IMPLEMENTATION AND ENFORCEMENT OF EU POLICIES

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Introduction: compliance in the EU’s multi-level system

Studying compliance with EU policies is an intricate issue. Even the very concept of ‘compliance’ is anything but trivial and there is a confusing multiplicity of definitions (see Hartlapp & Falkner, 2009, for a more in-depth treatment of this section’s subject). A classic international relations definition is that compliance exists ‘when the actual behavior of a given subject conforms to prescribed behavior’ (Raustiala & Slaughter, 2001; Young, 1979, p. 104). With a view to EU implementation studies, compliance of both the member states and of their citizens hence comes into play. Political scientists typically do not study the behaviour of individuals in the EU’s member states but focus on the public policies associated with compliance, i.e., on the ‘implementation’ of EU policies with the outcome of (more or less) compliance by the state in question. This is, admittedly, one step apart from the compliance of the citizens and hence leaves a big potential for non-compliance that is left outside of this picture. Nonetheless, even researching the compliance of states is still a complex issue since various layers of the involved political systems come into play in several stages. From the perspective of a member state, to dutifully implement an EU-related rule will typically include duties of a) rule-setting, b) control of these laws as to their application in practice, and c) enforcement where they are not adequately respected. Good compliance by the state in question will demand both timeliness and correctness in taking all indispensable actions. This multitude of dimensions, the various levels involved, and the many policies of the EU, all pose great challenges in researching the compliance of EU member states.

To provide a summary that is both accessible and encompassing, this chapter will first outline the EU actors and procedures involved. Next, the state of the art of compliance research will be summarized. The third section will discuss why non-compliance, particularly in recent times even with high-ranking decisions and constitutional issues such as the EU’s basic values, is a danger for European integration. The conclusions will suggest a way forward to improve compliance with EU policies.

Actors and procedures

The main actors in implementing EU law are the member state governments and, as far as the adaptation of laws is concerned, the national parliaments. As outlined in the introduction, that
may be further complicated by federal units such as the Bundesländer of Germany and Austria, who have competences and rights to implement relevant EU law on their own.

On the EU level, the main actor in enforcing good compliance with EU policies is the European Commission. According to Article 17 of the Treaty on European Union (TEU), the Commission ‘shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union’. More specifically, the enforcement of EU law is prescribed in the Treaty on the Functioning of the European Union (TFEU). Article 258 outlines that ‘if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union’. These are the so-called infringement proceedings which are at the core of the control over compliance with EU policies (for details, see European Commission, nd-b).

In 2014 alone, 893 new procedures were launched by sending a letter of formal notice, and 256 reasoned opinions were sent to member states (European Commission, 2015, p. 13). The Court of Justice of the EU (ECJ) delivered 38 judgments under this infringement procedure in 2014 (92 per cent in favour of the Commission). Unfortunately, because the Commission does not mention the number of cases referred to the Court every year in its annual report, it is more difficult to chart the quantitative development of its enforcement measures carried through to the ECJ. In any case, it needs mentioning that the Commission is free to choose if, when, or whether it transfers a case to the court. Therefore, one cannot automatically infer fewer compliance problems if there are fewer court submissions. Nevertheless, in 2007, there were still 212 cases of failure of a member state to fulfil its obligations taken to Court (ECJ, 2010, p. 107), but this has steadily declined to only 57 such cases in 2014 (ECJ, 2015, p. 97).

This decline could, at least in part, be due to measures taken to settle implementation problems outside such court proceedings. The European Commission has set up ‘fire-alarm oversight mechanisms by means of transgovernmental networks’ (Hobolth & Martinsen, 2013, p. 1406). Since April 2008, the ‘EU Pilot’ precedes the Commission’s first step of an infringement procedure under Article 258 TFEU. For a large part of what the Commission defines as single market law, this initiative aims to improve communication and problem-solving between the Commission and national authorities. This project is based on bottom-up complaints that are examined by the responsible service in the Commission and forwarded to the national authority. The Commission and national governments use a website to share the details of particular cases. The Commission seeks to inform the complainant of its evaluation after 20 weeks at the latest and may in cases of non-compliance initiate infringement proceedings (European Commission, nd-a). Since Croatia joined in July 2013, all member states take part. In 2014, 1,208 cases were opened and 1,336 cases processed, while in 2015, 881 cases were opened and 969 processed. By the end of 2014, 1,348 cases were still open, while in 2015, 1,260 were still open (both end-of-year figures include a backlog from previous years). The Commission reported 325 infringement proceedings (2014) and 201 (2015) were opened following closure of EU Pilot files (European Commission, 2016b).

One step further toward clarifying, improving, and speeding up the implementation of EU policies is SOLVIT, an online problem-solving network, which the European Commission started in 2002 (Hobolth & Martinsen, 2013). A primary objective of SOLVIT is to identify misapplication of internal market law by public authorities in a timely manner, and, hopefully to avoid legal proceedings. The national administration in each EU member state (as well as in
Norway, Iceland, and Liechtenstein) has a SOLVIT centre, which handles complaints submitted by citizens, businesses, or intermediaries. SOLVIT issues can range from recognition of professional qualifications to VAT refunds (European Commission, 2016c). SOLVIT’s essential tool is a database of complaint cases connecting the national centres. This alternative dispute resolution mechanism is free of charge and quicker than making a formal complaint. The effectiveness of this project is said to vary between member states ‘with a significant link between case load and effectiveness’ (Hobolth & Martinsen, 2013, p. 1421). Hobolth and Martinsen (2013) suggest the complaints under SOLVIT function as input for network interaction, upon which knowledge of EU law and problem-solving capacities expand; however, learning dynamics interact with other factors such as staffing levels and the wider bureaucratic capacity.

The SOLVIT system is particularly interesting from a social science perspective because it creates a cooperative arrangement between the Commission and national public administrations in a process which is neither strictly intergovernmental nor supranational (Hobolth & Martinsen, 2013). Despite the establishment of SOLVIT, if a change in laws is due (instead of it being simply the case of an implementation gap) or if a problem goes unresolved, formal action or even legal proceedings will still be needed. Another, more central weakness is that the SOLVIT mechanism focuses on internal market rules, not on all parts of EU law; so, for example, complaints dealing with consumer rights are excluded from SOLVIT. While the Commission’s recent improvements are indeed very useful and may contribute to the now significantly lower number of non-compliance cases taken to the ECJ, they clearly fall short of convincingly fighting the major problems of non-compliance with EU law. The latter are founded in enduring and profound factors such as insufficient enforcement capacities and overly scarce resources, both on the national and EU level, and less than dutiful ‘compliance cultures’ in most countries. These factors account for the still significant numbers of detected non-compliance problems, continued litigation, and for a presumably very much larger number of undetected cases.

But what happens, in any case, after a formal infringement proceeding? If the ECJ finds that a member state has failed to fulfil an obligation under the Treaties, ‘the State shall be required to take the necessary measures to comply with the judgment of the Court’ (Article 260.1 TFEU). And according to Article 4 TEU, the member states have to ‘take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’. If a member state has not taken the necessary measures to comply with the judgment of the Court, the Commission ‘may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it’ (Article 260.2 TFEU).

During the most recent period reported by the Commission (2015), the Court delivered three judgments under Article 260.2 TFEU, imposing penalty payments on Italy and Greece; in 2014, five Court judgments were delivered and penalty payments imposed on Italy, Greece, Portugal, Spain, and Sweden; and in 2013, five Court judgments were delivered under Article 260.2 TFEU, imposing penalty payments against Belgium, the Czech Republic, Luxembourg, and Sweden (European Commission, 2014, p. 13; 2015, p. 16; 2016a, p. 26). Overall, the Commission concludes that member states ‘frequently take the necessary measures to comply with the judgment of the Court of Justice in a timely manner’ but nonetheless, at the end of 2015, 85 infringement procedures were still open after a Court ruling because the Commission considered that the member states concerned had not yet complied with the judgments under Article 258 TFEU. Most of these cases involved Greece (10), Poland (8), and Spain (7) and were
related to environment (35), transport (12), taxation (9), and health and consumer protection (7). Only 2 cases out of these 85 cases had already been referred to the ECJ for the second time (European Commission, 2016a). This confirms earlier findings that the Commission actually uses the penalization proceedings with utmost caution (Falkner, 2015).

Since the 2007 Treaty of Lisbon, the Commission has a facilitated procedure at hand for a group of cases. If a member state has failed to notify measures transposing a directive, it may recommend penalization to the ECJ already in the first proceedings (Falkner, 2015). This is a significant improvement over the penalization proceedings as originally introduced by the Treaty of Maastricht in 1992. The Commission nevertheless admits that although all cases brought to the ECJ under Article 260 (3) TFEU since 2011 by the end of 2014 have been withdrawn due to complete transposition, ‘it is to be noted that these complete transpositions are achieved at a very late stage in the judicial procedure, some Member States benefiting from an undue prolongation of the transposition deadline set by the legislator equally for all Member States’ (European Commission, 2015, p. 20).

These data demonstrate that the recently added formal and informal innovations to the EU’s penalization proceedings have certainly not put an end to member state non-compliance in overall terms. Out-of-court settlements have been promoted as an explicit Commission policy (European Commission, 2012) and they have undoubtedly led to some improvements. The latter can, however, not be measured with any kind of certainty. The lower number of infringement proceedings transferred to the ECJ may result both from a policy to not make the EU look too uncompliant in the eyes of the public and in times of severe crisis – consider the financial, economic, and most recently, migration challenges (Falkner, 2016). Despite the declining numbers of infringement proceedings brought to the Court, the European Commission’s reports are not unequivocally positive: ‘The high number of infringement procedures in 2015 shows that ensuring timely and correct application of EU legislation in the Member States remains a serious challenge’ (European Commission, 2016a, p. 31) The Commission is thus in agreement with those researchers who suggest that further improvements are needed and ‘the scale of the compliance gap appears worrying’ (Toshkov, Knoll, & Wewerka, 2010: 5).

**Issues in research about compliance with EU policies: what do we know, what can we know?**

The development over time of research on issues of compliance with EU law has been compared to four waves with specific theoretical, empirical, and methodological focuses (see Treib, 2014). The first wave originated at the time of the single market project in the mid-1980s and was dominated by legal and administrative science scholars (Treib, 2014, pp. 7–8). Scholars saw the domestic implementation of EU rules as a rather apolitical process and stressed the importance of clearly worded EU provisions, effective administration organization, and streamlined domestic legislative procedures. These scholars did not exclude the enforcement and application stages from their analyses, but declined to make sharp analytical distinctions among the various implementation stages.

The second wave started in the late 1990s and focused on the ‘Europeanization’ of national systems, at large. Implementation issues were seen as one facet of domestic adaptation to European integration (Treib, 2014, pp. 8–10). The path-breaking studies were in the field of environmental policy, later to be followed by social policy issues. The theoretical focus was on ‘goodness of fit’: national actors were perceived as guardians of the status quo who would block those adaptations deviating from their own domestic structures. Emphasis on an ‘institutional filter’ based on the historical institutional assumption of sticky institutions promised an
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economical explanation of implementation successes and failures, but this focus on institutions did not produce satisfactory explanations. Specifically, most cases required analysis of further factors such as interest constellations between domestic actors. Also prominent at this time was an alternative approach focusing on the number of veto players in the national systems.

The third wave of implementation studies by the mid-1990s further explored factors on the sectoral and country level that could explain the great variance and incompatibility of the findings of different studies (Treib, 2014, pp. 10–13). This research agenda was characterized by a rise of quantitative studies based on data collected by the European Commission on its infringement proceedings and on member states’ notifications of transposed directives. Again, few explanatory factors found common support since ‘qualitative scholars increasingly stressed the political character of transposition, supporting the insights of the enforcement approach in compliance research’ and hence the role of controlling and sanctioning, but ‘the results of quantitative research pointed towards the management approach, highlighting the importance of efficient and well-co-ordinated administrations with skilled personnel’ (Treib, 2014, p. 11).

The fourth wave of implementation research saw a bifurcation between quantitative and qualitative studies, as well. The former mostly continued to focus on the transposition of directives, but now included more systematically EU-level factors, partly in large and complex databases. Most importantly, the degree of domestic opposition in the adoption of EU rules was expected to impinge on rule obedience. Qualitative studies considered fresh topics such as member states’ reactions to ECJ judgments in terms of containing either their effects or the degree of uncertainty arising from certain interpretations (Treib, 2014, pp. 13–15).

These stylized ‘waves’ of research are plagued by several weaknesses, most importantly:

• First, studies looking at the transposition of directives dominate (i.e., the translation into domestic law, and not at the entire process of implementation). Despite the tendency of such studies to purport to analyze ‘compliance’, limiting the line of inquiry to transposition represents a significant weakness because transposition failures are ‘the tip of the iceberg’ of non-compliance with EU law: ‘almost all studies that look beyond the transposition phase uncover serious shortcomings with administrative implementation and law application of the directives in the countries they study’ (Toshkov, Knoll, & Wewerka, 2010, p. 5). Thus, the dependent variable – compliance – is rarely covered entirely and seldom operationalized properly so as to prevent misunderstandings.

• Second, the statistics often used to study aspects of non-compliance have profound weaknesses. The most frequently used data in EU compliance research are the statistics published by the European Commission on transposition notifications and on infringement proceedings. Both are not a reliable measure for overall ‘compliance’ and both even distort the phenomenon of transposition performance, as Hartlapp and Falkner (2009) argue in depth.

• Third, and partly following on the first two points, the findings of the many ‘implementation’ or ‘compliance’ studies are often contradictory and the output of the field in its entirety is therefore still rather inconclusive.

A comprehensive review of both qualitative and quantitative studies (Toshkov et al., 2010, pp. 4–5) indicates that variables related to public bureaucracies and their processes tend to matter, in general, while veto players and their interests matter ‘in more specific situations defined by the salience and other features of the European legislation’ (Toshkov et al., 2010, p. 26).

However, it makes sense to also reflect on how much we can actually theorize matters of overly complex processes such as EU policy implementation and compliance with EU rules. When
reviewing the quantitative studies on compliance with EU law, Dimitar Toshkov (Toshkov, 2010, p. 38) suspects that very many factors are at play but that ‘there might be just too little to discover and... compliance... might not reveal many systematic relationships’.

**Non-compliance as a danger for European integration**

Why should we worry about non-compliance with EU law on its various levels (see Falkner, 2013a)? It can be argued that no policy has ever been implemented as it appears ‘on the books’ and that not even the most law-abiding society performs without any breaches of rules. So, why should the EU? It could even be held that it is a ‘compound’ polity (Schmidt, 2004) at a greater distance from the daily lives of its citizens and their businesses and that, therefore, non-compliance is less of a problem with EU rules compared to the rules of any lower-level polity. Several arguments contradict this complacent view, as follows:

a) ‘Integration through law’ is the EU’s landmark function and the rule of law is the very foundation stone on which the community has been built. Therefore, if the law visibly degenerates into a ‘dead letter’, then the project loses its basic function.

b) Moreover, the EU’s legitimacy is less solidly anchored than most other political systems’, both on the level of a constitution that might serve as point of identification and with regard to deeply founded feelings of belonging within ‘its society’. De-legitimization of its basic function (integration through law) will therefore endanger its continued existence more profoundly than would be the case with a typical ‘nation state’.

c) Non-compliance with EU policies is no longer a hidden problem in highly technical fields known only to experts. Non-compliance with agreed commitments has recently affected highly visible and sensitive issues such as the convergence criteria for Economic and Monetary Union (EMU) and the statistical reporting of member states with respect to EMU’s budgetary criteria, and even the results of European Council meetings (consider the June 2012 crisis summit where Finland publicly challenged crucial outcomes; see Falkner 2013a). Non-compliance was also a factor in the 2015–2016 European migration policy crisis. Despite TFEU’s Article 78 dealing with asylum, subsidiary protection, and temporary protection of migrants, which provides for a ‘common system of temporary protection for displaced persons in the event of a massive inflow’, several member states sought to block relocation of migrants from the most affected countries. By September 2016, only 5,651 asylum seekers had been relocated from Greece and Italy out of the 160,000 figure which the Commission determined should be relocated and whose asylum applications processed in other EU member states. The lack of solidarity within the EU even in the presence of a relevant Treaty provision is certainly no happy omen for a collaborative future.

d) The EU’s compliance problems now also reach the constitutional level. Article 7 TEU stipulates that a risk of a breach of values may trigger the prevention mechanism and a ‘serious and persistent breach’ of values, the penalty mechanism. In case of ‘a clear risk of a serious breach’ of values mentioned, the Council may, according to Article 7 TEU, address appropriate recommendations to that State. After inviting the government of the member state in question to submit its observations, the Council – meeting in the composition of the Heads of State or Government – may determine the existence of a ‘serious and persistent breach’ by a member state of values mentioned in Article 2. Based on that determination, the Council, acting by a qualified majority, may decide to suspend certain rights deriving from the TEU, including the voting rights of the representative of that member state government in the Council. The procedural rule for determining a breach of the EU’s basic values is
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Unanimity, without taking the vote of the member state in question into account. Yet despite Article 7, even basic EU values (see Article 2, TEU) such as the rule of law seem disrespected or, at least, endangered in some member states – most importantly, Hungary under the Fidesz government (see Dawson & Muir, 2012). Thus, the EU is only in theory, not in practice, able to counter such non-compliance with its basic norms. Studying compliance with EU law, in a wider sense, nowadays involves not just minor ‘implementation issues’ but major conflicts about core EU values such as human rights (of refugees), the rule of law, and increasingly also democracy at large – which could endanger European integration.

Conclusion: a way forward to improve compliance with EU policies

What can be done to prevent a meltdown of the EU’s rule of law system? There are no shortages of policy recommendations voiced by experts or EU actors (see Falkner 2013b). Both rule-oriented prescriptions based on sanctions and value-oriented measures connected to relevant beliefs could be usefully employed.

First, additional (and finally appropriate) resources for the Commission are indispensable with regard to improved EU-level control of the application of EU law. New members need to be truly capable of implementing the *acquis communautaire* and relevant EU monitoring systems should not be given up at the point of entry (but should, ideally, rather be extended to oversee all member states).

Second, a public campaign should be put in place throughout the EU promoting compliance and the basic, fundamental values involved in European integration. That could even have an additional, indirect benefit as well: the EU would, in the longer run, be less associated with agricultural subsidies and more with its role as a watchdog for democracy and basic rights – a role it has indeed started to play during recent years. However, the initial steps taken to collect and compare data regarding the rule of law in the member states (Justice Scoreboard, annual debate on the rule of law, etc.) need to be developed further (e.g., into formalized observatories, use of the open method of coordination).

Finally, even innovative institutions at the European level could be established to monitor for abrogation of the EU’s basic values. Among the ideas proposed is an EU constitutional council to vet significant national reforms to basic democratic institutions (Falkner, 2013b). The longstanding idea of democracy and the rule-of-law being located first and foremost in ‘sovereign nation states’ seems no longer appropriate in an era when European integration is being endangered by national politicians trying to undermine both solidarity between EU member states and democratic institutions ‘at home’. It is hard to imagine significant innovation taking place at any point soon since unanimity would be required in the presence of mounting distrust and political cleavages among the member states.

References


