance. The "solution" is to find the right balance between generality and relevance. The "solution" in this paper identifies the "basic ingredients" of implementing capacity which can then be used to derive at more precise statements in particular situations. Second, it must be expected and factored in the efforts to develop implementing capacity that there are important differences from one area of EU policy to another. Third, the difficulty of devising precise ex ante prescriptions of implementing capacity does not mean that prospective members should give up on the false presumption that it is a futile task. Rather, it means that they should design procedures and establish institutions which are flexible and can adjust over time as they learn more about how to enforce EU rules.

Before proceeding into more substantial issues, a point of clarification. The frame of reference of this paper is that of policies. The examples used are drawn from policies and the problems identified are those that appear in the implementation of Community policies. Hence, the claims and the conclusions of this paper must always be understood to refer to policies.⁴

⁴ It may be said that the EU has three "faces":

- i. the institutions and their decision-making procedures,
- ii. the rules or obligations assumed by the member states and
- iii. the Community policies or activities.

Policies are understood in this paper to differ from the rules, as defined in the Treaties and secondary legislation, to the extent that policies are sets that contain at minimum the following three elements:

Transposition – Application – Compliance – Enforcement

To facilitate understanding, it is necessary to begin with some definitions. The European Council, especially in its Madrid (December 1995) and Luxembourg (December 1997) Presidency conclusions, and the Commission, in its Agenda 2000 and subsequent reports on the applicants issued in November 1998 and October 1999, have referred to the requirement of “effective administrative capacity” by those that aspire to join the EU. This requirement has been stated in broader terms as well. For example, the conclusions on enlargement of the General Affairs Council of 7 December 1998 mentioned as a pre-condition of membership the “existence of credible and functioning structures and institutions”. They also stipulated that the “development of administrative and judicial capacities is a crucial aspect of preparation for accession”.

The Commission has used these terms largely in relation to available manpower, administrative / judicial procedures and budgetary resources. It is clear, however, that the Commission does not understand administrative capacity only with respect to manpower, procedures and money. The Commission has also referred, for example, to the nature of the implementing rules which should be clear, uncomplicated and flexible.

Because, however, in official documents on enlargement, there are these references to manpower, procedures and money, this paper deliberately uses the term “effective implementation capacity” which, as explained below, is regarded to be broader than administrative capacity. Ultimately, the EU is concerned about ability to achieve defined results or goals, i.e. application and enforcement of the rules, rather than whether a prospective member has plenty administrative resources. These resources are a necessary but not sufficient condition for applying EU primary and secondary legislation for the purpose of achieving tangible integration into the EU. Strict enforcement, for example, can in principle be successfully pursued with the aid of intelligent procedures, even without having too many resources at one’s disposal. Successful enforcement is as much the outcome of a well-designed system as of availability of resources. It is conceivable that a country can have adequate administrative capacity without having adequate implementing capacity because the laws or regulations in question are ill-designed [ambiguous; not conferring sufficient and clear power, etc.]. Implementing capacity, therefore, refers to both the legal / regulatory / institutional framework and the available resources and includes administrative capacity.

It may appear surprising to the reader that we attach so much importance to the legal / regulatory / institutional framework. The reason is that application of Community rules, even the simple ones, is not a correspondingly simple process or task. In many cases member states have discretion over the nature of implementing measures. It is that

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- i. certain objectives or goals,
 - ii. implementing instruments or measures and
 - iii. institutions or agencies responsible for the implementation of those instruments.

By contrast, rules (such as, for example, the obligation of member states not to discriminate on the basis of nationality) do not have either defined instruments and/or defined responsible institutions.

discretion that causes variation of application and enforcement across the EU. It is also that discretion that forces Member States to think of how to design their implementing procedures.

It is not obvious where the limits of that discretion lie, but in the following section it is argued that for effective capacity to be meaningful, it must be understood in relation to the fundamental EU objective of integration and establishment of a common market without any barriers to cross-border transactions.⁵

As already explained, the term implementation capacity is used in this paper to mean something more than ability to transpose, apply and comply with EU rules. The implementation process, as opposed to the formulation process, of Community acts, and in particular Directives, consists of four stages: **transposition, application, compliance and enforcement**. Later on effectiveness will be defined, to be the achievement of integration [the fundamental objective of the EU], and it will be explained that its achievement requires a fifth stage, that of **evaluation**, and a sixth stage, that of policy reform.

Transposition is the legal process of incorporating a new set of rules into the national statute books.⁶

Application includes the practical steps taken by the relevant authorities to put the rules into effect. It is the establishment of procedures and administration of the relevant measures.

Compliance encompasses those actions undertaken for the purpose of conforming with the obligations imposed on them by those to whom the rules or the practical measures are addressed. There is a distinction between application and compliance because in many cases, the tasks of public authorities in creating new procedures are different from the tasks of the private sector which may have to comply with the procedures.

⁵ As explained above, we confine our analysis to the European Community and its policies and activities. Although implementation problems exist in the areas of foreign and security policy and justice and home affairs, they fall outside the scope of this paper.

⁶ Transposition is an important legal process. The method of transposition, whether through a bill approved by parliament or through an administrative act, can have significant implications for the promptness, transparency and efficacy of application of EU rules. Analysis of legal processes is beyond the scope of this paper. However, it should be recognised that legal processes and policy formulation and implementation interact extensively. For example, the method of transposition relates significantly to definitions of policy objectives and specific tasks and the identification of responsible agency. The strictness and promptness of redress to infringements in national courts (which also reflect the organisation of courts, the level of training of judges, etc.) of transposed Directives relate to the availability and nature of sanctions. In addition, the nature of the rights created by Directives may also have a significant impact on the process and effectiveness of rule enforcement. Some Directives, although they require transposition, confer rights to individuals (see the landmark Francovich [C-479/93] and Factortame [C-46/93 & 48/93] cases). In this case individuals would have the right to sue the government for compensation for failure to transpose the Directive or for faulty transposition or implementation. The enforcement dynamics change considerably when individuals have such rights and incentives. There is an extensive literature on the legal aspect of enforcement. See for example, J. Vervaele, Compliance and Enforcement of European Community Law, (The Hague: Kluwer Law International, 1999).

Those three processes or stages of implementation are necessary but not sufficient conditions for ensuring that the rules in question bring about the intended results. Hence, ensuring compliance, or enforcement, is the fourth stage of implementing the relevant rules.⁷

Sometimes compliance is thought to be synonymous to enforcement. This is not correct. Compliance is the act of conformity by those that have to abide by the rules, while enforcement is the act of checking and ensuring or compelling conformity. Sometimes the same organisation has both to comply with and enforce the rules. But, even in such cases, if one looks beyond the surface, there are usually different departments responsible for compliance and enforcement. Again sometimes EU rules require compliance by both member states and private actors but normally it is only public authorities that have power to enforce. For example, Article 86 of the EC Treaty prohibits any measures contrary to the competition provisions and it refers both to member states and public undertakings. While private or state-owned firms have an obligation not to act anti-competitively, public authorities are required not to impose duties on firms that would lead the latter to behave anti-competitively. Hence, the obligation of member states is one of appropriate decision of their laws or policies while that of firms is one of appropriate behaviour or commercial practice. The distinctions between the various stages identified above are not always clear in EU documents or decisions concerning enlargement. For instance, although the General Affairs Council of December 1998 in its conclusions recognises that “the transposition of the *acquis* is not sufficient in itself but must be followed by effective implementation and enforcement”, it does not make any reference to compliance.

Defining the problem: When is enough, enough?

Why is implementation capacity an issue at all? Is full acceptance of EU rules by the applicants not sufficient for membership? Is the introduction of these rules into their statute books not adequate? A look at the EU's core – its internal market – illustrates well the problem. Most Community rules in the area of the internal market are in the form of directives [there are about 1,400 of them concerning various policy areas of the internal market]. Directives, in general, have no direct applicability and, therefore, member states have to draft applying legislation according to their legislative systems and traditions. This is transposition. In addition, the chosen means of application have to be compatible with their administrative procedures. Hence, they differ across member states.

For an existing member state the drafting of transposing legislation and the application of that legislation may be routine matters of its functioning within the EU. Even so, the record of implementation among the existing member states is neither uniform, nor consistent. The Commission's regular reports on the implementation of internal market rules by member states and the frequent recourse to the Treaty's infringement provisions attest to the legal

⁷ For a more detailed explanation of the differences among transposition, application, compliance and enforcement and for practical examples, see A. Beetsma, P. Nicolaidis and A. Turk, *An Assessment of the Approximation Process in Poland: The Importance of Coordination and Enforcement*, (EIPA for the European Commission, March 1997). This report includes case studies on technical standardisation and competition policy.

and administrative difficulties facing existing member states in their task to give effect to their Community obligations.⁸ The task is even more daunting for prospective members which have to set up new decision-making procedures and institutional mechanisms and apply policies with new instruments that generate results which have not been experienced or observed before.

If the implementation of internal market rules is far from perfect within the present EU of fifteen, the member states and the Commission are naturally concerned that the expansion of membership will only add to the problems, for example, of preventing sub-standard and unsafe products from reaching consumers, opening up markets, regulating the transport of hazardous materials, eliminating fraud, controlling unfair subsidies, etc.

Furthermore, capacity to implement effectively Community rules is an issue not only with respect to the obligations assumed in the internal market area. It concerns all facets of functioning within the EU – from operating the Community's common customs code, to utilising structural funds, to aligning national foreign policy to that of the EU, to processing asylum applications. Even where Community rules are completely harmonised, prospective member states may still have to develop their own procedures for ensuring compliance. So implementation is not only about having enough personnel and budgetary resources to execute certain assigned tasks. It is also about how to execute those tasks, which may require the development of, perhaps unique, procedures of putting the rules into practice for the ultimate purpose of integrating a member country into the rest of the EU.

For example, in the field of trade policy where the EU has established fairly uniform rules and practices, implementation takes the form, among other things, of applying the common customs code. This is a very detailed list of products with more than 16,000 entries and covers every conceivable good which is imported in or exported from the EU. The national customs services have been the first to develop a computerised network of communication within a Community-wide system of cooperation. It would seem, therefore, that effective capacity to apply the common customs code would require not much more than enough officials with good knowledge of the various product categories, the relevant customs forms and how the system works. However, as the Netherlands has discovered, manpower is never enough while the needs of modern commerce preclude the checking of each individual container or consignment, even if the manpower could be found to carry out that task. The Netherlands which operates the world's largest port has had to devise working procedures which were not required or stipulated by the EU. The reason was that the aim of the Dutch procedures was to identify consignments for priority checking depending on their "risk factor" [according to the nature of the product, the country of origin, the transport route, etc.] so as to maximise the efficiency of customs control. This means that customs checks can never cover 100% of traded products and the procedures indirectly admit that fact of life. EU rules, therefore, are in practice applied differently in a busy port than a small port where everything can be easily checked.

⁸ See, for example, the Commission's latest report on the implementation record of member states, Sixteenth Annual Report on Monitoring the Application of Community Law, COM(1999) 301 final, 9 July 1999.

When are resources sufficient and procedures satisfactory? How can it be determined that two officials, for example, are enough to do the job in one country while they are not in another? A partial answer to this question is that each member state has to devote adequate resources and implement those procedures which enable it to achieve the objectives of directives and carry out the tasks specified in regulations. Although this answer is correct, it essentially pushes the problem one stage backwards without resolving it. The problem is that directives and regulations do not stipulate, for example, the number of persons that should be assigned to a particular task or the precise administrative procedure that should be followed.

The European Court of Justice has had opportunity to tackle such questions and its rulings to shed some light. In a landmark case concerning fraud in the application of the instruments of the common agricultural policy [C-68/88, *Commission v Greece*], the Court ruled that “Member States are required by virtue of Article 5 of the EEC Treaty [present Article 10] to penalise any persons who infringe Community law in the same way as they penalise those who infringe national law” [emphasis added].

The Court then added, “... Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of similar nature and importance and which make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws”. [emphasis added].

So the Court has already identified a situation in which it has been able to define when “enough is enough”. This is the situation where member states can take action which is comparable to domestic actions. In these cases the applicable standard of effective enforcement is that of analogous or similar action. This standard, of course, cannot apply to all those situations where member states have to establish new institutions and procedures.

Recent research has shown that member states differ in the way that they implement EU rules, in particular directives on the liberalisation of utilities, and that these differences do not appear to reflect the formal structure of their respective regulatory systems and agencies. Hence, administrative structures do not seem to determine the extent, degree or effectiveness of policy implementation. In this context, what appear to be more significant are the divergent national conceptions of “public interest” which influence how consumer interests, producer interests and broader social concerns are taken into account in designing, applying and enforcing the relevant policy instruments and EU rules.⁹

⁹ See D. Dimitrakopoulos et al, Better Regulation of Utilities in Europe, (London: European Policy Forum, 1998) and the literature cited therein.

Precisely because implementation does not take place in a legal and institutional vacuum, the applicant countries must be aware how their system will inevitably influence their application and enforcement mechanisms. Once more, not only is it inappropriate to expect or seek to copy implementation models from the existing member states, more seriously, the dedicated size of staff, the formal procedures and the budgetary resources spent do not mean much if they are considered in isolation and without regard for the policy/political systems in which they are embedded. The applicants need to have a broader perspective in order to implement EU rules effectively. Inevitably, preparation for entry into the EU will require an assessment of institutional structures, decision-making procedures and coordination mechanisms that goes beyond the formal confines of the particular *acquis*.

It is not claimed here that the problem of implementation is of equal complexity in all areas of the *acquis*. In some policy areas it is relatively easy to identify what needs to be done in order for existing or prospective member states to comply with their obligations. In other areas it is more difficult. For example, in the field of state aid, member states have to compile a register of all their state aid schemes. Here it is easy to issue a decree instructing all ministries to supply information on all such schemes to the office responsible for compiling and maintaining that register. It is comparatively more difficult to determine the right number of bank supervisors because their number depends in turn on how thorough and detailed are their supervisory tasks and how extensive are the requirements imposed on banks.

The tasks stipulated in directives and regulations are never detailed enough. Member states always have a certain degree of discretion. That there is discretion and, therefore, possibility of variation among them in all areas of the *acquis* may appear as a too broad statement, but it is easily proven by a cursory look at the breadth of the rulings and workload of the European Court of Justice. There is a need for Court interpretation of the rules precisely because member states have discretion.

Even if discretion with respect to the means of implementation were completely absent, it does not follow that the task of determining the amount of the required resources would be easier. There appear to be no directives or regulations that stipulate the amount of resources that should be assigned to particular policy areas. How then can member states decide when enough is enough? The answer is that policy implementation must be understood within the broader objectives of the EU: i.e. integration and the establishment of the common market. Member states have to devote that amount of resources and define those procedures that are capable of removing intra-EU barriers, restrictions and discriminatory provisions and/or eliminating harmful effects on partner countries. It is by no accident that the Court, when there is ambiguity in specific rules, resorts to the general principles of the Treaties and asks how they could possibly apply in that particular situation. The guiding criterion in these cases is the achievement (or not) of integration.

For example, the directives on financial services require that each member state exercises supervisory control over banks established in its territory. This means that when member states decide how many bank supervisors to employ, they have to ask how many they need in order to prevent, on the one hand, the act of slow or too bureaucratic supervision from

becoming an impediment to the establishment of banks from other EU countries and, on the other, to stop loosely or improperly supervised banks from supplying their services across the border to their partner countries. Hence, the answer varies from member state to member state and depends, inter alia, on the size of their financial markets, the frequency of cross-border transactions, the number of resident banks, etc. If Member States would rely solely on the provision of the banking directives, they could employ a simple supervisor for issuing, for example, new licenses. That person could do the job perfectly but the inevitable delay could effectively prevent foreign banks from establishing new subsidiaries. This would be contrary to the objective of integrating national markets and creating a single European market in financial services.

How can the extent of achievement of integration be assessed? It should be assessed on the basis of the fundamental principles defined in the Treaty, which include the four freedoms, the prohibition of discrimination, the rules on competition [as they apply to governments] and the prohibition of excess taxation of non-national products. Account should also be taken of the principles developed by the Court in its various rulings on the four freedoms and, in particular, the requirements of necessity and proportionality. For example, do national rules treat imported products or services differently? Is such differential treatment objectively justified? Is it proportional to its intended objectives? Is compliance itself an obstacle to trade or cross-border investment? Are the procedures too long and cumbersome? It is by asking these questions that national authorities establish a point of reference, a benchmark, in relation to which they can determine how well the rules are implemented.

We arrive now at a rather paradoxical conclusion. It is not so much the EU-stipulated tasks in secondary legislation that ultimately determine the required resources and procedures for effective implementation, but the fundamental obligation for removal of barriers and the elimination of negative effects on partner countries. It is this obligation that determines when “enough is enough”. The specific tasks in secondary legislation indicate “where” member states must act and “what” their particular goals of their action must be. If related legal requirements are detailed enough, then they will also co-determine the resources that will have to be expended to achieve their aims. For example, a rule that stipulates that certain products must be checked by national authorities, naturally implies that member states must make provisions to issue certificates. At minimum, this requires the act of first inspecting those products and then the act of issuing the certificate. In this case, the rule in question entails that effective implementation must include at minimum those two acts. Yet even where rules are as precise as in our example, member states still have to determine the number of inspectors needed, their powers, level of training and qualifications, the place of inspections, etc. No Community rules, even simple ones, can be applied just as they come out of the Brussels machinery without any further thought by the member state authorities.

The magnitude of the implementing tasks of the member states is better appreciated when one looks at those issues for which member states do not have to implement Community law. Although this may sound as oxymoron, there is at least one area where the Community has both the legal competence and the responsibility of enforcement of the rules. That area is competition policy. Member states have concurrent jurisdiction as far as the prohibitive parts of competition rules [this means that they may take action against enterprises that

infringe competition rules but they may not authorise exemptions, which is the prerogative of the Commission]. Even though it may appear surprising, member states do not have an obligation to adopt their own competition laws. In reality of course all of them have done so. The Commission was given responsibility to apply the Treaty's provisions [Articles 81 and 82] in 1962 through Regulation 17. Since then it has issued numerous regulations, notices and guidelines of its own to explain its interpretation of the basic Treaty provisions, establish procedures and lay down rules concerning the operation of those procedures. Had member states, instead of the Commission, the obligation to apply competition law, then presumably they would have to do the same as the Commission.

Things get quickly more complicated when rules are framed in more general terms. Member states will have to turn to the obligations of integration to get an indication of "how" they should act and "how much" of their administrative resources they should expend for those purposes. Of course, the particular tasks are those which give effect to the general integration principles enshrined in the Treaties while the general principles, in turn, determine the nature of the tasks.¹⁰

Later sections explore further the difference between "where/what" and "how/how much" and examine the case when "a lot is too much" in the sense that implementation capacity which is "too effective" may be inefficient and in itself a barrier to the completion of the internal market.

Effective capacity = self-learning capacity

In this paper implementation capacity is defined to encompass all four stages of putting EU rules into effect: i.e. transposition, application, compliance and enforcement. In other words, implementation capacity denotes ability to conform not only with the letter but also with the spirit of the rules.

Indeed the Oxford Dictionary defines the verb to "implement" to mean "to complete, execute, fulfil". In our context it means to bring the policy process to conclusion [to fruition] and achieve the objectives of the policy in question. Ultimately, implementation capacity entails the existence of institutional mechanisms or procedures for assessing the results of the application of the rules, measuring the extent of compliance and adjusting appropriately and as necessary policy instruments, compliance methods and enforcement strategies.

It is necessary, therefore, to add two more stages to the four implementation stages identified above: that of evaluation or policy appraisal and finally that of policy reform or adjustment.

¹⁰ To put it differently, to give meaning to the principles or objectives, one has to define specific tasks. At the same time, the adequacy of the procedures for carrying out those tasks depends on the principles that have to be complied with or the objectives to be achieved.

Policy evaluation or appraisal examines whether the adopted methods of application and enforcement bring about the desired results. For this purpose, of course, the implementing authority has to be in position to identify, verify or quantify those results. It will have to be able to assess whether compliance has been achieved to a satisfactory degree. In some cases it may also need to measure its own effectiveness, possibly through the use of performance indicators or standards or benchmarks. Evaluation is indispensable for effective implementation of any rule, but in order to be meaningful, the implementing authority has to have a clear view as to what it seeks to achieve. It must be able to measure it in tangible or objective terms or at least identify it in observable terms.

Policy reform or adjustment is the incorporation into the policy process of the lessons drawn from the evaluation stage. This means “going back to the beginning” at the point where the policy objectives are formulated or the policy instruments and procedures are determined. It makes no sense to try to measure the results of the application of the rules [broad objectives and implementing measures] unless the rules themselves can be adjusted in light of the results and in light of the possible evasive action by those that have to comply with those rules.

Having broken down the implementation process into six distinct stages, it should become clear by now that effective implementation ultimately means intelligent implementation not in the sense of being clever but in the sense of being capable to (a) forecast the likely reactions to the application of the rules in question [that is why the expected results are defined before hand] and (b) learn from the mistakes that have been made either in the application or enforcement stage and from the actual reactions to the application of the rules. So learning processes have to be built in the various implementing stages. It is perhaps counterintuitive that effective implementation or intelligent implementation recognises that mistakes are bound to be made and precisely for that reason it prepares before hand to identify and rectify them.

Effective v efficient policy implementation [or when is much, too much?]

Policy implementation and its various components such as enforcement are ultimately about making intelligent choices and finding the right trade-offs. Perfect application and enforcement are ideals which are never achieved in practice. So in the end what needs to be determined is what constitutes “sufficient” implementing capacity that brings about “satisfactory” results. It is very difficult to find official EU documents that make references to “sufficient” capacity or “satisfactory” results. Not only are these concepts very difficult to define, they are also fraught with problems because it would be politically unacceptable for the EU, in general, and the Commission, in particular, to be seen to be making what would amount to a compromise.

Yet, there is no way to avoid completely the inherent trade-off between effectiveness and efficiency. For example, we could theoretically achieve perfect enforcement of traffic rules by posting a policeman at every street corner. That would be inefficient for at least two

reasons: too high costs and too many undesirable spillovers. That is, too many resources would be expended and personal liberties would be infringed to an excessive degree.¹¹

However, terms such as “sufficient” capacity and “satisfactory” results are not unknown in the Community’s jurisprudence. The Court itself is well aware of the problem and danger of interpreting Treaty principles absolutely or too rigidly. For example, even though it requires that competition is not distorted, the Treaty contains no definition of the concept of competition. For this reason the Court has come up with terms such as “workable” competition and “effective” competition and has classified as anti-competitive only actions that have “appreciable” effect on intra-EU trade.

The Commission’s own views on this subject are worth recording because they highlight the problem of determining the effectiveness of implementing EU rules. In the Fourth Report on Telecommunications Policy [October 1998], the Commission states [pp. 12-13]:

“While transposition can be judged against clear criteria by comparing the relevant national measures with the texts of the directives, the assessment of the effective application of those measures depends to a much greater extent on the indicators selected and on the Commission’s judgment, taking into account inter alia that of market players, as to compliance. In the final analysis, it will be for the Commission to test those judgments where necessary before the Court of Justice ...”

“In assessing effective application, the Commission has borne in mind that certain of the principles in the directives do not lend themselves easily to transposition, but require a direct examination of their practical application ... Further, and most crucially, in some circumstances a faithful transposition into national law may in practice be applied in a way which is contrary to the intention of the Community legislator, or may simply be a dead letter ...”

“There is a further potential barrier to market entry which has been cited by market players in connection with a number of the themes set out here, namely the complexity and in some cases obscurity of national implementing regulation. The Commission urges Member States to review rules and procedures where appropriate, to ensure the greatest possible clarity and ease of application.”

The text which is quoted reveals that the Commission correctly recognises both the complexity of the task of assessing effective rule application and the inherent subjectivity of that task. The Commission avoids, again correctly, to provide simple prescriptions and stresses instead the significance of its own judgement, that of market players and eventually the interpretation of the Court. Member states must also exercise similar judgement.

Given that there is no a priori prescription of the measures that bring about the right balance between effectiveness and efficiency, the optimal use of society’s resources and regulations

¹¹ See the classic article by M. Darby and E. Karni, Free Competition and the Optimal Amount of Fraud, *Journal of Law and Economics*, 1973, vol. 16, pp. 67-88.

dictates that the cost of expending one extra euro in strengthening enforcement should at the margin be equal to the additional benefits derived from stricter enforcement. In practice each case requires its own unique arrangements to reach that balance.

Too much or too strict enforcement imposes costs on society in four ways:

- i. a large amount of resources are devoted by the government and its agencies to monitoring and enforcement activities,
- ii. a large amount of resources are expended by operators in complying with the rules [or avoiding compliance],
- iii. strict and inflexible rules weaken competition [and either allow incumbents to earn extra-normal profits or discourage incumbents to invest because they are prevented from expropriating the returns to their investment], and
- iv. strict and inflexible rules reduce innovation and technological change.

As has long been recognised in the literature, there is a trade-off between “static” efficiency and “dynamic” efficiency. An attempt to squeeze every euro of excess profit from the regulated companies and reduce static inefficiency will deprive them of any incentives to take risks and invest in new products, processes and technology. The end result is an increase in dynamic inefficiency. Of course, this does not mean that a regulator is always functioning on the boundary of that trade-off. Often static and dynamic inefficiency coexist and, therefore, potential gains can be reaped by reducing both them. The “art” of regulation is to determine when it is possible to reduce both without trading one against the other.¹²

For the purposes of this paper the relevant issue is that implementation is costly both in terms of the resources it requires and in terms of the obligations it imposes on those who have to comply with the enforced rules. The implementing authority should take into account both of these costs. In other words, it should not be too ambitious and at the same time it should realise that it will have to experiment to discover how to raise efficiency and effectiveness without hitting the boundary of the trade-off between the two.

Within any system of rules, efficiency requires concentration of resources and effort. This means prioritising problems and identifying solutions that address as closely as possible those problems without causing unwanted side-effects or spillovers.

A step towards improving policy efficiency is to make a distinction between structural problems and behavioural problems. Where there are structural problems [e.g. barriers to trade, dominant market positions, diverse technical regulations], ex ante rules imposed on all market participants can be more effective in achieving integration. By contrast behavioural rules, whose applicability depends on the particular outcome in each case, can be implemented only ex post. While rules concerning structural factors can be applied fairly automatically, enforcement of behavioural rules requires prior examination of the merits of each case by the enforcing authority. Although, there can be no presumption that structural rules are in general superior to behavioural rules, the former require fewer administrative resources than the latter. Hence, by distinguishing between structural and behavioural

¹² See J. Tirole, The Theory of Industrial Organisation, (Cambridge, Mass: MIT Press, 1988).

problems and by using rules to deal with structural problems and regulatory procedures [that depend on market analysis and assessment of effects] to deal with behavioural problems, an agency may be able to focus its actions and enforce EU rules more efficiently and effectively. Hence, efficiency also reflects a judicious division of enforcement effort between reliance on ex ante rules and more active forms of intervention and/or supervision.

A question that arises at this point is what to do with EU rules that appear to be too costly to existing or prospective member states or impose excessive regulatory uniformity. The EU has still to face up to the problems of the cost of compliance and excessive uniformity. Although there have been many debates on the overt and covert costs of Community rules, the EU has yet to develop any practical means of evaluating the cost-effectiveness of its actions across the board. Moreover, the only criterion for assessing the need of action at the Community level is that of subsidiarity, even though it cannot determine when it is worth having “competition among national systems of rules” rather than a single, Community system of rules.¹³

Why then be interested in efficiency? The reason is simple. To evaluate the efficiency or not of policies and/or compliance procedures, one has first to define quantifiable or at least verifiable indicators of performance. These indicators which are linked to the objectives sought must then be related to the inputs used. By carrying out this kind of assessment, candidate countries will have enough information to identify their own needs, capacity strengths and weaknesses and potential remedies. If a simple recipe must be offered, then here is one: To develop effective capacity, begin by deciding how to measure its performance [i.e. go first to the last component of implementing capacity]. The issue of whether a country has sufficient capacity stops being a subjective matter once such quantifiable/verifiable indicators are defined.

The components of effective implementing capacity we defined earlier can assist in the task of establishing sufficient capability in the candidate countries for the purpose of adopting EU rules both effectively and efficiently. The candidates should not forget, however, that they will have to persuade the EU that the arrangements they gradually put in place are sufficient. It would not be obvious to the EU that they are indeed so.

Establishing effective implementing capacity – the importance of meta-analysis

At the beginning of this paper and in the previous section it was argued that in seeking to develop effective capacity to enforce EU rules in any particular sector or policy area, candidate countries [and existing members] should also look beyond the specific rules in question. On the one hand, they should evaluate the management structures and implementing measures they put in place according to their propensity to promote integration by eliminating barriers and negative cross-border effects. This means they

¹³ On the significance of competition among rules in a process of economic integration see, for example, J. Pelkmans, Regulation and the Single Market, in H. Siebert (ed.), The Completion of the Single Market, (Tubingen: Mohr, 1990); and P. Nicolaidis, Competition among Rules, World Competition, 1992.

should be concerned not only about complying with the letter of the rules, but that they should also aim to truly integrate their sectors or policy areas with the rest of the EU.

On the other hand, they should not be too zealous. Diminishing returns to their efforts will eventually settle in. What is very effective is not necessarily efficient. They have to be aware of the cost of over-regulation and of the necessity for adjustment of whatever is put in place. Complex regulation is in itself a barrier to trade.

Moreover, as has often been the experience in regulated sectors such as telecoms, it is virtually impossible to interpret even fairly simple rules without resorting to broader economic, legal, social or regulatory concepts. Nor can the particularities of each member state be ignored. Indeed it is important to recognise that it is these particularities that can make a significant difference to the quality of policy implementation. The research on regulation of utilities referred to earlier has also found evidence that initial liberalisation of utilities has been followed by “re-regulation” in the form of supplementary national measures which have not been stipulated by EU directives. This re-regulation has been more pronounced in those member states which have a tradition of state intervention in the economy and use broad criteria of social and/or national interest in their policy making [rather than, more narrow economic criteria].¹⁴

Irrespective of one’s opinion on such developments, at minimum those responsible for designing implementing mechanisms should take into account the influence of national characteristics. In a recent paper, two eminent legal scholars that have written extensively on the economics of law enforcement, have examined how social norms supplement legal procedures and how, in turn, laws need to reflect the particular society’s adherence or not to informal sanctions.¹⁵

Effective regulation and, more generally, effective application and enforcement of EU rules entail that the implementing agency or regulator or enforcer is capable of learning and adjusting. Learning and adjusting does not only mean being receptive to new ideas. This is just one aspect of it. Another more important aspect is consideration for the specific local conditions, needs and impact of the rules. These must be taken into account and properly addressed either at the policy formulation stage or the policy review stage. Therefore, there can never be such thing as precise instructions on how to implement EU rules across the Union. That would be possible only if member states had no discretion at all and if they were identical.

To answer, for example, the question how much, in terms of resources, should a country expend on implementing mechanisms it has to turn to the ultimate goal of EU membership. And that ultimate goal is integration and the creation of a single market. This means that for dearth of a more suitable word, what is described here is the usefulness of “meta-analysis”: employing concepts which are outside or broader than any particular area of EU policy in

¹⁴ See Dimitracopoulos et al, Better Regulation of Utilities in Europe, op.cit.

¹⁵ R. Posner and E. Rasmusen, Creating and Enforcing Norms, with Special Reference to Sanctions, International Review of Law and Economics, 1999, vol. 19, pp. 369-382.

order to gain a better understanding of the tasks that have to be performed within each of those areas.

At the same time, it makes little sense to expend huge amounts of resources if the whole system is badly designed, resulting in inefficient application of the rules because, for example, incentives for enforcement and compliance are skewed. Therefore, meta-analysis must also utilise, on the one hand, fundamental Community principles of integration and, on the other, the typical criteria for evaluating policies, such as those of efficiency and effectiveness [e.g. the presence or not of the right incentives for application of the rules by the responsible agency and compliance with the rules by those to whom they apply].

An example from the field of state aid can illustrate well the point here. The Treaty requires member states to obtain the prior authorisation of the Commission before they grant any aid. For this purpose the Commission has issued guidelines to assist member states to design state aid schemes which it could approve. The guidelines on regional state aid restrict the type of aid and the areas to which member states may offer aid. The guidelines, however, do not require that member states carry out ex post evaluations of the results of the aid they have granted. The fact that an aid scheme complies with the guidelines and has been authorised by the Commission does not necessarily imply that it was a “good” scheme for the country concerned. That member state has fulfilled its membership obligations but whether the aid scheme has been effective in its objectives or an efficient means of spending public money is a different issue altogether. Meta-analysis is needed precisely because legal compliance does not necessarily translate into efficient and effective policies.

In this context, it is very instructive to note that a senior Commission official in a recent paper proposed three “critical tests” for the purpose of identifying potential obstacles to access to bottleneck facilities in telecoms markets.¹⁶ These tests are (a) achievement of efficient access in a stable market environment, (b) securing access in a rapidly changing environment with technological convergence and (c) development of new ways of access in market with high innovation rate. What should be noted is that these tests are not legally required by EU directives. He was in fact resorting to met-analysis. His concern was how to assess properly the situation of the relevant market whenever technology, market players and consumer needs change rapidly; faster than the underlying legal framework. He argued that it was not possible to rely only on sector-specific, ex ante, rules because they would soon be out-dated by market changes.

The conclusion reached in that paper is that there is a need for more reliance on competition rules because they apply ex post [depending on whether there is distortion or restriction of competition], because they are more general [so they can be more flexible] and, more importantly, because they apply when there is distortion of competition which is, in turn, a much broader concept that relates to actual, potential or intended effects rather than to definitions of ex ante actions or practices of telecoms operators.

¹⁶ See H. Ungerer, Ensuring Efficient Access to Bottleneck Network Facilities, DGIV paper, 1998.

Once more we see that effective implementation cannot rely on concise prescriptions, nor can it only define ex ante criteria without examining the results actually achieved. Moreover, because being able to implement something effectively means being able to evaluate the rules and the implementing means themselves, inevitably one has to resort to concepts and principles which are broader than the rules and means in question. Or, one has to go to a level higher. This is meta-analysis.

Institutions as “process of discovery”

It was argued above that member states would need to use verifiable indicators because otherwise they would not know whether the implementing procedures and mechanisms are working properly [i.e. whether they are capable to produce the desired results]. This immediately raises the question what happens when it is not possible to identify with any kind of precision the result sought or to quantify / verify compliance. This is indeed the case, for example, with the application of competition policy which is based on general principles that have to be interpreted by a competition authority and each case has to be assessed on its merits.

The findings of the literature on economic regulation are relevant here. When rules cannot be defined with any operational degree of precision, then it becomes important to assign to an institution or agency the task of interpreting and enforcing the general rules. The task of implementation is then transformed into a series of actions beginning with the establishment of the agency and the delegation of sufficient legal powers to it. Implementation then continues with the issuing of interpretative notes and guidelines [for the purpose of educating those that have to comply with the rules] by the agency in question and the enforcement of the relevant rules which may also have to be accompanied with the application of sanctions to punish and deter future infringements.

The agency would probably also need to carry out studies on the various issues of the policy area or sector for which it is responsible and monitor market, technological and related legal developments. In other words, the agency will have to develop expertise and become a depository of relevant information through periodic reviews and consultations with the persons or enterprises which are active in the sector.

To conclude, when verifiable indicators cannot be defined with a satisfactory accuracy, the solution is not simply to give up but to create the right institutional context in which general principles can be interpreted, elaborated further and if necessary adjusted as the specific market conditions may require.

Case study: Institutional independence [or shifting from outcomes to processes]

When national authorities, regulators or agencies become responsible for implementing EU rules and when they have to be vested with broad powers and wide decision-making discretion, the EU normally requires that such authorities are independent of political influence. Independence is either stipulated in the Treaty itself [e.g. national central banks must receive no instructions from any political authority], or in secondary legislation [e.g. national regulatory authorities for telecoms or air transport must be functionally separate

from government departments that may control the commercial actions of state-owned operators].¹⁷

The reason for the requirement of independence is that decision-making discretion makes those who take decisions vulnerable to political pressure. In fact, the wider the discretion, the broader the extraneous political criteria that may determine the final outcome, and, consequently, the greater the political pressure that may be brought to bear. In a nutshell, discretion leads to politicisation. By contrast, stipulation of specific or narrow criteria for decision-making leads to “technicalisation” of the issues under consideration. This is so because other criteria [e.g. economic or social] are excluded from the decision-making process.

The question that arises is how independence can be achieved or secured in practice. Typical arrangements that are used to secure institutional independence are the following:

- decision-making autonomy mandated by law, with no need for anyone else to approve the decisions of the agency in question;
- appointment of non-political directors or board members directly by the cabinet or council of ministers with no need for confirmation by parliament;
- appointment for fixed period of time with no possibility for dismissal [unless there is negligence or gross dereliction of duty].

The arrangements above secure what may be termed as “nominal independence”. By contrast, “effective independence” would, in addition, require that the agency in question has sufficient resources to accomplish its mission. That is, it must have enough and well-trained staff, a budget that it can control and access to all the information that it needs to carry out its tasks. Staffing questions are probably best resolved at the outset or at the time the agency is established. With respect to the financing of the agency, budgetary independence may be strengthened by having the budget approved directly by the parliament. This avoids dependence on procedures [e.g. approval by the treasury or ministry of finance] that could make an otherwise autonomous agency vulnerable to political manipulation.

Access to necessary information is more difficult. An obligation imposed on ministries to inform the agency may not mean much if the ministries fail to respect that obligation [especially if there are no legal and/or personal consequences] or if ministries can hide the information by re-classifying it or if they implement measures under legally distinct procedures but which in practice lead to the same results. For example, it is difficult for state aid monitoring authorities to fulfil their obligation [monitor and prevent the granting of competition-distorting state aid] if aid-granting ministries do not inform them at all or inform them insufficiently or inform them ex-post or if they proceed to grant aid without approval of the monitoring authority. This kind of circumvention of monitoring control can be prevented by making the granting of any aid automatically illegal unless first examined

¹⁷ It is interesting to note that the applicant countries have been asked to establish state aid monitoring authorities which should have some kind of independence. Such authorities are not required in primary or secondary EC law. Moreover, as far as I am aware, the degree of their independence has never been defined in sufficient detail.

by the responsible authority. Note that the authority does not have to have the last word or right of veto. It may be sufficient to be able to express its opinion in public. This method could work well in cases that other ministries have to be prevented from proceeding without approval. In cases where other ministries have to be prevented from delaying the decisions of the authority by stalling on the supply of necessary information, either the authority should have powers to issue injunctions to obtain information or should be able to go ahead on the basis of best available information.

Although there are several ways by which nominal independence can be turned into effective independence, it is by no means a foregone conclusion that in democratic systems independence should be pursued single-mindedly and at all costs. All authorities, agencies and regulators which exercise delegated powers have to be accountable for their performance. Delegation of this kind must also be subject to the principles of effective policy implementation. But, it is not so obvious how an agency can be independent of political control and accountable at the same time. Primary and secondary EC law are silent on the issue of accountability.

If an agency is not accountable for its actions or decisions then it will not have any strong incentive to reach high levels of performance. Note that if it were possible to set performance targets, it would simultaneously reduce the vulnerability of the agency to political pressure because it would prevent it from deviating from prescribed targets. Even though it may appear paradoxical, performance targets can enhance independence because they are equivalent to the venerable tactic of “tying one’s own hands” and leaving little possibility for doing otherwise. So performance targets have a dual function: they make agencies both independent [because they reduce their discretion] and accountable [because they set criteria for evaluating what is or is not achieved].

However, the problem lies with those agencies or those issues for which no precise performance targets can be defined because they need to have room for manoeuvre or leeway to decide on the merits of each case. The solution, like in the case of the institutions that function as a “processes of discovery”, is to go from the level of outcomes to the level of processes.

If independence means decision-making discretion on the basis of general principles [not specified in detail], one way to improve accountability is to rely on open and transparent procedures that force the agency in question to explain its decisions and justify them adequately. This kind of transparency can work in several different ways. For example, minutes of decisions may be published. Final decisions may also be published and explained. Any repeals or blocking of decisions by higher authorities may also have to be published and explained.

In summary, nominal independence has to be accompanied with effective independence which means in practice adequate staff, financial resources and access to information. Furthermore, independence may not produce the desired results if it is not also accompanied by the right incentives for accountability and good performance. Open and transparent procedures and the obligation to explain decisions can strengthen accountability.

EU practice in assessing effective implementation

At this point one may justifiably ask what does the EU do to improve implementation of its rules and policies by its members? The institution that has the responsibility, as guardian of the treaties, to oversee the application of the rules is the Commission. In this respect, the Commission publishes periodic general and sectoral reports on the adoption of EU rules in the internal market area by the member states. To promote understanding of the rules and the rights they confer to businesses and consumers, it has also established information centres, has issued interpretative documents and operates several internet sites which can be accessed by the public. The reports have sought to compile a “scoreboard” of the transposition and application record of member states. The Commission’s infringement proceedings against member states have also concentrated, as would be expected from an essentially legal process, on errors of transposition and application that violate EU principles.

Apparently the Commission’s strategy for ensuring effective implementation of EU rules by the member states has followed a three-stage approach:¹⁸

- i. publication of the record of member states in notifying transposition of EU directives [so as to “shame” them into action]
- ii. dissemination of information [via the Contact Points for Citizens and Business] and encouragement of citizens and business to pursue their rights [via complaints submitted to the Coordination Centres which act as a link between the Commission and member states]
- iii. initiation of infringement proceedings whenever member states do not respond to remedy issues of complaint or issues raised in the Commission’s reasoned opinions.

The Commission has based its assessment¹⁹ of the performance of member states on a number of criteria, the main of which are the following:

- i. “inadequate transposition”
- ii. “poor quality transposition”
- iii. “different transposition methods”
- iv. “uneven enforcement”
- v. “discriminatory application”
- vi. “legislative gaps”
- vii. “overcomplicated rules”.

Note, however, that these criteria are not further defined in much detail, nor, in the documents we have seen, are the inter-relationships between the various criteria examined systematically. Moreover, these criteria refer by and large to the end result of implementation. Naturally, the Commission has not sought to advise member states on the inputs that are required for implementation because that would stray into issues that member states regard as their own prerogative (e.g. organisation of civil service, resource

¹⁸ See, for example, the information provided in [Single Market News](#), no. 17, July 1999.

¹⁹ See, for example, Team Europe Info Service, [Single Market Dossier](#), October 1998. See also the [Single Market Scoreboard](#), no 3, October 1998.

allocation, etc.). One gets a better understanding of the Commission's views by reading the general descriptions of problems in the internal market or the specialised reports on particular subjects such as state aid, telecommunications, public procurement, environmental protection, structural funds, etc.

The special document prepared by the Commission at the request of the Cardiff European Council on "The Functioning of Community Product and Capital Markets"²⁰ sheds more light on the meaning of implementation. In a section devoted to the quality of the single market's regulatory framework, it describes the necessary conditions for implementation in the following general statement: "The Member States must ensure that appropriate administrative and judicial means exist to enforce single market rules properly, including adequately staffed and trained market surveillance and enforcement authorities and that adequate means of redress and appropriate sanctions are available and sufficiently known to economic operators."

The action proposed by the Commission for "making the [internal market] rules more effective" is revealing because it highlights those issues or factors which are considered by the Commission to be significant. From that we infer that rule application and effective enforcement are understood by the Commission to require the following:

- i. "adoption and placing of legislation into force"
- ii. "establishment of framework for enforcement and problem solving" [these are explained to consist of establishment of Coordination Centres, participation in the EC cooperation framework and establishment of Contact Points for Citizens]
- iii. "provision of accessible and user-friendly information"
- iv. "simplifications of the rules".

Again, what emerges at this rather general level of discussion is an approach based largely on assessment of legal texts and encouragement of citizens and business to pursue their rights. Note, however, that the Commission's approach in certain areas such as telecommunications, environmental protection and structural funds has been more detailed and more systematic. Hence, in reality there is no dearth of detailed recommendations from the Commission. Yet, there is an apparent unwillingness to synthesise the particular recommendations into a cohesive statement on the meaning and requirements of effective implementation of EU rules and, with a few exceptions, no systematic inclusion of implementing standards in EU legal acts.

Telecoms is a notable exception with performance standards, for example, defined for telecoms operators and regulatory authorities. Another exception is the steady expansion of the rules concerning the obligations of the member states in obtaining and disbursing structural funds. Perhaps, the evolution of the structural fund rules is a precursor of similar developments in other fields. It is worth noting that the new general Regulation on the structural funds for the 2000-6 programming period [Council Regulation 1260/99 of 21 June 1999] lays down provisions for assessing the effectiveness of structural assistance, monitoring and evaluations to be carried out at three points in time: ex ante, mid-term and

²⁰ SEC(1999), 10 final, 20 January 1999.

ex post. Undoubtedly this gradual intrusion in member states' administrative mechanisms will improve the effectiveness of structural funds.

The Commission's assessment of the performance of the member states in the internal market area and its proposals for remedial action may be sufficient in the context of the rights, obligations and experience of the existing members, especially given the fact that their citizens and business already enjoy substantial rights. But they are not sufficient as a guide for the prospective members whose citizens and business have little information on the EU acquis and even fewer rights. It is difficult for the candidate countries to use this kind of information in order to draw any firm conclusions as to how they should structure their efforts to define, establish and/or strengthen their capacity to adopt and apply EU rules.

For the reasons explained above, a significant part of the EU's efforts to improve the quality of rule application and enforcement in the member states has focused on sharing of experiences among practitioners [which is a "softer" option than the definition of legally binding procedures].

The sharing of experiences among practitioners has taken place within the "Karolus" Programme for exchange of civil servants. This programme consists of two parts: exchanges and seminars. In the first part, civil servants responsible for various internal market areas are seconded to another administration for short periods for the purpose of becoming familiar with the administrative and enforcement machinery in that member state. In the second part, the same officials participate in series of seminars where they examine the various issues in detail, share their views and identify problems and, hopefully, possible solutions. Both the management of the exchanges and the organisation of the seminars have been entrusted to the European Institute of Public Administration (EIPA).

On the basis of the analysis carried out over the past few years at the various seminars organised by EIPA, the following appear to be the "typical" weaknesses in the transposition, application and enforcement of EU rules in the internal market area:²¹

- Transposition delays due to:
 - low priority assigned to those tasks
 - heavy work load
 - waiting to start identification of necessary changes until directive is adopted by the EU
 - inflexible and/or complex administrative procedures
 - ministry that negotiated EU legislation not the same as ministry responsible for transposition and/or implementation, hence absence of knowledge/interest

- Interpretation problems due to:
 - inherent difficulties in understanding intention of EU rules, given the compromises often reflected in their wording

²¹ The source of this information is the notes prepared by Arianne Beetsma who was the project leader of the Karolus Programme at EIPA during 1993-98. Their invaluable input to this paper is gratefully acknowledged.

- ministry that negotiated EU legislation not the same as ministry responsible for transposition and/or implementation, hence difference in views/understanding
- Incorrect application due to:
 - implementing authorities receive insufficient guidance from ministry
 - insufficient coordination among implementing agencies and/or among regional authorities
 - insufficient staff
 - insufficient training on new issues or requirements
 - unforeseen negative effects of implemented legislation
- Mutual recognition difficulties due to:
 - problems in information sharing and coordination between high level policy makers and implementing authorities which know better difficulties in practice
 - latent suspicion of other member states' legislation and competence
- Weak compliance and enforcement due to:
 - insufficient staff
 - available fines too low with no or little deterrent effect
 - insufficient awareness of requirements imposed by new legislation
 - resistance towards new legislation (opposing interests, insufficient prior consultation)

The list above reveals that the development of effective implementation capacity requires at its most basic level proper understanding of EU rules, proper coordination and consultation among the relevant actors and a proper system of incentives for compliance [both by the enforcers and the enforcees]. We take into account these problems which have been identified by practitioners themselves when we present what we call the basic components of implementing capacity. Therefore, following the conclusions of the previous section [that the specific obligations stipulated in EU rules indicate where action must be taken rather than how it should be taken] and of this section [that the internal market scoreboard does not provide a systematic method of identifying capacity weaknesses], we proceed in the next section to define the main components of effective implementing capacity. To put it differently, the scoreboard approach looks at the “output” side of implementation. That is necessary but not sufficient for identifying capacity weaknesses. In order to do that, one must look at the “input” side of policy implementation. The following section seeks to determine the bare basic inputs needed for effective policy implementation.

Components of effective policy implementation

If the candidate countries are to be able to embark on the task of developing the necessary administrative and enforcement capacity they have, first, to define the basic inputs in the process of determining and establishing that capacity. Then they have to decide how these basic inputs of capacity should be adjusted/adapted according to the particular conditions of the area or policy field in question. This adjustment is unavoidable for the simple reason that the requirements of membership vary considerably from one area to another and the precise administrative structures and procedural rules differ accordingly.

In beginning to identify those basic components, candidate countries must understand why the EU insists on the development of effective implementing capacity. Without that capacity, a new member, even with the best of intentions, would be unable to achieve the objectives of EU principles and laws. Formal and political acceptance of those rules does not automatically translate into ability to apply and enforce them. This entails that, at minimum, effective implementing capacity refers to all the means which enable a country both to reach those objectives and to assess whether the results in practice correspond to those defined by EU. It follows that effective capacity implies that a **Target** is set, an **Agent** is given the right and the obligation to act, the agent has at its disposal the **Means** to act and finally the agent has the means to **Evaluate** the effects of the undertaken action.²² In order to establish effective capacity, a candidate country must be able at minimum to answer four questions: what [target], who [agent], how [means] and how well [evaluation]. That is, our “TAME” classification corresponds to the following questions:

- Target – what?
- Agent – who?
- Means – how?
- Evaluation – how well?

The answers to “what”, “who”, “how” and “how well” have legal, organisational (administrative) and resource dimensions. The basic components of implementing capacity correspond to the underlying legal, organisational and resource dimensions.

More broadly, therefore, capacity to achieve EU objectives, or alternatively, fulfil the obligations of membership, can be defined in terms of the following four basic components:

- A legal framework [definition of targets, agents and legal means]
- An organisational (administrative) framework [structure of agents]
- Available resources [manning, equipment and practical means]
- Performance assessment procedures [evaluation].

In more detail, the first component, concerning the required legal framework, would at minimum include the following:

- Objectives: Well-defined obligations, in terms of objectives sought, for the implementing agencies
- Implementing agencies: Identification of responsible agencies
- Tasks: Well-defined and appropriately separated tasks, in terms of practical actions, for the implementing agency(ies) [to avoid mixing tasks that may cause conflict of interest]
- Instruments: Effective applying means or instruments, defined, as necessary, either in terms of ex-ante prevention and/or ex-post enforcement
- Independence: Appropriate decision-making independence for the implementing agency(ies)

²² This paper assumes that a functioning civil service is already in place. It, therefore, ignores all the problems that relate to more general issues about the government and the administrative machinery which is required for successful transition to a market-based economy. The paper focuses solely on the development of effective capacity for adopting, applying and enforcing EU rules.

- Sanctions / enforcement: Availability of sanctions for legal infringements and means for delivering them.

The second component, concerning the required organisational framework, would at minimum include the following:

- Management structure: The existence or establishment of a functioning organisation with effective internal managerial structure
- Public/user-oriented procedures: Adoption of user-friendly procedures and working methods [transparent, simple and speedy procedures]
- Coordination and consultation: Procedures and obligations for coordination and/or consultation with other ministries/agencies.²³
- Information services: Dedicated public information centres [points of inquiry and information to the public]
- Working conditions: Healthy and safe conditions of work for staff
- Personnel policy: Appropriate system of hiring, firing, and promoting staff.

The third component, concerning effective organisation, is meaningless unless sufficient resources are available in terms of the following:

- Money: Adequate budget
- Manpower: Adequate staff
- Training: Properly trained staff.

Finally, the fourth component presupposes that there are mechanisms for both identification and assessment of the results of the application of the rules in question. Assessment has a role to play in implementation only if its outcome is fed back into the policy process so that broad objectives and particular applied measures are adjusted accordingly. This completes the “policy loop”. The responsible organisation or agency, however, should also have the necessary institutional flexibility to change too. Learning in this context is not much useful if that internal flexibility does not exist. Hence, it is necessary to have:

- Outcome measurement: Criteria for identifying/quantifying results and procedures for monitoring, measuring and auditing
- Evaluation: Criteria for evaluating achieved results
- Reviews: Means of input by the public, possibly through open inquiries and consultations
- Policy feedback: Process of adjusting initial policy objectives (desired objectives) according to achieved results (feedback)
- Performance measurement: Means to measure the performance of the implementing agency
- Data collection: Means to collect relevant statistics.

²³ Non-governmental agencies, organised economic and social groups and professions [e.g. trade unions, trade associations, consumer lobbies, lawyers, etc.] play a significant role in the adoption and proper enforcement of EU rules. For example, knowledgeable lawyers can be instrumental in getting national courts to impose fines on companies that infringe the Treaty’s prohibition of anti-competitive practices. The analysis here is confined to the government and its agencies because of space limitations but also because in depth examination of the role and capacities of those groups would be beyond the scope of this paper.

The precise features and significance of each of the four components of effective implementing capacity and their sub-categories vary, of course, across the different areas of EU activity. Ultimately it is the responsibility of the candidate countries to determine which components are more important or relevant in each case, how they fit into their existing administrative structures and what their weaknesses and needs are in this respect.

As in many other areas of public affairs, new institutional mechanisms have to be adjusted as the relevant ministries or agencies gain experience and as market conditions evolve. Candidate countries have to make express provisions for adjustment and “institutional calibration” because they do not have any previous experience in enforcing EU rules and because their impending accession to the EU is bound to cause significant internal [to them] changes and problems, if not outright disruption.

Given the fact that countries with strong regulatory systems and traditions, such as the UK, have experienced significant evolution in their rules, procedures and institutional design, it cannot be over-emphasised how essential it is for the candidate countries to expect to make mistakes and, therefore, to build-in interim evaluation stages and legal/institutional/procedural reviews – perhaps with outside or independent assessors involved to guarantee objectivity.

Especially in their case, therefore, effective administrative and enforcement capacity also means flexibility: ability to detect errors, learn and modify accordingly policy procedures and instruments. It is for this reason that the fourth component includes capacities to monitor, measure, audit and assess.

The usefulness of a “bottom-up” approach: Verifiable indicators of performance

The section on the components of implementing capacity stressed the significance of performance evaluation and the need for definition of quantitative and qualitative measures of the results expected from the application of EU rules. Unless performance can be measured, the implementing member states or agencies will not be in a position to know whether they enforce EU rules effectively. The recent Commission trend towards developing “compliance indicators” [e.g. in telecoms] lends support to this approach. Most of those indicators focus on performance. Knowing how to measure what one seeks to implement is indispensable in building effective capacity to apply and enforce Community rules.

In other words, capacity building starts at the “end” of the process or the “output” side, by defining in quantifiable or verifiable terms the outcome sought. Unless, for example, product inspection, bank supervision, state aid monitoring or access to the telecoms network can be somehow measured, member states would not be in a position to determine how many human and financial resources they should devote to those tasks. It is much easier to estimate how many inspectors are needed when their task is defined in terms of checking, for example, “so many tonnes of something per day”, rather than in terms of “ensuring that

the quality of something is high". The magnitude of implementation becomes more visible when it is expressed in quantitative instead of qualitative statements.

Therefore, below there are identified five steps for determining how to establish or enhance effective implementing capacity:

- Step 1: objectives** Set policy objectives and implementing instruments in terms of the legally required obligations in EU directives, etc.
- Step 2: output** Define output in terms of verifiable indicators and quantitative / qualitative measures of successful implementation of those obligations. If not possible, define an institutional framework for applying the general policy principles.
- Step 3: components** Quantify / identify the relevant factors included in the four categories of implementing components which can generate that output.
- Step 4: meta-analysis** Evaluate both the inputs and the output in terms of the required components according to their effect on integration, their efficiency and their revealed effectiveness.
- Step 5: reform** Adjust policy objectives & instruments as appropriate.

What can the EU do to guide the candidate countries?

The EU, through the Pre-Accession Partnerships, and the member states, through bilateral programmes, have established an extensive system of financial and technical support for the candidate countries. The numerous seminars and the newly established "twining" project for the exchange of civil servants explicitly intend to transfer know-how and practical experiences to the applicants. What more can be done?

Moreover, there is a risk that attempting to do too much may backfire. Any advice from the Commission which may be perceived to be more of instruction rather than guideline may be found objectionable by both the prospective members, as unwarranted interference, and by existing members, as representing the thin edge of a wedge expanding arbitrarily the Commission's competence. Others may object to what may be interpreted as a disguised and misguided attempt to bring about excessive uniformity of application of EU rules. The principle of subsidiarity probably applies in this case. Also it should not be forgotten that diversity among the member states is in many respects a healthy state of affairs.

Whether the applicants need more guidance will very much depend on how it is done. Certainly it is not suggested here that grand schemes should be set up. But there are at least two practical ways in which the Commission may assist the applicants in their efforts, without interfering in their affairs and without exceeding its remit.

The first, is a register of the various implementing mechanisms and practices across EU member states. The Commission does not have to pass judgement and it will be up to the applicants to make the final choice. At least in this way they will see the range of available options. This in itself is not a radical departure from what already happens in certain policy areas [e.g. telecoms]. It should only be broadened and made more systematic.

The second possibility, which is slightly more politically sensitive than the first, is to compile a register of those implementing measures that have been found by the Court to constitute wrong transposition of EU rules. If such a register is too ambitious, at least a list of typical or most frequent mistakes or infractions would also be useful. Again this in itself is not new. In certain areas of the *acquis* the Commission has already prepared explanatory documents that outline how in its various rulings the Court has interpreted Community principles and what kind of national measures it has found to be inconsistent with those principles [e.g. freedom to provide services]. This would be very useful to the applicants because they are now undergoing a process of reform and frequently the political pressures are such that may lead to nominal harmonisation with EU requirements and nominal compliance with EU rules through the adoption of measures of questionable validity. It would be as good for them to know what they cannot do as what they can do.

Both of these options are systematic without claiming to identify the “right” model [they are systematic in the sense that they cover all member states and adopt the same methodology across all policy areas]. The danger with the existing arrangements [seminars and exchanges] is that in reality they provide information on particular national models because both the lecturers and those who participate in the exchanges are much more likely to be familiar with one or some member states, not all. The EU has to think more about the information which is channelled to the applicants in this respect.

Conclusions

The purpose of this paper is to make a first attempt to define the concept of effective policy implementing capacity so that it can be useful in the on-going *acquis* screening and accession negotiations. It is motivated by the fact that in the absence of any binding Community definition, the issue of effective capacity has the potential of becoming a source of considerable friction between the EU and the candidate countries.

The paper has identified six stages of policy implementation, five steps for establishing effective implementing capacity and four basic components that together constitute the inputs for developing effective capacity. Such capacity goes beyond the legal obligations of EU membership and focuses instead on actual outcomes in terms of removal of barriers and integration of national markets.

It is not easy to define in detail a universally applicable measure of effective capacity and ensure that such capacity exists in reality. There are no simple or quantifiable prescriptions on how effective capacity is attained. In some cases, legal powers are a pivotal aspect of effective implementation of EU rules. In other cases, the less tangible coordination and consultation mechanisms that emerge informally may prove to be more significant.

Because there are no definitive formulae on how to establish effective implementing capacity candidate countries have to identify the particular features of effective capacity in each case and they should be prepared to adjust as necessary whatever institutional arrangements and mechanisms they put in place. For this reason and the fact that the EU has no single model to offer, both the member states and the Commission should be flexible in their assessment of whether the candidates have achieved their targets and comply with the obligations of membership.

Perhaps, the process of enlargement will progress more quickly and more smoothly if the EU puts in place special arrangements that aim not only to strengthen the implementing capacity of the applicants, but also to assist them to identify and remedy their weaknesses through structured and more systematic reviews of their capacity.

In conclusion, the ten main findings of the paper are as follows:

1. EU rules always allow some discretion to member states with respect to the means of implementation.
2. EU rules do not stipulate the amount of resources that should be expended in implementation tasks, nor do they define in sufficient detail implementing procedures.
3. There can be no precise universal prescriptions as to the resources that should be expended or the procedures that should be adopted because the nature of EU rules differs from area to area and sector to sector.
4. There can be no simple copying of implementing measures and procedures from other member states because these measures and procedures reflect the legal, institutional and economic system and traditions of each member state.
5. Capacity for effective policy or rule implementation means capacity to evaluate results and learn and adjust accordingly. Effective implementation is also a strategic act – it takes into account the reactions of those that have to abide by the rules and therefore seeks to provide the right system of incentives for compliance.
6. Effective implementation is carried out in six stages: transposition or creation of the legal framework, application, compliance, enforcement, evaluation and reform.
7. Each implementation stage, in turn, requires that four components are in place: the legal framework of objectives, responsibilities, obligations and powers, the organisational framework, adequate resources and monitoring means.
8. Implementation starts at the “end” with identification or quantification of the results sought. In addition, the various tasks should be broken down to the lowest quantifiable level.
9. If the results cannot be quantified or verified to a satisfactory degree, supervisory institutional procedures need to be established to interpret and apply more general rules.
10. To judge the effectiveness and efficiency of implementing instruments and procedures, it is necessary to use broader policy assessment principles and the fundamental integration objectives of the EU.

Annex

Development of Effective Policy Implementation Capacity		
Components of Effective Capacity [they answer the questions on what, who, how and how faithfully the tasks have been performed]	Components of Meta-analysis [they answer the questions what are the barriers to be removed, what are the likely problems, how much to devote in terms of resources, how high the standards should be set and how to measure achievement of identified targets]	
	Integration criteria	Policy criteria
Legal framework	What are the effects on integration [any barriers or negative cross-border effects]?	Are the chosen tasks and instruments proportional? Do they cause side-effects [hence, inefficiency]? Is there a proper system of incentives for application and compliance with the rules?
Organisational framework	How are the various inter-relations and networks managed? How can public awareness be raised?	Is the implementing agency efficiently run? Are the procedures simple, transparent, cost-efficient?
Available resources	How do other member states carry out similar tasks? What do they have at their disposal?	Are available resources efficiently used? Are there incentives against mis-management?
Performance assessment	What can be done better to reduce cross-border trade friction? How has the market changed?	How can efficiency be improved? What are the mistakes? Can incentives be strengthened?



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