

GOVERNANCE OF EU POLICIES IN THE SINGLE MARKET: CHALLENGES OF MEMBER STATES' COMPLIANCE*

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While the EU is drafting a huge number of laws in recent times, Member States respond differently to the laws and obligations issued by the EU. It is debatable if the EU has achieved success in the Single Market, whether the EU lifted barriers existing between Member States and how States apply the policies created by the EU. The process of compliance has several distinct stages, and the process itself is very dynamic because some Member States hesitate to comply with the EU obligations. Through successful governance, the EU is making the harmonization process easier: at all times, the EU is ready to take legal measures in order to ensure the uniform application of EU law in all Member States.

A good governance and a better compliance with EU law are what EU citizens expect: the promotion of these values is not only a task for the Commission but it is a responsibility of all levels of public authority, private undertakings and organised civil societies. The failure to correctly apply EU law has a huge impact on the Single Market, because it denies the millions of citizens and European businesses the rights and the benefits they enjoy under European law. The issue of compliance is broad and has many different aspects, such as legal, political, administrative and economic. Member States may fail to comply because they are unwilling, unable, have a lack of human and material resources or they are unaware of their obligations.

1. Governance of the EU in the field of the Single Market

The term 'governance' means rules, processes and behaviour that affect the way in which powers are exercised at a European level. A good governance by the EU must be achieved through the principles of good governance, such as *openness, participation, accountability, effectiveness and coherence*. Each principle is important for establishing more democratic governance. They underpin democracy and the rule of law in the Member States.

In the early 1980s the failure of the single market was obvious for all to see and for that reason the Single European Act was issued, which set the objectives for achieving a successful single market. But even during this time the single market was developing gradually and was faced with numerous problems. These problems seemed to be present due to the lack of power of EU institutions to impose measures or sanctions against the Member States breaching EU law; at the same time, the competences of the EU Commission were not clearly defined. Another problem was that certain Member States, even after their accession to the EU, continued to develop a protectionist policy against other EU Member States. It is really difficult to face this situation when we have a detailed legal infrastructure and a never before seen cooperation between Member States

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and the EU: it appears that the Member States comply with EU law only when it is in their own interests.

In July 2001, the European Commission presented its White Paper on European Governance (in the following: the White Paper), which was the first document in the European integration history directly addressing the question of how to govern ourselves (European institutions and Member States) better. The White Paper suggests a key issue about the effective transposition of EU law: there must be a closer legislative collaboration between the institutions, annual assessment of the quality of legislation, a more appropriate use of legislative instruments, simplifying and reducing Community (now: EU) legislation, and ensuring the quality of legislation adopted.

2. Compliance of Member States with EU law

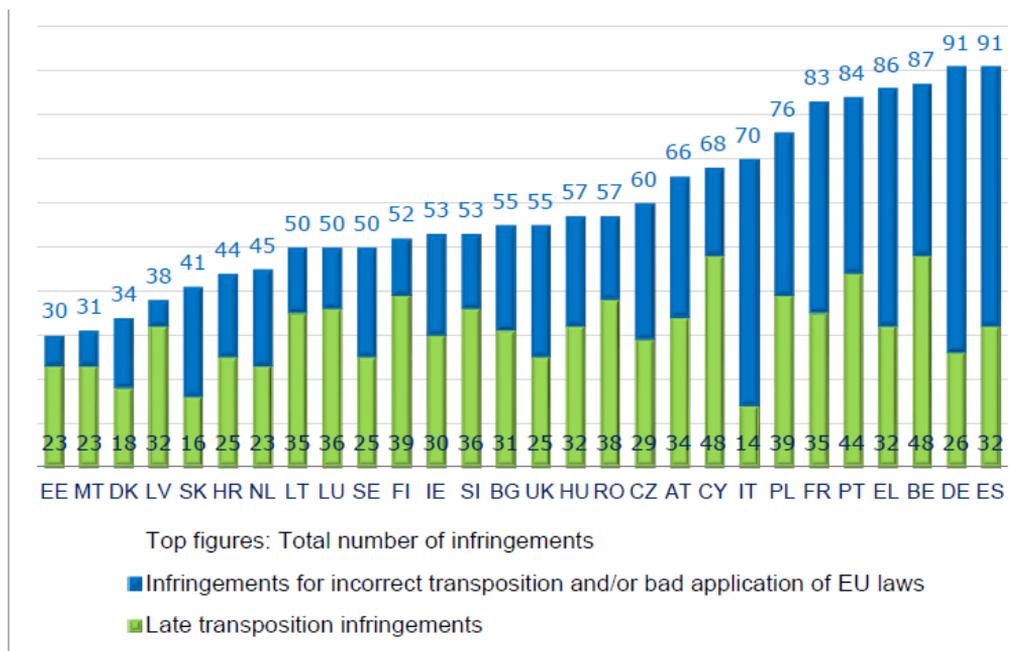
Member States act differently with regard to the transposition of EU law into national legislation. For different reasons, they do not always comply with EU rules, and even if they do, some of the states tend to comply only once the transposition deadline has already passed; even though it would be important for the Single Market to exist not only on paper but also in reality. At the end of 2016, there were 1657 open infringement cases, which is a considerable increase (21%) from the previous year and higher than all previous years. Also the number of new late transposition cases increased sharply (by 56%), from 543 (in 2015) to 847 (in 2016).² Figure 1 shows the number of infringement cases by country at the end of 2016.

The process of compliance in itself is more complex and difficult when it has to do with directives, as these legal instruments require transposition by the member states. So, in this case, states may be more flexible in how they incorporate EU law into national rules and very often they show negligence in this regard. The variety of instruments and procedures used by the Member States to give effect to directives can cause differences in national legal and administrative systems: for this reason, we do not have the same level of transposition within the EU. The best solution could be if the EU Commission would engage itself in finding the appropriate instruments and procedures for the transposition of EU law that would be used by all member states. This could be realized if the European Commission would observe the instruments that are being used by the best complying Member States and propose these to the non-compliers, or would arrange more meetings for experts representing Member States. For these reasons, it's not surprising that some scholars have given strong arguments in favour of regulations, proposing to reduce the number of directives not only in the single market field but in all areas of EU legislation, because regulations are directly applicable in each member state. However, we should take into consideration that it is not necessarily the best solution, as it can create tensions between member states and not all the members have the same level of development and democracy.

² For more details see: European Commission (2017b): *Monitoring the application of European Union law*. 2016 Annual Report. COM(2017) 370 final, 6 July 2017, Brussels.

Figure 1

Number of infringement cases in EU-28 on 31 December 2016



Source: European Commission (2017b)

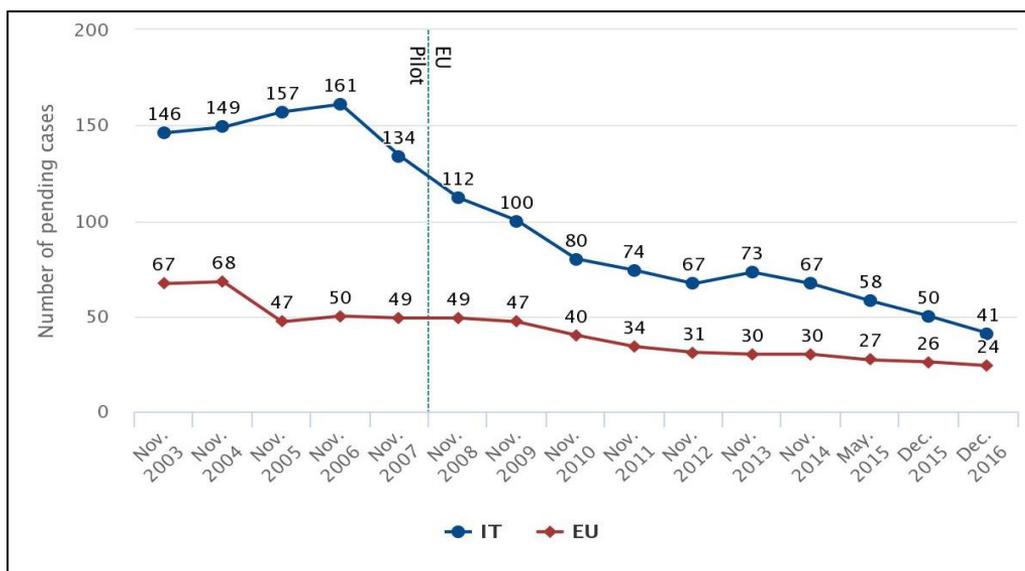
Regarding the compliance of Member States with EU law, we have several competing approaches. Enforcement approaches argue that states simply do not comply if the costs of a rule are too high and point to the role of infringement proceedings to increase non-compliance costs. Seeing this situation, the EU should create a clear framework in which it should determine the sanctions for the non-compliance with EU law, sanctions that must be imposed by measuring the consequences caused by non-compliance. In this case, non-compliance can be prevented only by increasing the costs of non-compliance. Based on this approach, smaller and less powerful states should be better compliers because they cannot bear the costs of infringement procedures and any eventual sanctions, while powerful states can afford the costs and they have more alternatives to cooperation with a particular partner: for these reasons it is more likely that powerful states would not comply and infringe on EU law.

The management approach assumes that non-compliance is involuntary. The literature has identified three sources of such involuntary non-compliance: lacking or insufficient state capacities, ambiguous definitions of norms, and inadequate timetables within which compliance has to be achieved. But, one can argue that the non-compliance is not involuntary because states intentionally resist to comply with EU law, due to governments trying to defend their existing rules. Any national government may decide to fight hard against the EU rules in Brussels, and having lost the battle at the European level, try to win it back at the implementation stage.

Due to the administrative reasons, in some cases the transposition of EU law is delayed for years. Based on the single market annual reports of 2017³ (European Commission, 2017a and 2017b) and previous years, we can see that for example Italy – even though it is one of the founding states of the EU – has a considerable number of infringement procedures relating to late transposition and it is considered as one of the worst compliers, however, to 2016, there has been a decrease in the number of infringement cases as compared to the EU average (see Figure 2 below).

Figure 2

Evolution of infringement cases – Italy (2003–2016)



Source: European Commission (2017a)

It is thought that the problems of non-compliance in Italy have their roots in the country's administrative problems. The administration of Italy is faced primarily with the issue of corruption – which stems from political problems, but affects the whole administration of Italy – the lack of staff and the lack of professionalism may be the other reasons making this administration ineffective.

Non-compliance also happens because the Member States do not protest against a specific EU law, they do not offer any appropriate alternative and in the end they do not implement it. The shortcomings of the judiciary system can also be a factor for the non-compliance as well, because some judges refuse to refer to EU law.

³European Commission (2017b): i.m.; European Commission (2017a): *Single Market Scoreboard Performance per Member State Italy* (Reporting period: 2016), available at http://ec.europa.eu/internal_market/scoreboard/docs/2017/member-states/2017-italy_en.pdf [accessed 2 May 2018].

3. What should the EU do for better compliance?

As it is determined in the 2001 Commission White Paper on European Governance, more effective enforcement of Community law is necessary not only for the sake of efficiency of the internal market but also to strengthen the credibility of the Union and its Institutions.

One of the tools through which they can ensure a better compliance is the impact assessment. It provides a structured framework for informing the consideration of the range of options available for handling policy problems and the advantages and disadvantages associated with each. This can include not only the impacts on business, but also on the environment, on social exclusion, etc. In an open, transparent and democratic decision-making process, it is important that groups and organizations, which will be affected by the new regulation, are consulted at the appropriate stages of the regulation process, so the consultations are also an effective tool.

Some of the other tools that are mentioned in different strategies of the EU are: simplification; access to regulation, meaning that everyone has the right to access regulation and to understand it; wider use of codifications; equality in the treatment of users; ability to impose sanctions and to make clear formulation of objectives.

4. Conclusions

The variety in the administrative systems of Member States is one of the factors why they do not comply with EU law at the same level. Administrative shortcomings can occur due to the lack of resources, the lack of professionalism, political problems or because of governments not wanting to apply the specific EU law who would rather not notify the state administration on time about the new EU law because they want to use their administrative problems as a justification for non-compliance. Based on practice, Member States are the least likely to comply with EU law if they do not benefit from a specific law: for this reason, they sometimes intentionally fail to inform their administration on time about EU rules, they resist adopting EU law claiming it's incompatible with their legislator traditions, or they interpret EU law in their favour. For many reasons the EU should take the enforcement approach seriously and increase the costs of non-compliance. Based on the above, it should be apparent that the EU system of governance suffers from a lack of the features that we usually associate with democratic governance.

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