

The Compliance Problem in the European Union¹



By Dr Phedon Nicolaides and Helen Oberg*

The European Union has an implementation “deficit”. The measures adopted by the EU are not always applied – or are not applied correctly – by all Member States. This is a serious problem. If a culture of compliance is to be fostered in the EU, Member States would need to learn from the experience of those Member States that appear to be more successful at complying with EU rules. At the same time they should learn about the “typical” mistakes made by Member States so as to avoid them. The Commission is naturally placed to identify both “good” and “bad” practices and promote “best” practices.

Introduction

The European Union has an implementation “deficit”. The measures adopted by the EU are not always applied – or are not applied correctly – by all Member States. This is a serious problem. As has been expressed by the European Commission in its Strategic Objectives for 2005-2009, “failure to apply European legislation on the ground damages the effectiveness of Union policy and undermines the trust on which the Union depends. The perception that ‘we stick to the rules but others don’t’, wherever it occurs, is deeply damaging to a sense of European solidarity.... Prompt and adequate transposition and vigorous pursuit of infringements are critical to the credibility of European legislation and the effectiveness of policies.”

One of the fundamental principles in the EC Treaty is the “loyalty” of Member States. to the Community through prompt compliance with its rules. Article 10 EC provides that “Member States. shall take all appropriate measures... to ensure fulfilment of the obligations arising out of this Treaty... They shall facilitate the achievement of the Community tasks [and]... they shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

Every year the Commission initiates hundreds of proceedings against Member States before the European Court of Justice in an effort to induce them to comply with their obligations.

According to the latest available annual report of the Court, which refers to 2004, the Commission initiated 193 proceedings against Member States. During the same year the Court found in 144 cases out of a total of 155 that a Member States had failed to fulfil its obligations. This

means that in more than 90% of cases the Commission was right to take action against one or more Member States.

The issue of compliance is broad and has many different aspects: legal, political, institutional (administrative) and economic. Member States may fail to comply because they are unwilling [domestic political opposition], unable [legal & administrative obstacles; lack of human and material resources], or unaware of their obligations.²

In this article we consider only two aspects of compliance that are currently on the political agenda. First, we ask whether the non-implementation problem can be remedied by a change in the legal instruments through which EU law is applied. Second, we examine whether a tougher policy towards non-complying Member States could induce them to apply EU law correctly and more quickly.

Available statistics indicate that close to 80% of the infringement proceedings before the Court of Justice concern directives. Less than 20% of court cases involve non- or mis-application of regulations.³ This is true at all stages of the three-stage procedure laid down in Article 226 [i.e. letter of formal notice, reasoned opinion, opening of a court case].

The complexity of many EU rules, which in itself often makes implementation difficult, is compounded by the fact that directives require transposition by Member States.⁴ For this reason it has been suggested that the implementation of EU law and policies could be improved if the EU relied more on regulations and less on directives.

This is a reasonable view. First, transposition introduces an extra stage in the process of applying EU rules. At a bare minimum it causes delay. The Commission classifies as infringement also failure by Member States to notify that directives have been transposed, i.e. incorporated into national law, by the set deadline. The XXIst Report on

Monitoring the Application of Community Law indicates that 60% of infringement cases refer to non-communication.⁵

Second, the transposition of directives through enabling national legislation offers an opportunity to Member States to add extra provisions making legislation even more complicated [the so-called “gold plating”]. More complex measures are presumably more difficult to apply and enforce.

Third, Member States have to interpret the general principles laid down in directives and develop the precise instruments and procedures through which to give them effect. These instruments and procedures may vary from Member State to Member State reflecting differences in national legal and administrative systems. The identification of the appropriate instrument that fits the purposes of each directive may lead to errors of interpretation. Similarly, newly-established procedures may suffer from teething problems.

Given that directives have certain inherent weaknesses, the natural solution to these problems appears to be beguilingly simple: just eliminate the need to transpose EU law. This is a strong argument in favour of regulations that must be applied uniformly by all Member States.

It indeed raises an important question. Does the choice of legal instrument weaken or strengthen the compliance of Member States with the requirements of EU law?

Our view is that directives cannot really be abandoned. And even if somehow they are replaced by regulations [so that transposition becomes unnecessary] legal and institutional adaptation and innovation within Member States will not be avoided.

At the same time, the Commission, in an effort to induce Member States to comply with their obligations, has adopted a policy of tougher penalties for infringements. We do not think that such a tougher approach will be an effective deterrent to non-compliance.

We begin our analysis by examining in more detail the issues arising out of the choice between directives and regulations and then consider the likely success or not of the tougher approach to infringements.

The directives v regulation conundrum

A fast-growing body of literature applying economic concepts to the assessment of law suggests that rational agents would comply with costly rules only if non-compliance would be even more costly.⁶ This would be the case whenever the penalty for non-compliance is larger than the expenditure required for compliance.

Assuming that Member States act as rational agents, the choice of legal instrument by the EU must be irrelevant to the willingness of Member States to abide by EU law as long as there is no effect either on the probability of detection or the size of the penalty for infringements. Penalties for infringements are determined according to the severity of the violation of EU law and the length of that violation. Since the severity appears to be independent of the form of the legal instrument, it follows that the most significant factor that could influence the behaviour of Member States is the probability of detection of a violation.

Indeed, the argument in favour of regulations has to explain, first, why Member States would be more inclined to comply with regulations than directives and, second, why misapplication of regulations can be detected more easily.

Let us consider the merits of the first issue. If there were a fundamental problem with directives, as opposed to regulations, then we should expect to see that all Member States have difficulties. Yet, the statistics on infringement of Community law reveal that a handful of (older) Member States consistently account for close to half of all cases. For the period 1997 to 2004 [that is the latest year for which statistics exist in the public domain], four countries – Belgium, France, Germany and Italy – accounted for over 45% of all infringement proceedings in the EU.⁷

This information on its own would suggest that the implementation deficit is not an EU-wide problem but a specific member-state problem. If Greece and Spain are added to Belgium, France, Germany and Italy,

then they reach over 60% of all cases.⁸ This does not support the view that there is a generic problem with directives.

Since these are some of the original or older Member States, inexperience or unfamiliarity with EU rules cannot be a significant explanation.

Also, it cannot be the case that these countries are persistently outvoted in the Council and are forced to adopt rules they do not like. It is unlikely, therefore, that their problem is one of being on the losing side at the decision-making level.

What is more likely to happen is that countries which are either unwilling to comply or have internal problems in applying EU law exploit the leeway given to them by directives.

Versluis provides a taxonomy of the prevailing explanations of non-compliance.⁹ She groups them in three

According to the latest available annual report of the Court, which refers to 2004, the Commission initiated 193 proceedings against Member States. During the same year the Court found in 144 cases out of a total of 155 that a Member State had failed to fulfil its obligations. This means that in more than 90% of cases the Commission was right to take action against one or more Member States.

Table 1:
Number of infringement cases brought before the Court of Justice (new actions, by Member State)

| Year | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | Total | Total% |
|-----------------------|------|------|------|------|------|------|------|------|-------|--------|
| EU15 | 124 | 118 | 162 | 157 | 157 | 168 | 214 | 193 | 1293 | 100% |
| Belgium | 19 | 22 | 13 | 5 | 13 | 8 | 17 | 13 | 110 | 8% |
| Denmark | 0 | 1 | 1 | 0 | 2 | 2 | 3 | 2 | 11 | 1% |
| Germany | 20 | 5 | 9 | 12 | 13 | 16 | 18 | 14 | 107 | 8% |
| Greece | 10 | 17 | 12 | 18 | 15 | 17 | 16 | 27 | 132 | 10% |
| Spain | 7 | 6 | 7 | 9 | 15 | 11 | 28 | 11 | 94 | 7% |
| France | 15 | 22 | 35 | 25 | 20 | 22 | 22 | 23 | 184 | 14% |
| Ireland | 6 | 10 | 13 | 14 | 12 | 8 | 16 | 3 | 82 | 6% |
| Italy | 20 | 12 | 29 | 22 | 21 | 24 | 20 | 27 | 175 | 14% |
| Luxembourg | 8 | 8 | 14 | 11 | 10 | 12 | 16 | 14 | 93 | 7% |
| Netherlands | 3 | 3 | 1 | 12 | 5 | 5 | 9 | 13 | 51 | 4% |
| Austria | 0 | 4 | 8 | 8 | 7 | 15 | 20 | 14 | 76 | 6% |
| Portugal | 15 | 5 | 13 | 10 | 7 | 10 | 10 | 7 | 77 | 6% |
| Finland | 0 | 1 | 0 | 4 | 3 | 1 | 6 | 8 | 23 | 2% |
| Sweden | 0 | 1 | 1 | 3 | 3 | 2 | 5 | 5 | 20 | 2% |
| United Kingdom | 1 | 1 | 6 | 4 | 11 | 15 | 8 | 12 | 58 | 4% |

Source: Eurostat

categories: intentional flouting of the rules when they are contrary to national interest, domestic administrative weakness, distinct national preferences or traditions. Consequently, the proposed remedies to non-compliance are stiffer penalties, strengthening of administrative capacity¹⁰ and development of common preferences ("socialisation"). We see later whether penalties are stiff enough.

Infringement statistics reveal that most problems occur in particular policy fields. This suggests that the "acquis communautaire" is more difficult or complex in certain fields.

Let us turn now to the second issue, namely that it may be easier to detect infringements of regulations because they are more precise. Once more, however, the record indicates otherwise. There are many more cases against Member States before the European Court of Justice concerning directives than regulations.

Although it is commonly held that directives are more problematic because they force national administrations to interpret them, we unfortunately do not have any statistics that prove that they are indeed inherently more difficult. It is important to note that even the fact that directives require transposition does not necessarily mean that regulations can be put in effect with no further national action. They may also require legal adjustments and extensive administrative adaptation.

Consider, for example, Council Regulation 1/2003 that implements Article 81 and 82 of the EC Treaty. Article 35

of the Regulation stipulates that "the Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial."

Although most Member States had national competition authorities in existence before 1 May 2004, the date on which the Regulation came into force, there was no requirement that such national competition authorities enforced EC law. In some Member States, there was a need for considerable institutional innovation and adaptation so as to be able to comply with that Regulation.

To summarise so far, apart from the fact that some Member States seem to break EU law more frequently than others, there is no convincing evidence that directives are inherently more difficult to apply. Directives must be transposed, but regulations too may need extensive institutional and legal changes. Since no data exist on how Member States comply with regulations, we cannot conclude that they are easier to apply.

Table 2:
Infringement cases brought before the Court of Justice (by policy area)

| | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | Total % |
|---|------------|------------|------------|------------|------------|------------|------------|------------|-------------|
| Total | 169 | 147 | 214 | 197 | 187 | 204 | 277 | 219 | 100% |
| Agriculture and fisheries | 38 | 14 | 49 | 37 | 26 | 32 | 31 | 29 | 16% |
| Environment, health and consumer protection | 34 | 10 | 34 | 33 | 49 | 57 | 54 | 40 | 19% |
| Enterprises | 0 | 0 | 4 | 13 | 4 | 10 | 15 | 11 | 4% |
| Research & education | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0% |
| Competition | 9 | 9 | 22 | 15 | 10 | 9 | 20 | 7 | 6% |
| Internal Market | 4 | 19 | 15 | 21 | 21 | 23 | 24 | 30 | 10% |
| Justice and home affairs | 40 | 45 | 44 | 31 | 28 | 36 | 54 | 51 | 20% |
| Energy and Transport | 10 | 23 | 18 | 15 | 16 | 9 | 23 | 19 | 8% |
| Employment and social affairs | 10 | 10 | 11 | 11 | 6 | 8 | 21 | 17 | 6% |
| Taxation and Customs union | 13 | 12 | 12 | 13 | 14 | 12 | 19 | 5 | 6% |
| Regional policy | 2 | 0 | 2 | 0 | 0 | 0 | 7 | 2 | 1% |
| Enlargement | 1 | 1 | 0 | 1 | 1 | 1 | 1 | 2 | 0% |
| External relations | 3 | 3 | 0 | 4 | 5 | 1 | 0 | 1 | 1% |
| Economy and finance | 0 | 0 | 0 | 2 | 0 | 2 | 2 | 3 | 1% |
| Other | 5 | 1 | 3 | 1 | 7 | 4 | 5 | 2 | 2% |

Source: Eurostat

The need for a mixture of policy tools

A general principle of public policy is that a policy tool is abandoned not when it is imperfect – they are all imperfect to varying degrees – but when a more effective tool can be adopted. Consider what could happen if directives were abandoned.

Directives tend to contain more general principles which have to be made operational by Member States. This means that if directives were dropped, regulations would have to be made more general and their application in each particular case would be subject to a greater degree of interpretation by the Member States than at present. Hence, detection of misapplication would also become more difficult.

This immediately raises another question. Should the EU, then, rely instead on detailed rather than general regulations? The answer is no. Bilal and Nicolaidis have argued that optimum policy enforcement relies on a mixture of specific and general rules.¹¹ Specific rules require no or little interpretation and therefore are easy to apply. Their disadvantage, however, is that they tend to be narrow in scope. By contrast, general rules, which are wider in scope, need to be interpreted and determine whether and how they may apply to each particular case. This makes them costly. It follows that optimum enforcement is a balancing act between the narrowness of the rules and the ease of

applying such rules.

If the EU would replace directives with detailed regulations, it would simply replace one problem with another. Making common rules more detailed, so as to improve detection, will come at the cost of making regulation less flexible and more cumbersome.

There is also the extra cost of potentially excessive homogeneity across the EU. Directives allow Member States to experiment and to learn from each other. This is valuable in those sectors where it is not obvious which implementing method is superior. One of the propositions of the principal-agent theory is that the principal must allow some leeway and discretion to the agent whenever the tasks of the agent cannot be defined with sufficient precision.¹²

Non-implementation can be contagious and addictive

No or faulty implementation of EU rules is a serious problem. It undermines both the substance of those rules and confidence in the process of integration. The success of European integration depends to a significant extent on the faithfulness by which Member States comply with their contractual obligations.

Since their record is imperfect, it is natural to believe that legal action against non-complying Member States is the perfect remedy. Consider, then, what may happen if the EU

relies only on the legal proceedings initiated by the Commission in order to induce Member States to respect their obligations.¹³

Surprisingly, any Member State, especially the new ones, may conclude that non-compliance "pays". It takes time for the Commission to detect an infringement, initiate proceedings before the Court and get a ruling finding that infringement has indeed occurred. But even with an adverse ruling, the Member State concerned can still procrastinate. The Commission will have to initiate new proceedings and request that the Court imposes a fine on that Member State for failing to comply with the previous ruling. It is after the second ruling that the Member State will start paying and actually feeling the "pain" of non-compliance. In the mean time, it could have "gained" anything between four and eight years of non-compliance.

In July 2000 Greece became the first Member State to be fined for not complying with EU law. The Court imposed a daily fine of €20,000. It took Greece six months to comply and ended up paying a total of €4.7 million. In November 2003 Spain became the first Member State to be fined twice for the same infringement. Its penalty was modest; only €625,000 per year. In July 2005 France suffered the largest penalty ever which was both a lump-sum of €20 million and a daily fine of €320,000.

Recently the Commission announced a new tougher policy on the determination of fines for non-compliance. In the future it will ask the Court to impose both lump sums and periodic penalties for each day of non-compliance. Under the new method, fines are calculated on the basis of a formula that starts with a standard flat rate [€600] which is then adjusted upwards depending on the severity and time length of the infringement, and the size of the economy of the Member State concerned.

But even this new tougher policy may not be dissuasive enough. The following example illustrates the problem. Assume that a new Member State, say Cyprus, considers whether to comply immediately with a new EU law or just ignore it because, say, it is too costly to establish the requisite institutional structure. The reason why Cypriot authorities would be facing that dilemma is that the government is in the process of reducing its budget deficit and public debt so as to qualify for membership of the Eurozone in the next 18 months.

If we assume that the prospective infringement is average in severity [the scale is 1 to 20] and it concerns failure to put EU law on the Cypriot statute books which suggests that the time length would be short [the scale is 1 to 3] and taking into account the small size of the Cypriot economy [the scale reflects the size of GDP and the number of votes in the Council], it is likely that the daily penalty will be around €8,000. In addition, there will be a lump-sum. The minimum amount for Cyprus has been set at €350,000. This means that if it takes Cyprus, say, six months to rectify the problem, the total fine will be about €1,800,000.

If Cyprus will have to pay €1,800,000 after, say, six years of non-implementation of EU law [the assumed

period from the initiation to the conclusion of legal proceedings] that makes it about €300,000 per year. Even for a small country that amount does not appear to be too dissuasive. In the case of France which last year paid a fine of €20,000,000, the infringement concerned failure to apply a 1991 directive! The annual cost of its infringement was less than €1.5 million over that 14-year period. For a large country, too, non-compliance may be cheap.

Of course, the real costs are likely to be much higher. There is the cost of the human resources which are diverted to managing court cases. There is also the risk of national courts awarding damages [provided EU law creates rights for individuals¹⁴]. But above all, there is the cost of failing to reap the benefits of integration and common EU policies.

But to politicians who are more concerned about protecting the interests of their constituencies and keeping the political promises they have made, an amount of €300,000 per year may be a gamble worth taking. For French politicians the length of the infringement also provided some "comfort". Those who took the decision not to apply the directive in 1991 are probably no longer in office while those who have to pay the fine have the excuse that it was not their fault. The length of legal proceedings in the EU provides a natural cover for non-conforming governments.

Our conclusion, therefore, is that infringement penalties are still too small and infringement proceedings too long for them to be an effective disincentive to non-compliance.

Moreover, we think it would not be good for the public image of the EU to raise penalties even more. Although, in principle, individuals are deterred from breaking the law by the severity of potential penalties, Member States may not react in the same way precisely because those who make the decision to flout the rules are unlikely to be the ones that will have to bear the consequences. At any rate, high-profile conflicts between EU institutions and Member States will not contribute positively to the development of a climate of cooperation and may create a hostile public attitude towards the EU.

Conclusion

Implementation, compliance and enforcement are unlikely to be improved through exhortation, penalties which are not tough enough or increased reliance on regulations rather than directives. If urging Member States to act in the common interest or threatening them with legal action were sufficient, the situation would have improved a long time ago.

Shifting from one legal instrument to another is an untested approach, but apart from eliminating the need for transposition, it does not appear to have any other advantage.

The solution must be sought in other approaches. But whatever approach is chosen, it seems to us that a necessary first step is better understanding of why Member States fail to fulfil their obligations. Perhaps surprisingly, the Commission letters of first notice, reasoned opinions and

Yet, the statistics on infringement of Community law reveal that a handful of (older) Member States consistently account for close to half of all cases.



© European Community, 2006

subsequent arguments before the Court of Justice and the rulings of the Court that find infringements do not explain why they have occurred.

If a culture of compliance is to be fostered in the EU, Member States would need to learn from the experience of those Member States that appear to be more successful at

complying with EU rules. At the same time they should learn about the “typical” mistakes made by Member States so as to avoid them. The Commission is naturally placed to identify both “good” and “bad” practices and promote “best” practices.

NOTES

* Dr Phedon Nicolaidis, Professor – EIPA Maastricht
Helen Oberg, Student Assistant – EIPA Maastricht.

¹ We gratefully acknowledge comments and suggestions we have received on earlier drafts by Edward Best, Simon Duke and Maria Kleis.

² There is a voluminous legal and political science literature on the implementation of EU law. For extensive reviews see, for example, J. Vervaele, *Compliance and Enforcement of European Community Law*, (The Hague: Kluwer, 1999), P. Craig, and G. De Burca, *EU Law Text, Cases and Materials*, 3rd ed., (Oxford: Oxford University Press, 2003) and J. Tallberg, Paths to Compliance: Enforcement, Management and the European Union, *International Organization*, 2002, Vol. 56, pp. 609-643.

³ The terms “directive” and “regulation” refer to the legal instruments defined in Article 249 of the EC Treaty.

⁴ Note, however, that there are multiple reasons for defective implementation of directives. These reasons range from political unwillingness to administrative weaknesses and differences in legal traditions. They also vary from Member State to Member State. For more information see E. Versluis, Explaining Variations in Implementation of EU Directives, *European Integration online Papers*, 2004, vol. 8, no. 19, accessed at <http://eiop.or.at/eiop/texte/2004-019a.htm>. Accordingly, the remedies also vary. Please see the research programme and the various papers on Better Regulation by the European Policy Centre accessed at www.theepc.be.

⁵ COM(2004) 839. Accessed at “http://europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/XXI_rapport_annuel/21_rapport_annuel_en.htm”.

⁶ See, for example, D. Friedman, *Law's Order: What Economics Has to Do with Law and Why it Matters*, (Princeton, NJ: Princeton University Press, 2000); S. Shavell, *Foundations of Economic Analysis of Law*, (Cambridge, MA: Belknap Press, 2004).

⁷ Strangely, these countries are the ones which by any standards are regarded to be the most “communitaire” or the most fervent supporters of deeper integration.

⁸ See “http://europa.eu.int/comm/secretariat_general/sgb/

droit_com/index_en.htm”

⁹ E. Versluis, *Compliance Problems in the EU: What Potential Role for Agencies in Securing Compliance?* University of Maastricht, paper presented at the 3rd ECPR conference, 8-10 September 2005, Budapest.

¹⁰ The Commission, for example, has recently proposed that “one senior member of government, at Minister or Secretary of State level, is designated as being responsible for monitoring the transposition of all internal market Directives into national law.” See Commission Recommendation of 12 July 2004 on the transposition into national law of Directives affecting the internal market, OJL 98, 16/04/2005, p. 47-52.

¹¹ S. Bilal & P. Nicolaidis, Regulatory Instruments and Enforcement in Regional Blocs, *Aussenwirtschaft*, 2002, no. 2.

¹² See M. McCubbins, R. Noll & B. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, *Virginia Law Review*, 1989, Vol. 75, pp. 431-482.

¹³ Proceedings against failure to implement EU law may also be initiated by businesses or individuals before national courts. The difference between EU and national courts is that damages may be awarded only by national courts. We ignore this possibility in our analysis because we have no data on any awards for damages made by national courts against public authorities in the various Member States. Nonetheless, it should be noted that national courts play a significant role in proceedings that clarify the obligations of Member States. This is indicated by the fact that many landmark cases on the obligations of Member States have originated in national courts through references for “preliminary ruling”. National courts make these references in order to request the opinion of the European Court of Justice on matters of interpretation of EU law. In general references for preliminary ruling account for about half of the workload of the Court.

¹⁴ Individuals can indeed take action against public authorities and demand compensation for damages they have suffered due to non- or faulty implementation of EU rules. This principle has been established by the landmark rulings in the Factortame, C-213/89, and Francovich, C-6/90, cases.

**RELATED EIPA
PUBLICATIONS****State Aid Policy in the European Community:
A Guide for Practitioners**

Phedon Nicolaidis, Mihalis Kekelekis and Philip Buyskes
Kluwer Law International / EIPA 2005/03, 136 Pages
ISBN 90-411-2394-6, €65

**Improving Policy Implementation in an Enlarged European
Union: The Case of National Regulatory Authorities**

*Phedon Nicolaidis with Arjan Geveke and
Anne-Mieke den Teuling*
EIPA 2003/P/01, 117 Pages
ISBN 90-6779-174-1, €28

**From Graphite to Diamond:
The Importance of Institutional Structure in Establishing
Capacity for Effective and Credible Application of EU Rules**

Phedon Nicolaidis
EIPA 2002/P/01, 56 Pages
ISBN 90-6779-167-9, €22

**Enlargement of the European Union and
Effective Implementation of its Rules**

Phedon Nicolaidis
EIPA 2000/P/03, 86 Pages
ISBN 90-6779-148-2, €25

**EU Structural Funds beyond Agenda 2000:
Reform and Implications for Current and
Future Member States**

Frank Bollen, Ines Hartwig and Phedon Nicolaidis
EIPA 2000/02, 213 Pages
ISBN 90-6779-142-3, €39