



In Quest of Compliance

Promoting effective enforcement
of the EU Single Market

2016:7



The National Board of Trade is a Swedish government agency responsible for issues relating to foreign trade, the EU Internal Market and to trade policy. Our mission is to promote open and free trade with transparent rules. The basis for this task, given to us by the Government, is that a smoothly functioning international trade and a further liberalised trade policy are in the interest of Sweden. To this end we strive for an efficient Internal Market, a liberalised common trade policy in the EU and an open and strong multilateral trading system, especially within the World Trade Organization (WTO).

As the expert agency in trade and trade policy, the Board provides the Government with analyses and background material, related to ongoing international trade negotiations as well as more structural or long-term analyses of trade related issues. As part of our mission, we also publish material intended to increase awareness of the role of international trade in a

well functioning economy and for economic development. Publications issued by the National Board of Trade only reflects the views of the Board.

The National Board of Trade also provides service to companies, for instance through our SOLVIT Centre which assists companies as well as people encountering trade barriers on the Internal Market. The Board also hosts The Swedish Trade Procedures Council, SWEPRO.

In addition, as an expert agency in trade policy issues, the National Board of Trade provides assistance to developing countries, through trade-related development cooperation. The Board also hosts Open Trade Gate Sweden, a one-stop information centre assisting exporters from developing countries with information on rules and requirements in Sweden and the EU.

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Foreword

The Single Market lies at the core of the European Union, as an engine for growth and a symbol of longstanding cooperation. However, its benefits are reduced when the rules are disregarded. The quest for better Member State compliance is almost as longstanding as the market itself.

The EU is facing significant economic and political challenges, and is struggling to deal with them. In such times, going back to the core might be the right direction. Making compliance with Single Market rules a prime concern in the years to come would be one way to strengthen the credibility and performance of the EU and to deliver those benefits which citizens and companies are entitled to under the Treaties.

The National Board of Trade is the Swedish Single Market agency. This report lays the analytical groundwork for a new take on enforcement by combining insights from research and policy with our own, day-to-day experiences of applying Single Market tools and supporting Swedish agencies and civil servants in how to act in compliance with EU law.

The report was written by Emilie Anér, with contributions from Maria Walfridson and Olivier Linden.

Stockholm, December 2016



Anna Stelling
General Director
National Board of Trade

Executive Summary

The EU Member States — the executors of EU law — do not fully comply with the Single Market's rules and principles, despite their legal obligation to do so. This **lack of compliance undermines the EU's credibility and effectiveness** in a situation where the Union is already facing numerous challenges, such as the financial and fiscal crises, the opposition of some Member States' governments to foundational principles of the Treaties, and the United Kingdom vote to leave the Union.

This report analyses the size and nature of Member State non-compliance with the Single Market, and the enforcement tools which the EU institutions have developed over time to tackle non-compliance. Thus, enforcement actions taken by individual Member States on their own initiative and enforcement towards private actors are outside the scope of our study. The available materials are complemented with analysis based on our experiences at the National Board of Trade, which is the governmental Single Market agency in Sweden. The broader purpose of the report is to provide evidence needed in the quest for compliance and an effective enforcement system.

While recognising that a certain degree of non-compliance is inevitable in all rule-based systems, as well as serious data limitations, it is found that **compliance deficits in the Single Market are at times substantial, may lead to significant problems for companies and citizens, and prevents the Single Market from fully delivering projected benefits.**

Non-compliant behaviour does not necessarily diminish with the length of EU membership or the high-level political priority attached to the EU.

The current enforcement landscape exhibits **an impressive range of enforcement tools** to deal with such problems, covering all stages of the implementation process, and enabling prevention and enforcement towards Member States both from below and above.

However, **the system is complex, not fully coherent, not evidence-based enough, and its**

effectiveness is being undermined by political considerations and to some extent lack of capacity.

The current Commission's **enforcement efforts seem to be increasingly politicised.** Being committed to “a European Union that is bigger and more ambitious on big things, and smaller and more modest on small things”, the Commission wishes to see its enforcement policy evolve in line with this focus on priority files.¹ While the Commission is free to set its own priorities and naturally needs to take its limited resources into account, there are **risks involved with aligning enforcement action with political considerations.** The Commission needs to balance carefully its political agenda with its important role as Guardian of the Treaties. Available data, interviews with key persons in EU institutions and Member States, as well as our experience as a SOLVIT centre indicate that the



Commission is pursuing fewer Pilot and infringement cases, especially in areas that are considered sensitive, notably regarding obstacles to the free movement of persons. If infringements are not pursued, even if “small”, this undermines the legitimacy of other aspects of the system as well.

The main difficulty is, however, that **Member States do not adequately assume political ownership of the Single Market**. National politics is often wholly separate from EU level politics, and governments sometimes ignore with impunity at home what they agreed to in Brussels, or, conversely, blame the EU for unpopular policies. No enforcement system is better than its users. National courts and authorities exhibit lack of will to fully play their part in enforcement, especially when there is a lack of clear signals from central authorities. **Not even the most effective enforcement tools can address non-compliance where the Member State is intentionally resisting change**. For example, the impressive line-up of tools developed for implementation of the Services Directive did not eliminate even all of the more obvious violations.

It is at the same time **often genuinely difficult for Member States to do right**. EU rules are made in one legal system and applied in others and the complex nature of the *acquis* itself means that compliance can become a matter of interpretation, and ultimately depend on work performed by individual civil servants. Thus, the capacity and knowledge limitations found in national administrations and judicial systems constitute significant obstacles to compliance.

Member States are in general reluctant to criticise each other, not to mention initiate infringement procedures against each other. They prefer the Commission in the role of the enforcer.

There is a trade-off between legitimacy of the system on the one hand and actual results on the other. Drawn-out time frames and confidentiality in the Member States’ dealings with the Court of Justice and the Commission may promote actual compliance but can undermine stakeholder confidence.

The following **good practices** have been identified in the EU enforcement system:

- Preventive and sanctioning (soft and hard) approaches are mutually supportive, as seen for example in the notification procedure for draft technical regulations.
- Political targets matched by systematic follow-up can sometimes change behaviours, as seen for example in the targets set for maximum levels of transposition deficit.
- Resource-intensity pays off, as seen for example in the implementation of the Services Directive.
- There are examples of tools that are both transparent and effective.

The following **areas of concern** have been identified:

- Too little is known about the preventive effects of current enforcement tools, despite their often being resource-intensive. Efforts are therefore not based on cost-benefit analyses.

- The deterrent effect of the sanctioning system is called into question when the Commission brings fewer cases to conclusion.
- There is a tendency to deal with non-compliance in superficial ways, for example by focusing on early closing of cases, which is not necessarily the same thing as reducing non-compliance.
- Not enough attention is paid to regulations, as opposed to directives, despite the fact that regulations now outnumber directives three to one in the Single Market area.
- Not enough attention is paid to application of the *acquis*, as opposed to its transposition. Much can and does go wrong at the application stage, for a multitude of reasons, sometimes despite the best intentions.
- Not nearly enough attention is paid to compliance at the local level, despite the EU's multilevel set-up where local government is responsible for application of nearly 70 percent of EU law.
- Citizens and companies are vital players in detecting non-compliance, yet their interests seem inadequately cared for. Costly and lengthy proceedings deter private parties from going to court. The problem-solving network SOLVIT is not adequately linked to the rest of the system and if the complainant's problem is a structural problem, the system effectively fails that person.

The Commission deals with an increasingly small share of registered complaints. These shortcomings reduce the possibility of claiming one's EU rights in practice. There is also a risk that the flow of information from below is being discouraged, and that complainants' trust in the system is undermined by how their concerns are dealt with.

As a governmental agency, working for a well-functioning Single Market characterised by free movement and correct application of EU law, the National Board of Trade Sweden argues that compliance with and enforcement of the Single Market rules ought to be a prime EU concern in the years to come, in order to strengthen the credibility of the EU and to deliver those benefits which citizens and companies are entitled to under the Treaties. The timing is opportune for a quest for compliance. The speed of new regulatory EU initiatives overall has slowed down. With the free trade-minded United Kingdom leaving, there is also a risk for less ambition in any new Single Market proposals. Both of these could free resources in EU and national institutions for better enforcing and guarding what has already been achieved in the Single Market. In the last chapter, we suggest some options that could be taken into consideration in such an endeavour.

Sammanfattning på svenska

EU:s medlemsstater fullgör inte sina plikter under EU-rätten fullt ut. **Efterlevnadsunderskottet underminerar EU:s trovärdighet och handlingsförmåga** i en situation där unionen redan står inför svåra utmaningar: den ekonomiska krisen, motståndet i vissa medlemsstaters regeringar mot några av fördragets demokratiska grundprinciper och Storbritanniens beslut att gå ur EU.

Denna rapport analyserar dels medlemsstaternas efterlevnadsunderskott inom EU:s inre marknad, dels verktygen som EU-institutionerna har utvecklat över tid för att minska underskottet. Vi studerar inte de åtgärder som medlemsstater vidtar på eget initiativ, eller tillsynen över marknadsaktörer. Analysen baseras på forskning, policydokument och erfarenheter från vårt dagliga arbete som svensk inre marknadsmyndighet. Det övergripande syftet med rapporten är att lägga grunden för ett analytiskt och konstruktivt arbete kring den centrala fråga som efterlevnadsunderskottet utgör.

Regler efterlevs aldrig fullt ut. Det finns dessutom betydande svagheter i de data som kan användas för att mäta efterlevnaden i EU. Rapporten finner ändå att **det finns väsentliga efterlevnadsunderskott på inre marknadsområdet vilket skapar problem för företag och medborgare och hindrar den inre marknaden från att nå sin fulla potential**. Brister i efterlevnad består dessutom ofta över tid, oavsett vilken politisk vikt som tillmäts EU i det nationella politiska samtalet.

Ett imponerande antal verktyg har skapats i EU för att upprätthålla efterlevnad. Verktygen riktas både mot genomförande och tillämpning av lagstiftning, möjliggör för granskning både uppifrån och underifrån, och kan såväl förebygga som bestraffa överträdelser.

Samtidigt är systemet komplext, inte helt sammanhängande, inte tillräckligt evidensbaserat och dess effektivitet undermineras av politiska

hänsyn och i viss utsträckning brister i kunskap och kapacitet.

I den nuvarande EU-kommissionen politiseras tillsynsarbetet allt mer. Kommissionen har valt att fokusera på ett fåtal stora frågor (president Junckers tio prioriterade områden) och dra ner på arbetet med andra frågor. Detta spiller över på tillsynspolitik. Kommissionen vill utveckla tillsynen i samma riktning som de utvecklat sin politiska dagordning.² Kommissionen har begränsade resurser och mandat att prioritera sitt eget arbete, men det finns **risker med att anpassa tillsynsverksamheten alltför mycket till politiska hänsyn**. **Det behövs en balans mellan kommissionens roll att föreslå ny lagstiftning och rollen som fördragets väktare**. Data, intervjuer med nyckelpersoner i Sverige och Bryssel samt vår roll som SOLVIT-center visar att kommissionen driver färre ärenden genom den så kallade EU-piloten och till

EU-domstolen. Detta gäller särskilt på områden som kan betraktas som politiskt känsliga, såsom fri rörlighet för EU-medborgare. Om överträdelse, små såväl som stora, inte följs upp får det följder för legitimiteten i det övriga systemet också.

Det största problemet är dock att **medlemsstaterna inte tar det politiska ägarskapet av den inre marknaden på tillräckligt stort allvar**. Nationell politisk diskussion sker ofta helt separat från EU-politiken. Regeringar kan ibland ignorera hemma vad de gick med på i Bryssel, eller felaktigt skylla på EU när de ska försvara impopulära åtgärder. Inget system är bättre än dess användare. Nationella domstolar och myndigheter prioriterar inte alltid att fullfölja sina åtaganden rörande tillämpning av inre marknadsrätten, i synnerhet när den politiska ledningen inte tydligt förväntar sig det. Inte ens det mest effektiva tillsynsverktyg kan säkra efterlevnad när medlemsstaten aktivt motsätter sig förändring. Ett exempel är att den imponerande uppsättning förebyggande och övervakande verktyg som utvecklades under genomförandet av tjänstedirektivet inte lyckades eliminera ens relative uppenbara överträdelse av direktivet.

Samtidigt är det **ofta genuint svårt för medlemsstaterna att göra rätt**. EU-regler utformas i ett juridiskt system och tillämpas i andra och många regler är dessutom svåra att förstå vilket innebär att efterlevnad kan bli en fråga om tolkning. Till syvende och sist kan kvaliteten i tillämpningen bli avhängigt den enskilda tjänstemannens arbete. Det är därför ett problem att många nationella förvaltningar och domstolsväsen saknar tillräcklig kunskap och kompetens för sina uppgifter.

Medlemsstaterna är vanligen ovilliga att kritisera varandra, ännu mindre inleda överträdelseförfaranden mot varandra. De föredrar, med vissa undantag, att kommissionen tar dessa roller.

Det finns en inbyggd motsättning mellan systemets legitimitet och dess resultat. Medlemsstaternas samarbete med EU-domstolen och kommissionen i tillsynsfrågor präglas i stor utsträckning av långa ledtider och icke-transparens. Detta kan i praktiken främja efterlevnad genom att parterna får tid att lösa ut problem i förtroende, men kan också underminera tilltron från de samhällsaktörer som saknar insyn.

Vi identifierade ett antal **styrkor** i systemet:

- Verktyg som innehåller både förebyggande och bestraffande element är mer effektiva än andra. Exempelvis är dessa aspekter ömsesidigt stödjande inom anmälningsförfarandet för nya tekniska föreskrifter.
- Politiska mål kan förändra beteenden om de följs upp. Ett exempel är Europeiska rådets numeriska mål för att minska andelen direktiv som genomförs för sent.
- Resurser spelar roll. Genomförandet av tjänstedirektivet kan betraktas som en relativ framgångssaga bland annat tack vare dess resurskrävande karaktär.
- Det finns verktyg som både är transparenta och effektiva.

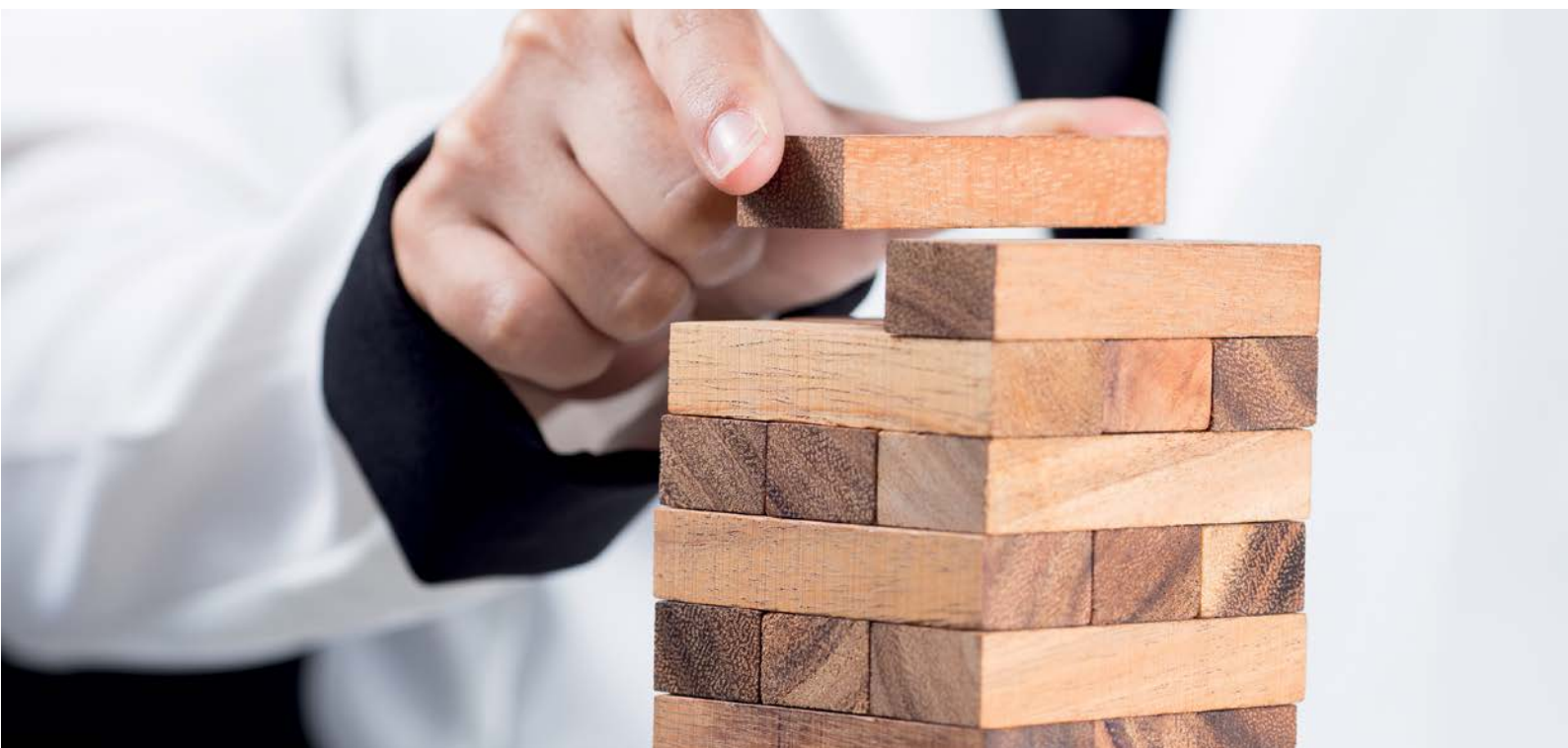
Vi identifierade även en del **brister**:

- Vi vet för litet om hur bristande efterlevnad kan förebyggas. Många förebyggande verktyg är resurskrävande och skulle behöva utvärderas efter kostnader och effekter.
- Sanktionerna i systemet blir mindre avskräckande och därmed mindre effektiva när kommissionen drar allt färre överträdelseärenden till domstol och avslut.
- Det finns en benägenhet att om möjligt hantera bristande efterlevnad på ytan. Att stänga ärenden i tidiga skeden är exempelvis inte nödvändigtvis samma sak som att minska efterlevnadsunderskottet.
- Förordningar uppmärksammas betydligt mindre än direktiv trots att det nu finns tre gånger fler förordningar än direktiv inom inre marknadsrätten.
- Tillämpningen av inre marknadsrätten uppmärksammas betydligt mindre än dess genomförande trots att mycket kan gå fel i tillämpningsstadiet, med eller utan avsikt.
- Efterlevnad på lokal nivå uppmärksammas oroväckande litet trots att den lokala nivån ansvarar för tillämpningen av nästan 70 procent av EU-rätten.
- Klagomål från medborgare och företag ger viktig information om problem i medlemsstaternas tillämpning, men de klagandes intressen tillgodoses inte tillräckligt väl. De har till exempel

möjlighet att gå till domstol när deras EU-rättigheter inte respekteras, men kostsamma och långdragna processer avskräcker. Det problemlösande nätverket SOLVIT kan bidra till att lösa enskildas problem på informell väg, men det är alltför frikopplat från det övriga systemet och kan ofta inte lösa så kallade strukturella problem. Privata aktörer kan också registrera klagomål direkt hos EU-kommissionen. Denne agerar nu på en allt mindre del av dessa. Sammantaget kan dessa brister motarbeta den enskildes möjligheter att få sina rättigheter tillgodosedda och minska informationsflödet underifrån genom att underminera tilliten till systemet.

Kommerskollegium är en statlig myndighet som arbetar för en välfungerande inre marknad i EU och korrekt tillämpning av EU-rätten i

Sverige. Vi menar att efterlevnaden av inre marknadsrätten borde vara en av EU:s huvudfrågor under de kommande åren. Det skulle stärka EU:s trovärdighet och säkra att medborgare och företag får del av de fördelar som de har rätt till. Tidpunkten är lämplig för en satsning på efterlevnad. Den nuvarande kommissionen presenterar färre lagförslag och driver färre överträdelseärenden än tidigare, vilket skulle kunna frigöra resurser. När det frihandelsinriktade Storbritannien lämnar unionen finns det en risk att nya inre marknadsförslag får en lägre ambitionsnivå. Givet dessa faktorer är det viktigt att prioritera övervakning, tillsyn och förebyggande när det gäller befintlig inre marknadslagstiftning. I rapportens sista kapitel tar vi upp några frågor som kan tas i beaktande i en sådan satsning på efterlevnadsproblematiken.



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1

Introduction – why care about compliance?

In times of economic slowdown, the EU turns to its prime creation, the Single Market and its four freedoms, as its best engine for growth.³ However, if the Single Market is to fulfil this role, its rules must be faithfully implemented and properly applied – in other words “complied with”. With Member States being joined in an economic and political Union, national non-compliance with EU norms is not a national concern any more – it is a joint problem for all members. A common market cannot function fully if not applied properly by everyone.

Compliance is a legal obligation. One of the fundamental principles of the EU Treaty is loyal and sincere cooperation of Member States with the Union’s objectives.⁴ The importance of “making what we have, work better” has been recognised in every Single Market-themed Commission strategy, Council conclusion, European Parliament resolution and scholarly product for decades.

The EU as a political project is being challenged by several complex issues: the rise in political extremism, increased scepticism toward globalisation and movement of persons, opposition of some Member States’ governments to foundational principles of the Treaties⁵, the United Kingdom vote to leave the Union, and of course the financial and fiscal crises. The latter have also influenced EU rule-making, as the need for quick action has prompted *ad hoc* solutions and less thorough preparation of laws through the regular machinery. Successive enlargements means that rules are influenced by an increasing number of players, and may be considered as less and less home-grown.

As a governmental agency, working for a well-functioning Single Market characterised by free movement and correct application of EU law, the National Board of Trade Sweden argues that compliance with and enforcement of the Single Market rules ought to be a prime EU concern in the years to come, as a way to strengthen the legitimacy and credibility of the EU and to deliver those benefits which citizens and companies are entitled to under the Treaties.

The timing is opportune for going in quest of compliance. The speed of new regulatory EU initiatives has, overall, slowed down. With the free trade-minded United Kingdom leaving, there is also a risk for less ambition in any new Single Market proposals. Both of these could free resources in EU and national institutions for better enforcing and guarding what has already been achieved in the Single Market.

1.1 Purpose, outline and materials

In order to lay the groundwork for a renewed quest for compliance, this report **analyses the state of the art regarding compliance with EU law.**

More specifically, **our focus** is on *compliance by Member States* (their central, local and administrative authorities), regarding primarily *the Single Market acquis*, and *the EU enforcement efforts aimed at the Member States* to bring about compliance with this *acquis*.

Thus, enforcement actions taken by individual Member States on their own initiative and

enforcement aimed at private actors are outside our scope.

The following **questions** guide our analysis:

- What is the size and nature of the EU's "compliance deficit", i.e. what is the problem that must be addressed? (chapter 2)
- How has the EU's enforcement landscape evolved over time? (chapter 3)
- How effective are the EU's current enforcement tools in preventing, monitoring, challenging and sanctioning Member State non-compliance? (chapter 4)
- How effective is the enforcement system, i.e. how well does it address Single Market regulation and compliance problems? Which are the good practices and areas of concern? (chapter 5)
- How can the quest for compliance be taken forward? We propose some options that the EU could explore in its analytical and policy work (chapter 6).

Our **materials** are documents produced by EU institutions, academic literature (in English), available data, and interviews with key persons in the EU institutions and Swedish authorities. We also utilise our own experiences from our tasks as a governmental Single Market agency (see box 1). Materials and analytical frameworks are further discussed in the individual chapters.

1.2 Definitions

In this section we define, for the purposes of this report, the main concepts regarding the relationship between laws and actors in the EU.⁶

Rule-making in the EU results in **treaties (primary law)**, **directives, regulations, and decisions (secondary law)**.⁷ This is complemented by various types of international agreements, declarations and resolutions, soft law, delegated and implementing acts, and the practice of the Court of Justice of the EU (CJEU). Together, these represent the accumulated EU "law in the books", the *acquis communautaire*; "the *acquis*" for short. This report does not analyse rule-making, but takes the *acquis* as given.

The **Single Market section of the *acquis*** encompassed, as of December 2015, no less than 1 099 directives and 3 175 regulations, according to the Commission.⁸ In this report, we mostly draw our examples and conclusions from the

Box 1

Single Market tasks of the National Board of Trade

The overall mission is to promote a well-functioning Single Market and promote correct transposition and application of EU law in Sweden. The Board also has the following specific tasks:

Support Swedish agencies and local authorities in their application of EU law

Operate Sweden's SOLVIT centre, product contact point, and contact point for the Workers Directive (Directive 2014/67/EU)

Support the Swedish point of single contact for services regulations (EUGO)

Analyse and notify to the Commission new requirements on service provision in Swedish laws, ordinances and regulations

Coordinate submissions on other Member States' proposals for new technical product regulations, the Internal Market Information system (IMI), and Swedish information on Your Europe

Review, from a Single Market perspective, proposals for new national regulations and Swedish decisions to stop goods on the Single Market

Participate in EU and national expert groups and committees, as part of our technical support to the Swedish Cabinet Office for matters relating to the EU and the Single Market



acquis which relates to the “**four freedoms**”: free movement of goods, services, persons and capital. The four freedoms aim at the creation and functioning of a single market covering all Member States where goods, services and capital may be traded across borders without barriers, and persons may move, settle and work abroad without obstacles. The methods are “negative integration”, i.e. removing national barriers, and “positive integration”, i.e. harmonising national rules in order to create a common regulatory framework.

Implementation is the process whereby EU law is applied at national and subnational levels. It has several phases. In literature, the term implementation may refer to one, two or all of these phases. In order to avoid confusion, we avoid the term as much as possible.

Transposition is the EU-specific term for the process by which directives are incorporated by Member States into their national legal orders. This phase also includes abolition or revision of pre-existing legal acts which would render the goals of the directive unattainable. **Correct and timely** transposition of directives means integrating the EU norms seamlessly and effectively within the specified time frame.

Treaty articles, regulations and decisions are, unlike directives, **directly applicable** in Member States. However, adjustments to national systems may sometimes be necessary in order to

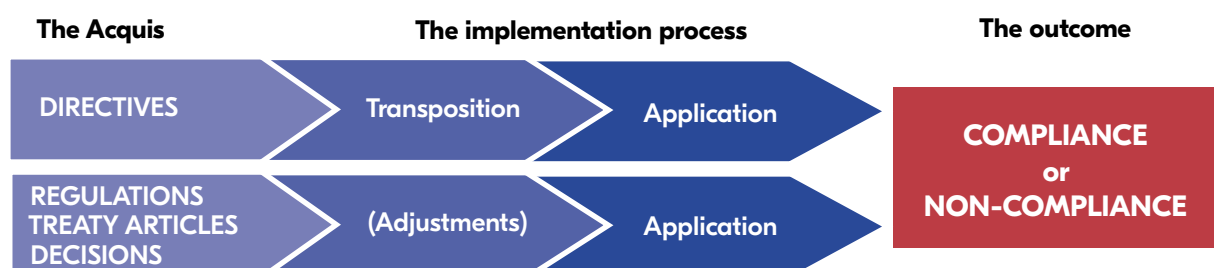
comply with these acts.⁹ Examples of adjustments can be to change certain other legal acts, or appoint and suitably equip a national authority to carry out a specific task.

Application is the process by which the *acquis* is used in practice by central, local and administrative authorities and courts. **Correct** application means that this “law in action” is in line with all EU norms. Due to the principle of EU law primacy, it means e.g. that authorities should disregard national laws where they are in conflict with EU laws.

Compliance is the desired outcome of the implementation process. Compliance occurs when all branches of the Member States’ governments act in accordance with the provisions of the Treaties and all regulatory measures such as the regulations, directives and decisions that spring from it (Versluis 2005). **Non-compliance** occurs, by contrast, due to failure to transpose on time, transpose correctly, and apply the *acquis* correctly in the administration.

Enforcement means measures taken by public authorities to generate compliance. These measures are channelled through **enforcement tools**, intended to support, monitor, follow-up, and sanction non-compliance in the various phases of the process.¹⁰ In this report, we focus on enforcement from the EU level towards the Member States (their central, local as well as administrative authorities), i.e. only EU enforcement tools.

Figure 1: Flow chart of the implementation process



2

The size and nature of the EU “compliance deficit”

Non-compliance, or the “compliance deficit” has been a concern in the EU for a long time. To some extent, non-compliance is inevitable in all rule-based systems. The *actual* degree of non-compliance is also inevitably larger than that which is revealed by monitoring, research, a legal proceeding, or chance.

In this chapter, we assess the extent of the revealed EU compliance deficit and what indications it provides about the actual compliance deficit. We begin by looking at why non-compliance occurs in the first place.

2.1 Explaining EU non-compliance

Scholars have provided three main general explanations for why a social actor, such as an EU Member State, may fail its obligations: it may be *unwilling* to comply (e.g. due to domestic political opposition), *unable* to comply (e.g. due to lack of resources) or be *insufficiently aware* of its obligations and how they are relevant to one’s own situation (see box 2).¹¹

2.1.1 The multilevel structure of the legal and political system

However, even if all Member States were perfectly willing, able and aware, full compliance with EU law would still be difficult to obtain because of the unique dual – even multilevel¹² – structure of the union’s legal and political system. In this system, laws are made in one legal order (comprising the Member States’ governments,

Box 2

Three explanations of EU non-compliance

The *rational* perspective assumes that non-compliance occurs due to rational calculations; when costs of compliance are larger than the benefits, states choose to disobey EU law. The solution to non-compliance is effective monitoring and sanctions.

The *management* perspective focuses on lack of resources and capacity. The solution to non-compliance is therefore managerial: information, assistance and capacity building.

The *constructivist* perspective assumes that international relations are constructed over time. Compliance becomes the appropriate behaviour when the State has internalised EU social norms through long-term exposure to and participation in creating EU norms. Learning and persuasion are key concepts in this school.

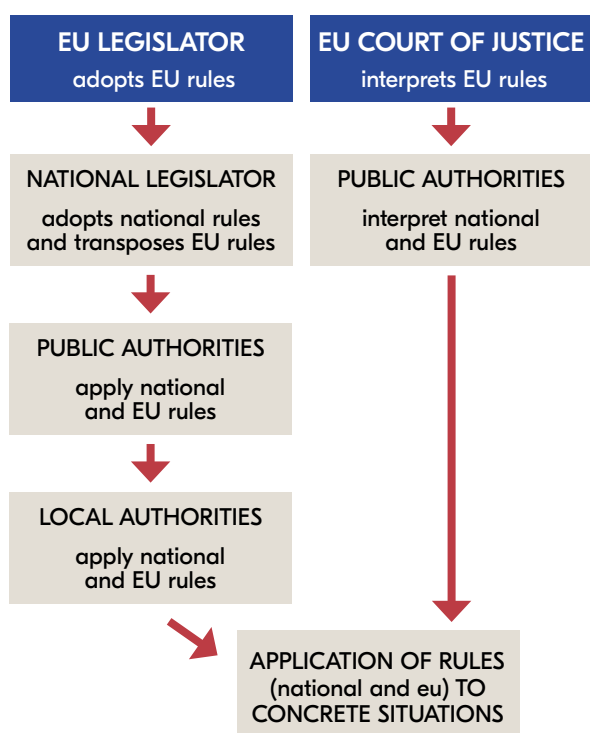
the European Parliament and the Commission), and applied in others (the national, often also the regional and local levels). Save for certain situations, EU law is totally dependent for its application on national actors, in accordance with national procedural rules.¹³

The political context of the EU level is also very different, often wholly separate, from national politics. Thus, Member States compromise in

one political context and must then stand by the results in another. It is not uncommon that Member States agree to policies in Brussels which they later disregard at home.

Figure 2 illustrates this multilevel system. The obvious challenge is that a longer chain of policy making – from the adoption of a rule to its concrete application – brings a higher risk of miscommunication between the different levels of that chain, and that something will go wrong.

Figure 2: Flow chart of EU policy making and implementation



The regional and local levels are often overlooked in policy making and research, even though it has been estimated that they are responsible for implementation of nearly 70 percent of all EU legislation.¹⁴ They are often the addressees of Single Market legislation. One difficulty from a compliance perspective lies in governance. Only the central state is accountable to the EU for non-compliance on its territory.¹⁵ Yet, all EU Member States (except the UK, depending on definition) have institutionalised local self-government with directly elected political assemblies. While many national systems allow for some degree of central control, especially where “supra-municipal” issues are at stake¹⁶, it is by no means certain that

the state can compel the local authorities into conducting their affairs in a way that, according to central government, complies with EU legislation. This is for example the case in Sweden, where several Single Market-related issues, such as market supervision, partly lie within the realm of local self-government, as guaranteed in the constitution.¹⁷ The central level is generally unwilling to challenge the boundaries of local self-government. Interestingly, some Member States have introduced a system where a local or administrative authority can be held liable for all or part of the financial sanctions imposed by the Court for an infringement caused by this authority.¹⁸

Another difficulty is to secure early involvement of the local level in policy-making so as to prevent later application problems. The local level has a small but institutionalised voice in EU law-making, through the Committee of the Regions, but in practice their main way to influence the rules they are supposed to apply is through their national consulting systems. However, these are not always sufficiently inclusive or foresighted to make such participation effective.¹⁹

2.1.2 Characteristics of the Single Market *acquis*

In addition to the multilevel character of making and implementing law, the EU and Single Market law itself presents difficulties.

Firstly, Single Market law often follows a different logic than national law, as it aims to promote European integration, whereas national law is more about balancing conflicting interests. For example, national consumer rules would aim at protecting consumers from abuses, whereas EU consumer rules would seek to combine that objective with removing unjustified consumer-related restrictions to cross-border movement of goods and services. A national rule may therefore be more protective of a legitimate interest (e.g. public health, work safety or the environment) than an EU rule because the latter would also seek to mitigate the negative impact of overly cautious legislations on trade. To achieve these aims, the EU legal order has developed its own principles and concepts (e.g. proportionality, non-discrimination, subsidiarity) which are not always easily translated into the national legal orders.

Secondly, due to compromises in the law-making between diverse interests, Member States, and EU institutions, much of the *acquis* is complex

and ambiguous. Most Single Market acts are adopted by qualified majority voting, which means that provisions may be drafted in a way that allows for multiple interpretations.²⁰ Moreover, legal acts are not always consistent with each other, and drawn-out negotiations may result in rules that are partly obsolete when they enter into effect.²¹ Low quality legislation obviously makes compliance down the chain more difficult.²²

Thirdly, Member States have a margin of discretion for transposing Single Market rules. Typically, EU directives set an objective of harmonisation (e.g. a threshold upon which a product is deemed to be safe) but leave to the Member States the decision on the means to achieve it, in order to accommodate the diversity of national legal orders. Thus, the application of EU rules may vary from one Member State to another, and sometimes within a single Member State. This fragmented regulatory framework is the very result that Single Market legislation seeks to avert, and the margin of discretion also makes it difficult to establish exactly what constitutes non-compliance in each case.

Box 3

Mutual Recognition – an example of legislation with an unclear scope

Mutual recognition is a cornerstone of the free movement of goods in the EU. It was first developed in the Court's case law and guarantees that any product lawfully sold in one EU country can be sold in another, even if the product does not fully comply with the technical rules of the other country. The principal legal act (Regulation EC 764/2008) lays down procedures relating to the application of the principle. Unfortunately, the regulation is generally considered as insufficiently clear for its important role.²³ The National Board of Trade argues for example that in order to apply the act in accordance with the original intention of the legislator, its scope should be clarified and extended so it becomes clear that it covers decisions by national authorities

1. by national authorities directed at professional end users of a product, as well as distributors and manufacturers, and
2. by national authorities regarding withdrawals of products not having prior authorisation.²⁴

2.1.3 Illustrating the complexity

As seen, non-compliance with the Single Market *acquis* has many reasons. The long chain of policy making which extends over several legal and political systems is a structural challenge. In addition, even when fully harmonised, the rules themselves are often less than clear for those that should apply them. Research about EU non-compliance has advanced plenty of explanatory factors²⁵, but meta-analysis shows that the evidence is mixed and inconclusive.²⁶ In order to understand why non-compliance occurs, it seems necessary to view the actions of and difficulties encountered by EU Member States in a broad perspective, and look upon the various explanations as complementary rather than competing (see e.g. Tallberg 2002).²⁷ People, not to mention political organisations, are complex, with not just one motive for all their actions.

As an example of how “everything matters”, consider the European Parliament's (2009 study) list of factors contributing to insufficient implementation and enforcement of EU consumer law:

- **Factors at EU level:** complex, ambiguous, or overly detailed or technical language; extensive use of recitals; short transposition deadlines; overreaching and/or controversial policy goals; limited attention to views of domestic stakeholders; lack of learning based on previous policy; insufficient assessment of policy alternatives; lack of capacity and information for monitoring national outcomes.
- **Factors at national level:** lack of political priority; limited administrative coordination within and between ministries and other implementing authorities at local/regional level; limited and late involvement of national parliaments; “gold-plating”; complex national drafting techniques and preferences resulting in mismatches; translation of legal terminology; negotiations at EU level and subsequent implementation at the national level are handled by different units; national elections.

2.2 Measuring revealed non-compliance

We now turn from explanations to discussing the extent of the revealed compliance deficit and the indications it provides about the actual compliance deficit.

Non-compliance can be revealed in all stages of implementing EU law: transposition of directives (and to some extent regulations) may be late, incomplete or incorrect, and the ensuing application may be faulty.

2.2.1 A critical look at available data

Non-compliance is revealed for legal purposes when the Court of Justice of the EU has declared an infringement. For policy and research purposes two other data sources are commonly used: data covering transposition, infringement proceedings and specific mechanisms as published by the Commission, and academic case studies. Their characteristics are outlined in table 1.

Infringement proceedings are initiated when the European Commission launches a legal investigation into a perceived instance of non-compliance in a Member State (outlined in more detail and depth in chapter 4.4). The main limitation of infringement data is that while it often reveals non-compliance, the measure as such shows the Commission's *reaction* to perceived non-compliance rather than actual non-compliance.²⁸ Infringement cases are generated through strategic considerations and interac-

tions; not all instances of non-compliance are found, and of those found not all result in an infringement proceeding.²⁹

A main limitation of the academic studies is that they are skewed towards certain objects of study. An impressive research project which has compiled databases of hundreds of quantitative and qualitative compliance studies (Toshkov 2010, and Toshkov, Knoll and Wewerka 2010) showed that only 1.5 percent of the qualitative studies (five cases in the database) analysed aspects of Single Market law.³⁰ Furthermore, their work revealed that transposition of directives was much more studied than the application of law. As a consequence, only one study out of 120 researched application of Single Market law.³¹ There was also very little information about implementation at local levels.

Overall, there is a lack of transparency in the EU enforcement system, which makes it difficult to study. Some information may be unavailable out of habit or because of a lack of resources to collect and publish. Throughout the preparation of this report, poor or non-accessible data have presented problems.³²

Table 1: Available compliance data – advantages and disadvantages

Source	Advantages	Disadvantages	What is really measured?
Transportation data Published by the Commission	Availability Can be analysed quantitatively Timeliness is straightforward to measure	Captures a limited part of the enforcement process and only the law in the books Timeliness data underestimates delays Correctness is difficult to measure	Some non-compliance in regard to transposition of directives (mainly its timeliness)
Infringement proceedings Published by the Commission	Availability Can be analysed quantitatively Indicative of actual non-compliance in the case(s) at hand	Generated through a political process, affected by strategy Problems with reliability and transparency ³³ In practice biased towards the transposition parts of the enforcement process	The occurrence and patterns of infringement proceedings, reflecting the Commission's enforcement strategy and capabilities
Specific mechanisms (e.g. as exhibited in scoreboards) Published by the Commission	Availability Can provide information about realities on the ground Quantitative, comparable indicators	Results difficult to generalise to other sectors/mechanisms Lack of qualitative indicators Case-based mechanisms reflect priorities and knowledge of complainants	Compliance with specific rules, to some extent
In-depth qualitative studies Published as research	Can capture realities on the ground (the law in action) including causal mechanisms	Resource-intensive Results difficult to generalise	The cases and variables of the study

2.2.2 Transposition deficit

Late transposition, i.e. transposition after the deadline inscribed in the directive, is a longstanding EU problem. In 1990, Member States were on average late with more than 30 percent of the new Single Market directives.³⁴ Since then, the average transposition deficit for Single Market directives has decreased to about 0.7 percent of all directives in force.³⁵ While an important improvement, the figure underestimates the problem, because it mainly builds on self-reporting by the Member States³⁶, and because the number of directives in force has increased over time, thus making it easier to have a better score.

Incorrect transposition, i.e. that a directive is not correctly or not seamlessly integrated into the national legal order, may take several forms, including

- omitting to transpose certain obligations.
- creating overlaps between the newly transposed directive and other national legislation, through failure to sufficiently repeal or amend the latter.
- going beyond the requirements of the directive in a way which compromises its objectives.
- transposing in a way which creates uncertainty about the objectives or status of the new rules.

There is no systematic way to measure quality of transposition. Overall, Member States share little information on how they integrate a directive's provisions into their legal order.³⁷ Over the last few years, the Commission has opened infringement proceedings for – on average – 0.7 percent of all directives, suspecting them to be incorrectly transposed.³⁸ As mentioned, this figure does not, however, represent all possible non-compliance, as the Commission does not prosecute (nor discover) each and every infringement. There is no EU system for *ex ante* checking the correctness of draft transposing instruments.

Qualitative research supports the notion that incorrect transposition is a serious problem. As many as half of the 350 qualitative cases submitted by Toshkov, Knoll and Wewerka (2012) into the Compliance Database revealed incorrect transposition to some or a large extent.

By transposing EU laws late and/or incorrectly, a Member State can sometimes (at least temporarily) favour its own businesses or its own public finances over those of other Members.³⁹ It may

Example

Incorrect transposition – a Dutch example

Mastenbroek (2007) shows that the Netherlands left out a key feature when implementing directive 97/27/EC on motor vehicles. The directive made criteria for issuing permits to road transport operators more stringent, but these criteria did not fit into the current Dutch system. Since the Dutch stakeholders could not agree on a new system, the old one was kept. Thus, unlike the directive's more stringent provision, Dutch permits could only be withdrawn in cases of *repeated* offences by the operator. This may have resulted in an unfair advantage for Dutch road transport operators. Mastenbroek's interviews showed that the government counted on getting away with this omission, although normally the fear of infringement procedures would offer an important check on this kind of behaviour.

also deny citizens important social, economic, or environmental benefits, sometimes rather dramatically. Monteagudo *et al* (2012) show, in a prediction of the effects of the Services Directive, that a more ambitious (or a more correct, depending on viewpoint) transposition of the directive could result in gains of about one extra per cent EU GDP growth.⁴⁰

2.2.3 Application deficit

EU law must also be correctly applied. This goes not only for directives, but also for the other parts of the *acquis*, such as treaty articles, decisions and regulations. The daily application of the Single Market *acquis* in Member States' administrations includes a range of possible activities, for example

- legislating and regulating,
- taking administrative decisions,
- issuing guidelines, recommendations or advice, cooperating with authorities in other Member States, and
- notifying new regulations or decisions.

Considering the structural difficulties of applying legal acts originating in another legal and political order and the complex nature of the *acquis*, it is not surprising that many things can and do go wrong at this stage. For example, administrative decisions might undermine the



rights of free movement of citizens and companies, and issued guidelines might (inadvertently or not) discriminate against non-local providers.

There is only scattered knowledge available about incorrect application. The Commission does not publish any indicators comparable to the easily accessible “transposition deficit”. There are however a handful of academic in-depth case studies that look into administrative implementation and application of EU law. Almost all of them reveal incorrect, insufficient or otherwise problematic behaviour by national administrations.⁴¹ The increasing case load in mechanisms in the Single Market, such as SOLVIT (see box 4, and also chapters 4.1 and 4.5)

where citizens and companies can complain and be helped, also indicates a steady amount of incorrect application.⁴²

Interestingly, to our knowledge, there are no academic studies of the application of *regulations*, as opposed to directives.⁴³ There is also an almost stunning lack of knowledge about application at the regional and local levels. Few infringement cases are directed at local level. In a Eurobarometer study, respondents from local authorities acknowledged regular resistance among stakeholders to EU policy which was not seen as in the local or national interest, which of course may imply difficulties for correct application. The unclear nature of much legislation was not helping either.⁴⁴

Experiences of Commission officials suggest that Member States that have difficulties to transpose in time also experience difficulties with correct transposition and application.⁴⁵ If this is true, the figures showing late and incorrect transposition indicate that there are likewise a multitude of problems with application as well. In addition, Versluis (2007) demonstrates that correct transposition can *also* be followed by incomplete application.

Incorrect application, even where revealed, may be remarkably persistent over time. In Sweden, the right to free movement for EU citizens has for a long time been compromised by the conditions for obtaining a personal identity number, yet the problem remains, in our view, inadequately addressed.⁴⁶

Interesting data of Member States’ regulatory behaviour can also be drawn from the notifica-

Box 4

How incorrect application of EU law can create problems in a company

A Swedish company wanted to develop an app for cross-border nautical charts. It requested access to nautical data from several Member States, relying on directive 2003/98/EC on reuse of public sector information. However, the relevant Spanish authority denied such access with reference to a negotiation of an agreement with a British authority. The company was consequently denied an opportunity to develop its product for the Spanish market. SOLVIT considered that this was not in line with EU law, and has since helped find a solution.

Source: the SOLVIT database, Case 0639/15/SE

tion procedure for draft technical regulations (see chapter 4.2). It is a mechanism for improving the application of the Single Market *acquis* for goods. Digging deeply into this data, Pelkmans and de Brito (2012) conclude that even after decades of exposure to the key EU principle of free movement of goods, “it is striking to find that, much like 10 or 20 years ago, it seems difficult for national ministries, and units inside national ministries, to master and understand EU law, or at least the basics with respect to the free movement of goods. [...] Many of the same types of mistakes or ‘failures to think internal market’ still show up today.” The authors observe that “some learning has taken place”, but that it seems to take a long time.⁴⁷

Few studies have attempted to quantify economic costs of Member State non-compliance with the Single Market *acquis*. One exception is Jervelund *et al* (2012) who analyse the lack of proper application in public procuring agencies of those provisions of the Procurement Directive which promote cross-border bids. If better implemented, these provisions would lead to five percent in savings in public contracts, which would have been equivalent to 0.1 percent increase in EU GDP.

After all, it is not strange if correct application remains elusive. As Jervelund *et al* write “Much of EU legislation requires civil servants to change their ways. [...] However, findings from organisational and management literature suggest that changing the way people behave on their jobs is not simple.”⁴⁸

2.2.4 Country patterns

Even if non-compliance as seen cannot be fully measured, data indicates some country-specific patterns, with some Member States performing better than others. The European Parliament (2013) concludes, based on interviews with Member States and Commission officials, that the main reasons for delayed transposition are country-specific. It takes longer when extensive changes are required in national law and when the national legislative process is slower than average. Country-specific issue salience has also been shown to matter, by making states affected politically more unwilling to comply than others.⁴⁹

There is also significant variation in country patterns when it comes to infringement proceedings. Börzel (2001) and Nicolaides and Oberg

Box 5

“The four worlds of compliance”

Falkner and Treib (2008) argue that Member States follow specific patterns in their behaviour. In the “*world of law observance*”, compliance as a goal overrides national concerns except in rare cases which touch on fundamental traditions or philosophies.⁵⁰ Application and enforcement work well. The Nordic countries belong to this group. In the “*world of domestic politics*”, compliance is at best one goal among many, a goal that is not unfrequently overruled by political resistance. The administrations are typically effective, thus the problems are with transposition rather than with application. Countries in the “*world of transposition neglect*” have inefficient administrations and typically react with inactivity to transposition-related duties, not viewing compliance as a goal in itself. In the “*world of dead letters*”, administrative incapacity rather than political unwillingness is the main problem. Other social actors, such as civil society, are typically too weak to be able to support enforcement, even though the laws appear compliant on the surface.

The theory is developed on the basis of the social policy directives, but the country characteristics (while highly stylised) are probably relevant for implementation of the Single Market *acquis* as well.

(2006) point to four countries as the most persistent offenders in terms of infringement proceedings: Italy, France, Belgium, and Greece.⁵¹ Interestingly, these countries are typically seen as the most fervent supporters of deeper EU integration. Some scholars consider that the differences between Member States are large enough to place them within different “worlds” of compliance (see box 5).

2.2.5 Obstacles to correct application – perspectives from a national Single Market authority

The National Board of Trade, author of this report, is a Swedish governmental authority, thus according to some of the scholars cited above located within the “world of law observance”. Based on our mandate to ensure correct application of EU law in Sweden, by supporting administrative and local authorities, we discuss our expe-

riences about how and why non-compliant application still occurs on a daily basis in the Swedish administration.

In 2005, ten years into Sweden's EU membership, we conducted a survey among 25 Swedish authorities on their knowledge about, and integration of EU law and affairs into their daily work.⁵² The result showed great disparity of knowledge and strategies, and often depended on the views and knowledge of individuals. Lack of coordination and clear direction often resulted in delayed transposition and reduced legal quality. We also found evidence of intentional disregard of EU norms in issues that were viewed as politically salient in Swedish politics and tradition. We also found that judges and legal personnel perceived EU law as something alien and complex, with which they were not sufficiently familiar.⁵³ This picture was subsequently confirmed by other public investigations into the EU and Single Market dimensions of the Swedish administration.⁵⁴ A recent investigation furthermore pointed out that public debate gives little visibility to EU policies and that EU knowledge is lacking in society overall.⁵⁵ Naturally, this can be expected to influence knowledge and incentives of the administration as well.

While no new survey was undertaken in the context of this report, our day-to-day experiences on the issue-specific level indicate that while another eleven years have further familiarised and educated the administration in EU law, similar problems remain. The majority of the problematic application we observe is not

revealed to others than those involved in the case, thus being compatible with a seemingly strong Swedish compliance performance.

The key obstacles to compliance differ from case to case.

Unwillingness to comply is not unknown. When an issue is politically sensitive, such as issues regarding cross-border posting of workers, we see that it may negatively affect the quality of both transposition and application. Political unwillingness also seeps into the administration through lack of clear expectations from the central government to take EU norms seriously.⁵⁶

Sometimes the problem is that the administration itself shows inertia or unwillingness to change its ways, for example by declining to cooperate with other EU authorities even where this would support the quality of their work. However, it must be stressed that we generally observe strong inclination among many civil servants to do right, and improve procedures and compliance, including on the local level.

We also observe *inability* to comply, particularly resulting from a lack of knowledge. Knowledge is a perishable good and needs to be reinforced, at least, at every change of personnel.⁵⁷ While specialised authorities or persons are generally very knowledgeable about "their" area of EU law, they may be unfamiliar with general EU principles regarding e.g. the right to free movement and how it ought to affect their work. It is particularly difficult to apply principles that emanate directly from the Treaties and have not been codified in secondary law.⁵⁸



Sometimes, the *quality of the EU legal act* is the problem, when it is insufficiently clear to enable or encourage correct application. It is no coincidence that social security remains the biggest problem area for citizens exercising their right to free movement.⁵⁹ Regulation (EC) No 883/2004 coordinates Member States' social security systems and continually gives rise to difficulties regarding interpretation.⁶⁰

Sometimes the problem is instead low quality of transposition, e.g. transposition which leaves out key provisions or creates inconsistencies.⁶¹ Our experience backs up that of the Commission officials – poor transposition often results in poor application.

2.3 Conclusion: a sizable and multifaceted problem

In a strict sense, neither the full scope, the exact nature, nor the economic consequences of the EU compliance deficit can be assessed. We are especially in the dark with respect to the application of law, the application of regulations as opposed to directives, and application at local level.

However, even applying necessary caution due to the data limitations, it seems reasonable to echo the conclusions of the researchers compiling the databases of compliance studies: “the scale of the compliance gap appears worrying”.⁶² The non-compliance revealed through infringement cases, research and scoreboards is not trivial. Substantial gaps appear across the various stages

of the implementation process. To this, a stock of *non-revealed non-compliance* can be added, as for example our experiences from the Swedish context indicate. After all, the daily application of the Single Market *acquis* lies in the hands of individual civil servants and depends among other things on their having adequate resources, training and vigilance on the job every day.

Non-compliant behaviour appears to persist over time and does not necessarily diminish with the length of EU membership or the high-level political priority attached to the EU.

A range of explanations are needed to understand why non-compliance occurs. The long chain of policy making which extends over several legal and political systems is a structural, continual challenge for practitioners – a challenge moreover which is even *less* likely to be soon alleviated than poor quality of individual pieces of legislation. It is therefore important to maintain a sense of realism. Securing full effect of the Single Market *acquis* would require an unbroken chain to be in place: political commitment, correct implementation and an effective and fully committed administration.

Considering the scope of this challenge, the importance of the Single Market, and the legitimacy of the EU project, there is a need for an ambitious, coherent and effective enforcement system that attempts to bridge the divide between levels of the structure. In the following two chapters, we analyse whether the current EU enforcement system is up to the task.



3

The EU enforcement landscape – legal and political framework

This chapter describes the responsibilities of the main actors, as defined in the Treaties, and how the enforcement landscape has evolved over time.

3.1 The main actors

The European Commission is often referred to as the Guardian of the Treaties. According to Article 17.1 (TEU), the Commission shall “ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them” and it shall “oversee the application of Union law under the control of the Court of Justice of the European Union”. The Commission is the driving force in developing new enforcement tools and strategies.

Member States, by contrast, are the *executors* of EU law.⁶³ They must take any appropriate measure to ensure fulfilment of their legal obligations and refrain from any measure which could jeopardise the attainment of the Union’s objectives (Article 4.3 TEU). Their obligation is to cooperate sincerely for this purpose. Their courts and national authorities are key players.

The Court of Justice of the European Union (CJEU) shall ensure law observance in the interpretation and application of the Treaties (Article 19 TEU). Its main tasks are to (a) rule on actions brought by a Member State, an institution or a natural or legal person, and (b) give preliminary rulings, at the request of Member State courts, on the interpretation of Union law. A key feature in the system is that only Member States can implement the Court’s decisions – the Court has no intervention powers. The Court has however

played an active – some would say activist – role in developing the EU enforcement system, especially regarding the role of the national courts.⁶⁴

The European Parliament plays a more marginal role, but shall “exercise functions of political control” and “the Commission, as a body, shall be responsible to the European Parliament” (Articles 14.1 and 17.8 TEU). The Parliament is increasingly attempting to hold the Commission accountable in its guardian role.⁶⁵

3.2 Changing landscape and strategies

Originally, the infringement procedure was the only enforcement tool in the EU, and it had no sanctions attached to it. Over time, the EU institutions have developed many other tools to support the execution of their respective obligations, based either on secondary legislation or the general guardian role of the Commission. Judging e.g. from its annual reports, it is obvious that the Commission is strategic in its enforcement efforts, and continues to adjust its approach over time.⁶⁶

One major reason for more enforcement was the programme to complete the Single Market, launched in 1985. This wave of new legislation simultaneously increased the compliance costs for Member States, and the importance of such compliance for attainment of their joint goals. Enforcement therefore came into sharper focus. The Commission introduced a “shaming strategy”; embarrassing or peer pressuring Member



States into compliance by comparing them on several parameters transparently and regularly.⁶⁷ The infringement proceeding was rendered more effective, including by introducing in the 1992 Maastricht Treaty the possibility of financial penalties for non-compliance. Most recently, the Lisbon Treaty provided the Commission with new powers to propose a “fast-track” financial penalty for failure to transpose directives on time (Article 260.3 TEU).

Meanwhile, the CJEU developed in several landmark cases the doctrines of direct effect, supremacy of EU law, and state liability for non-compliance, thereby establishing a system of enforcement through national courts.

Alongside these developments, softer (sometimes called “managerial” or “networked”) forms of enforcement have also gained ground with several new tools being introduced from the 2001 *White paper on governance* and onwards.⁶⁸ In subsequent communications on the enforcement of EU law, the Commission has argued for a shift towards prevention and co-operation, away from policing and conflict.⁶⁹ Tools have thus been introduced to support, persuade and monitor the Member States.

The Better Regulation Agenda, including the Regulatory Fitness and Performance Programme (REFIT), also touches on these developments. This agenda is e.g. about ensuring that rules are clear, enforceable, and continually evaluated so as to remain fit for purpose. As will be shown, however, the connection to other enforcement tools is not wholly developed.

3.3 Conclusion: an increasingly complex landscape

The last decades have resulted in a unique and increasingly complex and multipronged enforcement landscape, combining hard and soft approaches. Developments can, as said, be seen in the light of making the Single Market a reality, but also of the need to manage an increased number and diversity of Member States and issues on the agenda, while respecting the principle of subsidiarity as well as the limitations of the Treaties and the budget.

Considering that no Member State has a perfect compliance record, it might be puzzling that they often endorse stronger enforcement policies both legally and politically.⁷⁰ This is probably explained by a wish to ensure that the *other* Member States also do their job, so that one’s own efforts do not come to nothing because others do less. The Single Market does not work for one, if not implemented by the others.

4

The EU enforcement tools

In this chapter, we discuss how effective the current enforcement system is, by analysing all currently used enforcement tools that are relevant to EU enforcement of the Single Market acquis. These tools include both those of general application, such as the EU Pilot, and the specific Single Market tools, such as SOLVIT. Tools can be either formal or informal. Informal means that there is no legal basis, and that Member States' participation is voluntary.

Chapter 2.3 showed how non-compliance is the result of many factors, meaning that a broad analytical perspective is necessary. Tallberg (2002) describes the EU enforcement system thus: "The combination of compliance mechanisms in the EU takes the form of a highly developed '*management-enforcement ladder*' – a twinning of cooperative and coercive measures that, step by step, improve states' capacity and incentives for compliance". According to Koops (2014), moreover, this complementarity between sanctions and cooperation is what sets more effective international enforcement systems apart from others.⁷¹

Table 2: Adapted version of the "management-enforcement ladder"

Type of tool	Purpose
Preventive / Persuasive	Reduce the risk of non-compliance due to incapacity or inadvertence Create normative change
Monitoring	Enhance transparency of state behaviour Expose non-compliance
Case handling ⁷²	Action against cases of non-compliance Further clarify existing rules
Sanctioning	Punishing non-compliance Deterrence

We draw on Tallberg's idea of a "ladder" to create a classification for different types of tools (see table 2).⁷³

Each of the tools is analysed by comparing how it is used in practice with the purposes it should achieve, as described in table 2. Some tools belong in more than one group, and may be discussed in several places. For the analysis, we identify which implementation phase the tool belongs to (transposition vs application) and provide relevant numerical indicators, such as how frequently the tool is used. We also draw on conclusions from studies which in various ways attempt to evaluate some of the tools. The main ones are Pelkmans and de Brito (2012), Andersen (2012), European Parliament (2013)⁷⁴, various issue-specific Commission reports, the Single Market Scoreboard, a Eurobarometer study of local government, a report from the European Court of Auditors, and the annual reports of the Commission and the Court of Justice. Where relevant, we complement this with our own experiences.

Because of differences in available data, the sub-chapters differ in length and structure.

4.1 Preventive/persuasive tools

Preventive and persuasive tools aim to reduce the risk of non-compliance which is due to incapacity or inadvertence, by informal clarifying of rules, building of capacity and effecting normative change. As shown in figure 3, there are preventive tools relevant for all phases in the implementation of the *acquis*. Each tool is described and summarised. At the end, we summarise overall conclusions of the sub-chapter.



Figure 3: Preventive and/or persuasive tools by phase

TIMELY TRANSPOSITION	CORRECT TRANSPOSITION	APPLICATION
	Better regulation	
	Package meetings	
	Expert groups/committees	
Implementation plans		
Use of regulations		
	National regulatory impact assessments	
	Individual capacity building	
		IMI
		Interpretative guidelines
		SOLVIT

Better regulation

The quality of regulation matters for its enforceability. For more than a decade, considerable EU work has gone into a programme to achieve “better regulation”, yet, as discussed above, much of the *acquis* remains complex and ambiguous. The Commission, Council and Parliament now “recognise their joint responsibility in delivering high-quality Union legislation [...] designed with a view to facilitating its transposition and practical application [...]”⁷⁵, and the Commission is running an ambitious programme to review existing legislation (REFIT). The “Better Regulation Toolbox” picks up several of the tools discussed below. *It remains to be seen to what extent these initiatives can*

foster legislation that helps prevent compliance difficulties.

Package meetings

Meetings between one Member State and the Commission have been arranged for a long time on an *ad hoc* basis, to discuss a “package” of the Commission’s concerns regarding that State’s compliance performance.⁷⁶ Both the Commission and Member States consider that the meetings contribute to better understanding on both sides and are able to prevent and manage problems.⁷⁷ One advantage is the opportunity to involve the competent authorities in the dialogue. However, *since meetings, even agendas, are*

confidential, it is difficult to assess from the outside the degree of prevention achieved.

Expert groups

There are no clear definitions for the role and terminology of the various groups set up or managed by the Commission.⁷⁸ Here, we look at expert groups as tools which, as argued by the Commission⁷⁹, can improve exchange of information and good practices, hence support transposition and prevent infringements. There are about 50 such groups in the Single Market area.⁸⁰

Most research about expert groups relates to their role in policy-making rather than compliance.⁸¹ However, the European Parliament (2013) found that setting up a committee does not seem to correlate with more timely transposition, but this may be because they are in fact only set up for directives which are foreseen to be difficult to transpose. Both Member States and Commission officials responded in interviews that the exchange of best practices in groups is generally highly useful. Competent authorities can be included in the dialogue. Expert groups might have an advantage over infringement procedures as the discussion is open to all, and any solutions found can be used by other Member States. Andersen (2012) argues, based on the expert group set up to improve compliance with the directive for free movement of persons, that the groups may help the Commission to manage compliance issues in a manner more inclusive and pre-emptive than in the EU Pilot (which precedes an infringement procedure, see chapter 4.4), but since disputes are often about contested norms rather than practicalities, many issues cannot be addressed through groups. When the Commission combines use of the group with the threat of infringement procedures in a strategic way, it may, according to Andersen, be more effective. All in all, *a number of positive outcomes are in theory associated with expert groups, but it is difficult to assess from the outside the degree of prevention achieved in practice.* It is perhaps telling that an expert group for the implementation and application of EU law had its last – perhaps only – meeting in 2011 and has published neither information, agendas nor activities.⁸²

Implementation plans

One of the features in the “Better Regulation” guidelines and toolbox are the plans to be issued by the Commission to support implementation

of all major directives, and sometimes also regulations with directive-like features. Implementation plans are used systematically in some policy areas, but so far only occasionally in the Single Market area (e.g. the Services Directive), and so far without being evaluated. The plans may support timely and correct transposition by describing implementation challenges and initiate relevant support actions to be taken by the Commission. The tool is, in interviews, considered to be useful if the Member States are ready and able to apply the plans.⁸³ However, it is difficult to make plans relevant to all, as challenges differ between Member States. There are concerns that needs and difficulties of local and regional authorities are not always adequately addressed.⁸⁴ *The tool has not been evaluated, is probably usually helpful, but not necessarily responsive to the needs and difficulties at the local levels.*

Use of regulations instead of directives

An explicit policy of the Commission has been to use regulations “wherever appropriate”⁸⁵, and in the Single Market area this has resulted in a dramatic increase in the number as well as the relative share of regulations. In 2002, the Single Market *acquis* encompassed five times as many directives as regulations; in 2015 there are instead almost three times as many regulations as directives.⁸⁶ Regulations create the same rules for all Members, and are directly applicable. Legislation by way of regulations can therefore prevent late and incorrect transposition. However, it is not obvious that regulations also help prevent incorrect *application*. Most regulations will require some action on the part of Member States to render them effective, and the lack of an explicit transposition obligation means that this process is less transparent, and results in less information both within the country and in reports back to the Commission. Also, while regulations create fully harmonised rules, these still need to be interpreted and applied. Our experience of regulations under our mandate is that differences in transposition are often replaced with differences in interpretation which may be almost equally difficult to overcome (see box 6). *Regulations facilitate (or make unnecessary) transposition, but could generate their own kind of compliance difficulties. Interestingly, given the increasing importance of regulations, we have found no research into this question and the Commission pays no attention to it.*

Box 6

What is a “traditional” pastry? How different interpretations of a regulation may hinder free movement

Food safety rules are harmonised in the EU, yet one pastry company encountered barriers to free movement. The regulation on flavourings (Regulation no (EC) 1334/2008) sets maximum limits for coumarin, a substance found e.g. in cinnamon. However, exceptions may be made for “traditional” pastries, and Member States interpreted “traditional” in different ways. As a consequence, the company had to adjust its recipe for cinnamon buns in order to sell their product all over the EU.

Source: National Board of Trade (2016c)

Regulatory impact assessments, RIAs

The Commission has over the last decade developed a comprehensive and ambitious approach to RIAs as regards its own work⁸⁷, but RIAs are in fact not an EU enforcement tool aimed at the Member States, because there is no requirement on Member States to conduct RIAs nationally, nor an EU system in place to encourage it.⁸⁸ In practice, however, all Member States have a national requirement to use RIAs, which is why the tool still appears in this list. There is a great variety in how well they execute their RIAs.⁸⁹

In our experience, a RIA is a powerful preventive tool when used to screen proposed new rules for consistency with the *acquis*. However, Member States vary considerably in the extent to which this aspect is taken into account in their RIA processes.⁹⁰ The main focus is often on the business climate. Case studies show that in some instances the European dimension is not adequately considered, thereby delaying decision making or even making it necessary to revise policies to ensure they are compatible with EU rules.⁹¹ Proposals have been put forward to establish voluntary coordination and exchanges between Member States and the Commission to enable gradual convergence of key aspects.⁹² The notification requirements for technical rules (described in the next section but also a preventive tool) is a proven way to institutionalise the Single Market test for new regulations, but it is only used in that specific issue area. *RIA is a potentially powerful enforcement tool, which appears underused for compliance purposes (although well used for other purposes).*

Capacity building

EU funding for training of judges and administrative personnel is a long-established tool to ensure correct application on an individual level (see more in chapter 4.5).⁹³ There is also a system in place where national experts are seconded for a limited time to the Commission services from the domestic civil service. This is intended to build both individual and institutional capacity as the experts are expected to apply their improved knowledge of EU issues in their home administration following the secondment. Again, we cannot find any evaluation of the usefulness for compliance purposes.

The Internal Market Information system, IMI

IMI is an IT-based information network that enables national, regional and local authorities to find and communicate with their counterparts in other Members. Pre-translated questions allow for communication in one’s own language. Use of IMI can prevent non-compliance by simplifying contacts between authorities. IMI is so far used for administrative cooperation in eight policy areas. Most requests for information concern professional qualifications, services, and posting of workers.⁹⁴ As a facilitative tool, IMI is appreciated by users. National authorities are the most frequent users; the system is much less used and known by local and regional authorities.⁹⁵ Our experience as a national IMI coordinator is that while being a useful, appreciated tool, IMI’s effectiveness cannot be separated from whether the underlying legal act creates legal obligations or not. It is more difficult to register authorities in IMI and encourage them to be active when participation is optional and/or without sanctions. Moreover, it may occur that authorities communicate flawlessly through IMI, yet persist in handling cases in a way not fully compliant with the *acquis*. *IMI has potential to be a powerful preventive tool, but would only be fully realised where there is also a coercive element and if it became better known e.g. at local level.*

Interpretative guidelines

The Commission and certain other EU bodies may issue guidelines on how to interpret and apply certain legal acts. These are non-legally binding documents, usually adopted as Commission communications, and rather common. In 2015, 68 new communications containing guide-

lines were adopted, 41 of which concerned Single Market issues.

Guidelines may support central and local authorities in application of the *acquis* e.g. by summarising the case law. Member State officials appreciate having the Commission's position explained, thus enabling them to "safeguard" themselves against future infringement proceedings. The local level benefits considerably from guidelines, but sometimes complain that they are not relevant enough to their particular situations.⁹⁶ Member States are often consulted in the drafting, which may result in vague guidelines in politically sensitive areas, thus lessening their enforcement value.⁹⁷ There does not appear to be any horizontal evaluation by the Commission of when guidelines should be used. At the National Board of Trade, we have considerable experience e.g. with the guidelines issued for the application of the directive for free movement of persons.⁹⁸ Many authorities are unaware of these guidelines, do not actually follow them, and/or interpret the criteria of the directive differently. The guidelines have been of considerable help, but we have advocated that key provisions should be made legally binding by incorporation into the directive to support correct application.⁹⁹ *While their non-binding character is a natural limitation, and their usefulness for local level could be better monitored, the guidelines appear useful in several respects.*

SOLVIT

SOLVIT is an informal problem-solving network represented in all EU/EEA member states, aimed

at reducing bad or non-application of EU law by national authorities. The national SOLVIT centres work together in the electronic IMI system. Complainants who encounter a problem in exercising their EU rights apply to their home centre for help. After analysing the case, the home centre forwards it to the lead centre in the country where the problem occurred, which in turn deals with the responsible/relevant national authority by way of an informal dialogue.

The Commission plays an important role in the network. It administers the database where cases and outcomes can be compared and organises regular training sessions and network events. In complex cases, Commission experts can provide informal legal advice to facilitate the work for a solution. This advice is not binding, and does not represent the view of the Commission as an institution, only the view of the Commission official providing it.

In terms of the management-enforcement ladder, SOLVIT is a tool for everything but sanctions, acting both as a persuasive, a monitoring and a case-handling mechanism.

While mainly handling non-compliance in specific cases, the network also has a persuasive function. Through capacity building of SOLVIT staff, and the exchanges between them, the staff can support their national administrations in preventing misapplication. By allowing citizens and companies to register complaints, SOLVIT exposes violations, contributing to monitoring. It also provides information to the European Commission and Member States as to cases of



structural misapplication. Finally, though informal in nature, it is also a case-handling mechanism – this function is discussed in chapter 4.5.

On a less positive note, many centres are understaffed, despite increasing case-loads, and suffer from lack of staff continuity.¹⁰⁰ Public awareness about the SOLVIT mechanism is low, leading to under-usage.¹⁰¹ The informal legal advice does not always resonate with alleged wrong-doers in the administration, especially if they, also, are uninformed about SOLVIT's role. It would however be difficult to render this advice anything but informal, considering the informal nature of SOLVIT.

SOLVIT is a high-value mechanism, performing a multitude of important roles. There are well-known limits to its efficacy, however (see also in chapter 4.5).

4.1.1 Conclusion: mostly unclear to what extent the tools help prevent non-compliance

Preventive and persuasive tools have multiplied in the last decade. Their purpose is to reduce the risk of non-compliance and effect normative change. The tools we have mapped touch on all phases, from timeliness of transposition to the daily application. They form a long, rather impressive line-up. Yet surprisingly little is known about to what extent most of them actually have persuasive or preventive effects. There is no concerted follow-up of their value by the Commission. Some tools are very resource-intensive, which makes it even more important to know their actual value.¹⁰²

Some of the tools would be difficult to evaluate, since they operate through confidentiality and/or concern the behaviour and norms of individuals: package meetings, expert groups, and individual capacity building. Most of these are considered useful by those involved, but that may be for other reasons.

Other tools could be, but are not, objects of evaluation. The specifics of implementation plans and interpretative guidelines could be related to compliance outcomes. Some tools have strong potential value, and ought to be the object of more study: the Better Regulation initiatives, the use of regulations as an enforcement tool, and EU law aspects of regulatory impact assessments.

However, even where the preventive value is clear, and the challenges to effectiveness known, this may not lead to necessary changes – SOLVIT is a case in point, where the challenges to its effectiveness deserve more attention.

Several preventive tools can involve administrative agencies which is positive since they are often involved in the application of the *acquis*. The local level rarely seems to be consulted or addressed, however, which seems like a missed opportunity considering their vital role. Yet, this might mainly be the fault of national governments, not of the EU tools themselves.

4.2 Monitoring tools

The purpose of the monitoring tools is to enhance transparency of Member State behaviour and expose violations. Each tool is described and summarised (in italics). At the end, we summarise overall conclusions of the sub-chapter.

Transposition notifications

To enable monitoring of timely transposition, Member States shall transmit their transposing national legal instrument(s) electronically to the Commission.¹⁰³ The Commission enters it into a database which flags up non-notification and thus allows for monitoring of lateness. Regulations are not transposed but may also contain notification requirements e.g. on the name and powers of designated competent authorities.¹⁰⁴ *Simple yet with powerful effects, notification of transposition is a key tool.*

Conformity checking

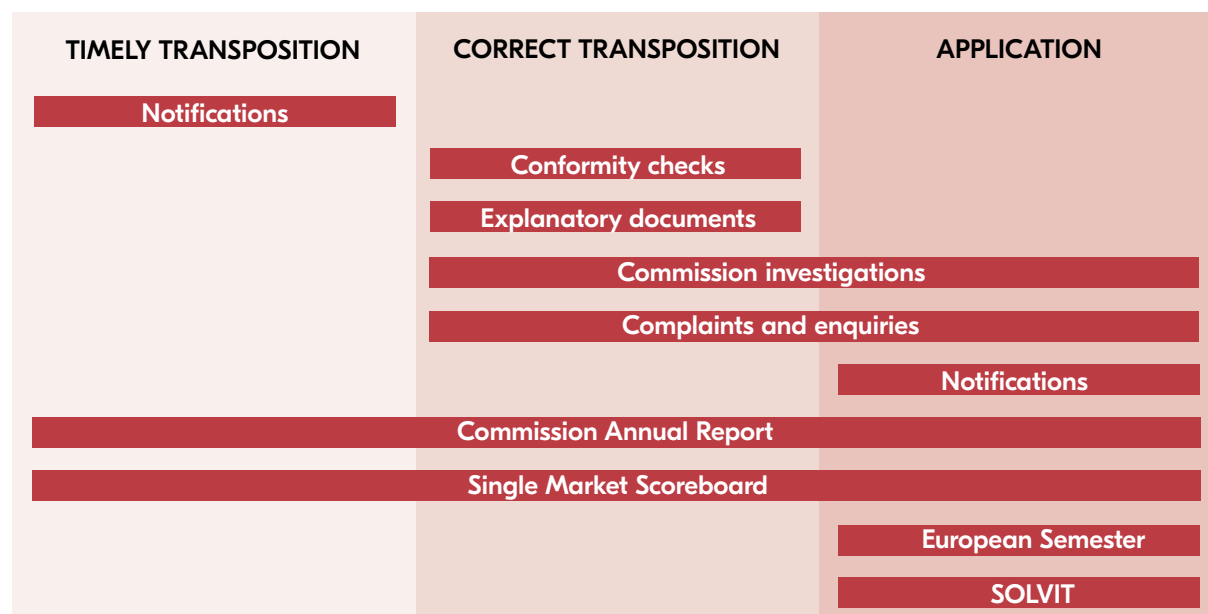
To monitor the quality of transposition, the Commission (in practice often private subcontractors) checks the content of the notified transposing legal instruments, and for complex directives presents the results in studies. Commission officials consider these checks exceptionally useful. Member States are less enthusiastic, arguing that external consultants might not be familiar enough with the subject matter, too much emphasis may be put on verbatim transposition,

and they are resource-consuming.¹⁰⁵ *While necessary in some form to check the quality of transposition, the methods may need to be adjusted.*

Explanatory documents/correlation tables

For the monitoring of transposition quality, Member States are encouraged to provide explanatory documents on their transposition “in justified cases”, for example in the form of correlation tables, article by article. This was agreed by the Commission, the Member States and the Parliament after many years’ stalemate.¹⁰⁶ The Commission places high value on these documents¹⁰⁷, but the Member States are less keen and have ensured that there are no binding legal obligations to submit them.¹⁰⁸ When submitted, the documents are usually not made public. In reality, Member State fulfilment of this (soft) commitment leaves a lot to be desired.¹⁰⁹ Indications are that correlation tables are effective in reducing the Commission’s time and costs for ensuring legal conformity. Directives that encourage correlation tables are also more likely to be implemented on time.¹¹⁰ For the Member States, they ought to be quality-promoting tools, but they are also resource consuming and may be considered as giving the Commission too much insight, which could possibly be used against the state in an infringement proceeding.¹¹¹ *These documents are useful enforcement tools, but remain difficult to deliver for political reasons.*

Figure 4: Monitoring tools by phase



Commission investigations

The Commission's own-initiative studies of the quality of transposition and application, based for example on news reports, are a main source of new infringement proceedings.¹¹² However, this may be changing, as our interviews with key Commission officials indicate that they have little resources available anymore for conducting their own investigations. In any case, little information about these investigations appears to be available. "Fitness checks" of legal acts are also conducted within the REFIT platform, but it is less than clear whether and how the knowledge generated is used for enforcement purposes.¹¹³ REFIT appears an instrument to review regulation rather than to promote compliance. *Investigations provide the basis for much Commission action, but little is known about them.*

Complaints and enquiries

For monitoring application of the *acquis*, the Commission is helped by tools allowing citizens and companies to complain about measures by national authorities which they consider to be against Union law. Complaints can be communicated directly to the Commission¹¹⁴ or via the petitions committee in the European Parliament.¹¹⁵ Members of the European Parliament can also pose questions to the Commission. About 3 000 complaints are registered with the Commission each year (see figure 6, chapter 4.4.2.).¹¹⁶ One third of all EU Pilot cases have their source in a complaint. Half of these cases are then taken forward into a formal proceeding.¹¹⁷ Our interviews with key Commission officials suggest that, because of lack of resources for own investigations, the complaint function is even more important than these figures indicate.

There are examples of both petitions and complaints resulting in changes, but there is no obligation for the Commission to act on the complaints. Several studies have pointed at the lack of transparency and rights for complainants as risks for the legitimacy and efficacy of this monitoring tool.¹¹⁸ In the case of the directorate-general for the Single Market (DG GROW), they are actively trying to reduce their number of infringement proceedings. This means that a higher share of complaints are never acted upon, which means a risk for hollowing out the tool. Lack of public follow-up also makes it difficult to assess its functionality as an enforcement tool.

The complaint function is a crucial informational complement to the top-down monitoring of the Commission and the self-reporting of the MS, and it is important to maintain its legitimacy.

Sector-specific notification requirement

Some aspects of the application of the *acquis* have their own notification systems, particularly in the Single Market.

Best known is Directive (EU) 2015/1535, requiring Member States' proposals for new national technical rules for goods to be notified via a database to the Commission. Other Member States, the Commission and stakeholders may scrutinise the proposals and comment.¹¹⁹ If proposed technical rules are not notified, they are considered legally void and unenforceable.¹²⁰ During the period of scrutiny, the proposals may not enter into effect ("standstill"). Furthermore, for a proposal that has generated detailed opinions, the standstill period extends by three additional months, and the proposal often has to be revised or withdrawn.¹²¹ There are thus several "sticks" involved in the process. Around 700 proposals are notified each year. The Commission has become increasingly active in reacting to notifications in recent years. Member States are also active in the process, although their share of the total number of reactions is decreasing.¹²² There are concerns that not enough resources are devoted to monitoring of other Member States' notifications, resulting in little peer review in practice.¹²³

Despite this, the notification system is generally praised as an effective enforcement tool because it prevents (at least some) new trade barriers, allows for an effective dialogue between Member States and Commission, provides for benchmarking between Member States, and allows for stakeholder involvement.¹²⁴ According to Pelkmans and de Brito (2012), the mechanism has contributed towards "Europeanisation" of national law making, and improved knowledge in national authorities about how to apply key EU principles. A key feature is that regulators are forced to justify their new barriers. At the same time, getting there has been a slow process and the contents of many proposals still exhibit the same types of mistakes or "failures to think internal market" as when the system was set up. Our experience is, similarly, that the system is very valuable and has enabled a learning process

which, over time, has increased awareness among affected authorities. In particular, authorities learn from the analysis provided in the detailed opinions.¹²⁵

By contrast, results are less impressive in the case of the notification system for new regulations instituted under the Services Directive. Most of these notifications concern regulations that have already been adopted, which reduces any preventive effect. Some Member States submit no notifications at all, and others only do so sparingly, which reduces the monitoring effect.¹²⁶ In our view, the lack of sanctions and legal obligations render the process ineffective. Another difficulty is the lack of legal clarity as to what should be notified.

Notification systems combining enforceable obligations with facilitating tools can, over time, have powerful monitoring and preventive effects on the application of the acquis in question.

Annual report “Monitoring the application of Union law”

A part of the “name and shame” strategy developed in the 1990s, the Commission’s annual reports present yearly data on complaints, Pilot cases and infringement procedures, as well as brief analyses of trends and changes in the enforcement strategy. Focus lies on directives. The last ten reports barely mention the application of regulations, certainly not in a strategic way, whereas difficulties in transposition are discussed at length. Preventive tools are occasionally described and declared to be useful, but never systematically evaluated. Scholars have found that the presented data can be inaccurate, incomplete or inconsistently treated over time.¹²⁷ *The reports are a key tool in the Commission’s name and shame strategy, but the content is skewed towards certain aspects of compliance.*

The Single Market Scoreboard

Another name and shame tool, this Scoreboard has been published twice a year since 1997.¹²⁸ It presents, in an easily accessible way, the performance of Member States on a number of mainly quantitative indicators. Originally, it included only transposition and infringements issues, but was broadened in 2013 to include Member States’ performance on institutions and mechanisms underpinning the working of the Single Market.

The transposition of directives is still very much in focus. There is no monitoring of the

transposition or application of regulations. The “governance cycle” around which the Scoreboard is organised does not have a stage for the application of law. The degree of information and support to citizens and administrations post-transposition is also scored, e.g. relating to SOLVIT and the Services Directive, but not other application of law by administrations.

It appears that the scoreboard has helped to improve Member States’ record of timely transposition over time. Since its inception, member states’ average “transposition deficit” of Single Market *acquis* has been decreasing steadily and remains now more or less stable at a low level, although the problem of late transposition is not fully removed (see chapter 2.2). This improvement should also be seen in the light of a clear political effort and the new sanction tool for late transposition, introduced in the Lisbon Treaty.¹²⁹ The relative superficiality of the Scoreboard is both its strength and its weakness.¹³⁰ Non-contestable and comparable data, joined with a communication of results through press releases, provide (at least in theory) for public as well as peer pressure.¹³¹ *The Scoreboard is a strong and useful monitoring tool, within its limitations.*

The European Semester

In the annual cycle which organises the EU’s economic governance, the Commission issues country-specific recommendations. Some Single Market issues have made their way into these recommendations. For example, in June 2014, issues related to “competition in the service sector” were included in 14 recommendations. In the later years the Commission has however attempted to reduce the number of recommendations, and focused on other issues, often of a macro-economic nature. The European Parliament has called for the Commission to instead develop and strengthen the Single Market aspect of the semester.¹³² The country-specific recommendations and semester process have a monitoring, peer pressure rationale, and could be argued to have greater political impact than infringement procedures since they are agreed and adopted by the governments. However, they do not have a very impressive track record. For 2012–2013, only about ten percent of recommendations were fully or largely implemented.¹³³ The European Court of Auditors (2016) conclude, in relation to the Services Directive, that there is no evidence that the recommendations are more

effective in removing barriers than infringement procedures. *The country-specific recommendations, despite high political status, have so far been used only sparingly for Single Market issues, and to no very great effect overall.*

SOLVIT

As shown in section 4.1, SOLVIT has a monitoring function, providing important information for policy analysis regarding obstacles to a well-functioning Single Market.

4.2.1 Conclusion: monitoring is uneven

The purpose of the monitoring tools is to enhance transparency of Member State behaviour and expose violations. Certain aspects of the *acquis* are well monitored, others less so.

Clearly, monitoring of directives is more systematic than that of regulations.¹³⁴ The notification of transposition is directly linked to possible action by the Commission. By contrast, difficulties involved in adjusting to and applying regulations are almost absent from the Scoreboard and the Commission’s annual reports. Several monitoring tools (transposition notification, conformity checks and explanatory documents) are only used for directives.

Overall, there is more monitoring of the “law in the books” than of its actual application. It is naturally much more difficult to detect and measure non-compliance in the latter, since it is decen-

tralised, takes place on a daily basis, and is therefore scattered as well as omnipresent. The Commission’s sources are resource-intensive own investigations, and the important information obtained from complaints. A relatively high number of complaints are taken forward into the EU Pilot, but, as also shown below, the share of non-addressed complaints grows, which might undermine this system for “private” monitoring.

The Single Market Scoreboard and the notification system for technical rules contain incentives for Member States to comply – political incentives in the first case and legal incentives in the latter. Both appear to be rather effective in what they do. The reason that the notification system for technical rules works well is probably because it combines “carrots and sticks”. Cooperation of Member States is encouraged through sanctions and a facilitating framework that reduces costs of compliance. It also appears as one of few instruments where Member States also monitor each other. By contrast, sanctions are missing from other tools, reducing their effectiveness; e.g. the Services Directive notifications and the explanatory documents regarding transposition.

While important for revealing non-compliance, monitoring alone will not make Member States comply where they particularly do not wish to. This is evident through the example of the European Semester, and also in the case study of the Services Directive, following in chapter 4.3..



4.3 Special study: the Services Directive tools

The Services Directive (Directive 2006/123/EC) probably represents the most ambitious usage of preventive, persuasive and monitoring tools in the quest for compliance. At the National Board of Trade, we have been closely involved both with negotiating and applying its provisions. The Directive is therefore a suitable case for a special study.

The directive mainly codifies case law based on the freedoms to provide services and of establishment. Reaffirming this existing law could be viewed as an attempt to persuade and better socialise Member States into already agreed norms. The novelty of the implementation phase lies in the tools developed for correct transposition and application of the codified principles.

The tools to support correct transposition of the Directive include

- the Commission's handbook on implementation,
- assessment of the quality of transposition in each Member State,
- screening and mutual evaluation of national services regulations through individual self-assessments and peer-review meetings,
- performance check by the Commission on the interaction with the e-commerce and professional qualifications directives,
- implementation report including an economic assessment, taking stock and proposing new measures,
- peer review among Member States on remaining requirements for legal form and share-holding, and
- stakeholder workshops on remaining obstacles.

The tools to support correct application include

- notification of new services regulations through IMI,
- enable Member State authorities to cooperate through IMI,
- monitoring Member States' execution of these tasks in the Single Market Scoreboard, and
- continued Member State exchanges in a Services Directive expert group.

To realise the goals of the directive, Member States were also required to set up one-stop-shops where service providers could obtain information and handle administrative formalities online (the EUGO network).

Without attempting to fully evaluate this huge undertaking, some reflections can be made based on a European Court of Auditors (2016) study, the Commission's analysis, and our own experiences.

First, the process was and remains resource intensive. It has been discussed as a model for future endeavours, but consumes so many resources that it cannot be used for all directives.¹³⁵ However, from the Commission's side a structured transparent dialogue ought to have created some "economies of scale" compared to the infringement tool. Thus, relatively more work was done by the Member States themselves in the enforcement of the directive.

Second, the body of knowledge gathered through the process is impressive and highly useful in an area with insufficient statistics. It has been used as a basis for proposing new measures.¹³⁶

Third, the process, especially the screening/evaluation stage, removed as well as prevented non-compliance. Member States reported more than 34 000 requirements in the screening process; obstacles which could then be addressed in various ways. The screening probably also had a longer-term preventive effect, since all levels of national administrations were educated in employing a Single Market perspective by being called upon to critically assess their own rules and those existing in other Member States from this perspective.¹³⁷

Fourth, despite these good results, a host of revealed (and probably unrevealed) non-compliance remained. In the first assessment in 2012, the Commission estimated that only 10 percent of barriers in the Member States had been fully removed, 60 percent partly removed and 30 percent remained.¹³⁸ The peer review showed that Member States had not carried out thorough proportionality assessments of legal form and share-holding requirements, despite being required to.¹³⁹ Also, Member State diligence regarding the one-stop-shops is generally sub-par, despite positive assistance on how to implement through a "charter", as well as an incentive through the name and shame process of the Scoreboard.¹⁴⁰

Fifth, the process accentuates rather than removes the fact that Member States are not equally good at compliance. The outcomes with respect to each Member depended e.g. on their pre-existing regulatory and organisational set-up as well as on their level of political engagement, i.e. their “ownership of the issue”.¹⁴¹

Sixth, the Commission considers that the process led to an improved “habit of dialogue” between the Member States but, from our experiences, there is limited critical peer review or exchanges of best practices. In the expert group, and even in the “mutual evaluation” phase, Member States are cautious of criticising each other, preferring that the Commission take this role.¹⁴² Also, Member States only rarely comment on each other’s notifications of new services regulations.

Finally, an ambitious implementation process can alleviate, but not fully compensate for, inherent problems in the legal text and/or lack of enforcement zeal. Obligations in the Services Directive are not always clear and precise which of course hinders effective enforcement. For example, as discussed elsewhere, the notification tools put in place by the Directive are not up to par with those concerning technical rules for goods. The European Court of Auditors (2016) criticised the Commission for launching too few infringement proceedings based on the Directive (e.g. sending only one case to the CJEU). The Commission defended itself by saying “much of the Directive is based on a proportionality assessment to be conducted by the Member States on a case-by-case basis [...] Action is therefore decided not by levels of confidence but by legal basis”.¹⁴³ This may be true, but our experience

also indicates a certain reluctance to use “hard” tools, as many issues regulated through the Services Directive remain politically sensitive.

4.3.1 Conclusion: partly a success story

The Services Directive case study indicates that preventive and monitoring tools can achieve a great deal that would probably not have come about otherwise. However, these tools cannot, on their own, be expected to compensate for lacking legal clarity, political ownership, resources and/or capacity on the part of the Member States, and determination on the part of the Commission.

4.4 Case handling tools from above

When preventive and monitoring tools have failed to prevent non-compliance, there must be tools available to enable action against the infringing Member State. During the handling of such cases, the concerns are to be addressed and rules can become further clarified. In the EU, cases can be initiated both from above (the Commission’s Pilot and infringement proceedings) and from below (citizens and businesses, through national courts and SOLVIT). There is also case-based cooperation between the EU and national judicial levels (preliminary rulings).

In this sub-section, we describe each enforcement tool from above, e.g. the work of the Commission. Overall conclusions regarding the Commission’s tools are drawn at the end of the sub-chapter. The next sub-section covers SOLVIT and the work of the courts and is summarised in the same way.

Figure 5: Case handling tools by phase

TIMELY TRANSPOSITION	CORRECT TRANSPOSITION	APPLICATION
		Pilot
		Infringement proceedings
		SOLVIT
		National court proceedings
		Preliminary rulings

4.4.1 The Commission's Pilot and infringement proceedings

Since its launch (indeed as a pilot project) in April 2008, the **EU Pilot** provides an informal framework for the Commission and the Member State authorities to cooperate on correct transposition and application of law.¹⁴⁴ In the Pilot, the Commission may confidentially gather information about an area of concern, and the Member State may correct itself voluntarily, if needed. Through a joint database¹⁴⁵, the Commission sends a query to the national government, which has ten weeks to reply within the same database. The Commission then has 10 weeks to assess the response.

If the Commission is not satisfied with the Member State's response during the Pilot phase, it may continue onto the formal track by initiating **infringement proceedings**.¹⁴⁶ At that point, the Commission sends a letter of formal notice to the Member State giving it a deadline to issue a response. If there is no response or the response is unsatisfactory, the Commission sends a second letter (reasoned opinion). If the Commission is still not satisfied after the Member State has replied to that letter, it can initiate proceedings at the CJEU. There are three types of infringement: non-conformity/non-compliance (legislation is not in line with EU law), incorrect/bad application (of directives, regulations, treaty provisions and decisions) and failure to notify (late transposition).

The latter type is the most easily detected since Member States are obliged to notify when they

have transposed a directive. Failure to notify in time will send a signal to the Commission, which appears to almost automatically initiate an infringement proceeding (without using the Pilot).¹⁴⁷ The Commission typically opens proceedings against a number of Member States at the same time regarding the same legal act.¹⁴⁸

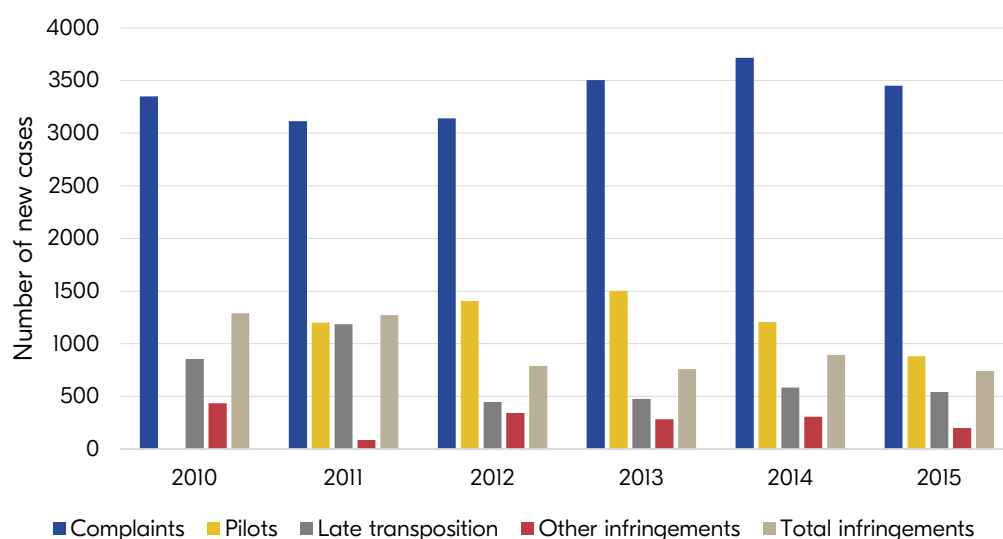
The other types of cases are based on complaints or the Commission's own investigations (or both – see discussion in chapter 4.2).

The Treaty also provides for a horizontal infringement procedure, where one Member State initiates proceedings against another in the CJEU (TFEU 259), after having brought the matter to the attention of the Commission. This possibility has very rarely been used¹⁴⁹, in all likelihood because it may create (and reflect) political ill-will between Member States. They have instead preferred the Commission in the role of prosecutor. However, it is common that Member States intervene in the judicial proceedings, in support of either the Commission or the defendant.¹⁵⁰

4.4.2 Effectiveness of the Commission's case handling

The first purpose of a case handling system is to **enable action against suspected non-compliance**. This matters both for that particular case and for deterrence and legitimacy. As shown in figure 6, more than 3 000 complaints about Member State non-compliance reach the Commission every year. The Commission initiates more than a thousand new cases every year.¹⁵¹

Figure 6. Number of complaints and newly initiated cases, per type and year



Source: Own calculations from European Commission 2011, 2012b, 2013, 2014, 2015f and 2016b.¹⁵²

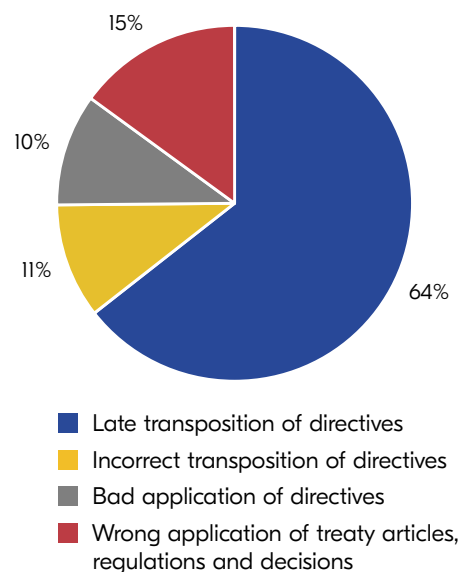
The Pilot became fully operational in 2011. After peaking in 2013, the number of new cases per year has since fallen to almost half. The number of new cases for *late* transposition lies around 500 or so per year, whereas the number of new infringement cases regarding *incorrect* transposition or application is lower and also declining. As a consequence of these declines, the gap grows between the number of complaints from citizens and businesses and the number of investigations into those complaints.

The number of initiated cases normally varies with the number of directives to be transposed during the year. However, our interviews with key persons in Brussels, our experience as a SOLVIT centre, as well as the Commission's own strategies¹⁵³ all confirm that the decline is deliberate. The Commission is working hard to reduce and prioritise among new cases, both Pilots and infringements, explaining that "in line with the Juncker Commission's focus on priority files ('big on big, small on small'), current approaches to the Commission's enforcement policy need to evolve".¹⁵⁴ Having wide discretion in *how* to handle infringements, the Commission is now choosing to link its guardian role to its active role as initiator of EU legislation, i.e. its work programme. Scholars have long found the Commission to be selective and policy-oriented in how many and which cases are initiated.¹⁵⁵ What seems to be new is the active attempt to pursue only cases which are relevant to policy priorities and drop or downsize those which are not, with less regard for the legal merits of the case. The Guardian of the Treaties thus becomes (more) political.¹⁵⁶ One consequence that we have observed is that some instances of non-compliance that are considered politically sensitive, relating e.g. to the free movement of persons, are not acted upon despite being well known to the Commission. Yet, for the functioning of the Single Market, movement of persons, one out of four fundamental freedoms, is arguably not a "small thing".

Among initiated cases generally, Single Market issues are present, but by no means dominant. In recent years, roughly 8 percent to 20 percent of new Pilot and infringement cases relate to Single Market issues.¹⁵⁷

As shown, the number of new cases for late transposition dwarfs the other types of infringement cases, making up two thirds of all infringement cases (see figure 7).¹⁵⁸ Furthermore, about

Figure 7. Approximate break-down of new infringement cases 2013-2014 by type



Source: Data provided for this report by the European Commission.¹⁵⁹

85 percent of all cases concern directives in some way, whereas 15 percent concern application of treaty articles, regulations and decisions.

This distribution between types of infringement cases is roughly the same as it was in previous periods.¹⁶⁰ Late transposition is more dominant now, perhaps because of the new addition of the fast-track sanction option (see chapter 4.5) for late transposition. Thus, focus has for a long time been on directives rather than other legal acts, and in particular on their timeliness – the variable most easily measured.¹⁶¹ Conversely, it seems as though application of legislation, particularly of regulations which now constitutes three fourths of all applicable legislative Single Market acts¹⁶², is increasingly underrepresented.

The second purpose of the case handling tools is to **address concerns**. In general, the closure rate at each stage in the process is high. It is a stated ambition of the Commission to solve cases as early as possible, preferably already in the cooperative Pilot stage, to conserve resources and end non-compliance quickly.¹⁶³ Member States' interest also lies in avoiding the Court, in particular the sanctions. This shows in the data: 68-75 percent of all cases between 2011 and 2015 were closed in the Pilot stage.¹⁶⁴ The number of remaining cases continues to be significantly reduced along the rest of the case handling chain, with only a handful of cases resulting in CJEU judgements.¹⁶⁵



The Pilot is often considered as a tool with strong solving ability; both the Commission and the Member States agree with this.¹⁶⁶ The Pilot is e.g. useful for fact-finding.¹⁶⁷ Cooperation between the parties in the Pilot phase has, according to the Commission, helped reduced the number of *pending* infringement cases, which is currently at a record low.¹⁶⁸ Pelkmans and de Brito (2012) also argue that the Pilot is a success, not least because it creates a partnership between the parties that contributes to compliance.

However, closing a case is not necessarily the same as solving it. The real value of high closure rates is difficult to verify because results achieved through the Pilot and in infringement cases which do not result in Court judgements are secret. Neither complainants nor researchers are allowed access. The Commission and Member States agree that confidentiality is necessary to safeguard trust and cooperation, but this has also been criticised.¹⁶⁹ Closing a case ought to mean that the Member State had either showed that there was no infringement or that any such had been rectified. Our own insights however show that this is not always fully true.

One barrier to effective case handling in the Pilot is lack of resources. The requirements to translate all documents into the Member State's language is costly, makes the Pilot less informal, and makes it difficult for the Commission to meet deadlines.¹⁷⁰

Processing times remain long throughout the system. The European Parliament (2013) concluded that the average time needed for issuance of a letter of formal notice for late transposition

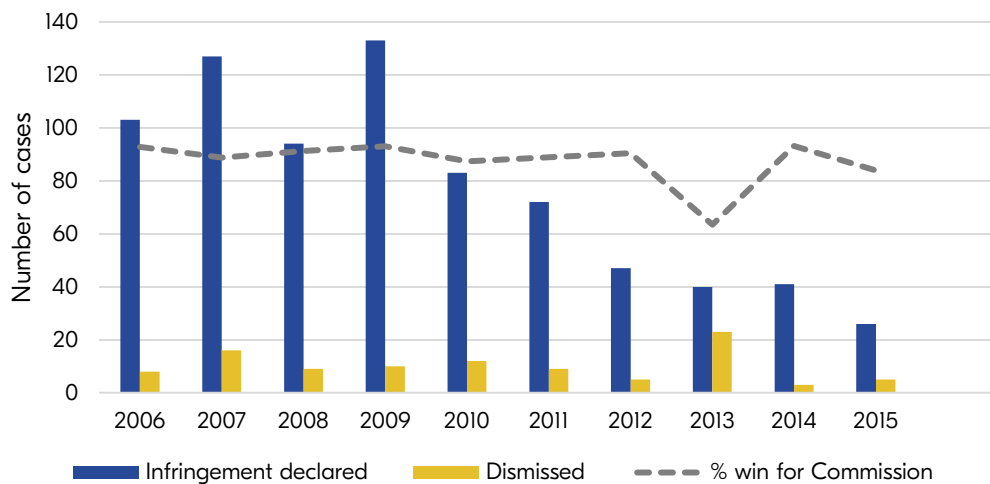
(which ought to need little analytical work) was 9 months from the moment of infringement. With additional time for the coming steps, it takes on average over two years for a late transposition case to reach the Court.¹⁷¹ For the Single Market infringement cases of all types, the average duration in 2015 between the letter of formal notice and the closing of the case was two and a half years. After a court judgement, Member States took almost another two years to comply on average.¹⁷² Both figures have also increased in recent years.

Are long processing times unambiguously negative? Andersen (2012) argues that the main function of the infringement proceeding is to promote dialogue, and that the drawn-out time in each stage of the process should be seen as part of the strategy, rather than mismanagement, as it provides time for the parties to come together.¹⁷³ This may be true and promote actual solving of problems, however, it also undermines trust and efficiency in the system's ability to correct non-compliance, especially if combined with a reluctance to pursue even cases with strong legal merits.

Finally, the case handling stage shall also **provide clarification of rules** through the collection of practice. This is primarily done through the judgements and preliminary rulings of the CJEU.

Figure 8 shows that the number of judgements delivered by the Court has substantially declined in the last decade, reflecting less incoming referrals from the Commission. In that sense, rule clarification happens less and less, but legal and political practitioners might still find it difficult to keep up with all legal developments considering the complexity of the cases.

Figure 8. Approximate break-down of new infringement cases 2013–2014 by type



Source: Court of Justice of the European Union.¹⁷⁵

It also becomes clear that the Commission usually wins; in 88 percent of all judgements since 2006, the Court declared one or more infringements on the part of the Member State. This has been explained by the Commission's status as a "repeat player", but also by the fact that it carefully selects cases where it is reasonably convinced that it will win.¹⁷⁴

4.4.3 Conclusion: focus on cooperation, directives and early closing

The case-based enforcement system enables action against non-compliant Member States. Non-compliance which is revealed *and* followed up by the Commission is tackled more effectively than in the past. The Pilot has made the process more cooperative, perhaps also more effective, than previously. The complaint function is a key source of information, and the CJEU provides rule clarification on an ongoing basis.

However, the share of cases that are thoroughly investigated and brought to conclusions is declining; both as regards Pilots, new infringement proceedings (other than late transposition) and Court referrals. Politics and strategies have always been a part of the infringement process, but seem to increasingly dominate its other dimensions.

Cases are generally closed in the early stages of the *process*, but late as regards the *time elapsing* from the first step. This might promote actual compliance, by allowing time for cooperation and confidentiality but may challenge the legitimacy of the system from the view of stakeholders. This trade-off is difficult to solve, other than to

deploy resources to limit unnecessary delays, such as delays due to translation of Pilot documents.

Even allowing for its less resource-intensive character, timeliness of transposition appears to take up a disproportionate share of the Commission's attention. There is relatively little focus on legal acts other than directives. Application of law seems inadequately addressed – particularly non-compliant application in politically sensitive areas. As will be shown below, application would be better addressed if the Commission would consistently address cases initiated from below which SOLVIT cannot solve.

4.5 Case handling tools from below

Non-compliant Member States are also liable to be challenged from below, i.e. from citizens and businesses. Facing a possible violation of their EU law rights, private parties have access to three main types of proceedings: they may file a complaint to the European Commission (discussed above), notify the SOLVIT network or bring a case before a national court. Each of these remedies has its advantages and drawbacks in terms of costs and effectiveness. They are each described and overall conclusions are drawn at the end of the sub-chapter.

4.5.1 SOLVIT

The informal problem-solving network SOLVIT has been discussed above. Regarding its case-handling function, there has over the last ten

years been a 525 percent increase in cases.¹⁷⁶ The majority concern practical problems faced by citizens exercising their right to free movement, with social security issues making up 58 percent of cases and residence rights 16 percent. The small number of business cases has long been a concern in the network. It might simply be because businesses prefer other tools, like court proceedings, but could also indicate lack of awareness of the service offered by SOLVIT or lack of interest because of challenges to SOLVIT's effectiveness.¹⁷⁷

SOLVIT aims to solve cases within 10 weeks. About two thirds are handled within this time, which makes it overall much faster than other mechanisms for redress. It solves on average around 90 percent of its cases each year.¹⁷⁸ The cases also provide long-term solutions where they lead to changes to administrative practices or legislation.¹⁷⁹ To be effective, cases need to be handled at the right time, since SOLVIT cannot act when an issue is, or has been, subject to court proceedings.

The main challenge to SOLVIT's effectiveness is the lack of follow-up of unresolved cases by the Commission. There is currently no comprehensive and automatic system for making sure that these cases are taken forward when SOLVIT has reached the end of its abilities to act. Thus, in order to solve cases where national authorities do not voluntarily conform to SOLVIT's suggestions, the complainant must often start anew, by posting a complaint to the Commission.¹⁸⁰ This wastes time and resources, and legal analysis and evidence gathered by SOLVIT might not always

be used. Again, issues regarding free movement of persons and related rights represent three fourths of the unresolved cases (see one example out of many in box 7).

Box 7

Waiting periods for residence cards — an example of a structural problem affecting free movement of persons

A German citizen turned to SOLVIT for help, as her Brazilian husband had waited over six months without getting his residence card from the responsible authority in Sweden, the Migration Agency. The long wait caused the couple serious distress as it was difficult for the husband to travel in and out of the EU and to deal with other Swedish authorities, who usually require a proof of a positive decision by the Migration Agency, such as the residence card.

SOLVIT Sweden has received several cases of this kind. The case handling time for these cases exceeds the time limit permitted by the applicable directive, 2004/38/EC, and the problem affects many individuals who need to have their right to reside registered in order to access other rights and functions in Swedish society. SOLVIT Sweden has approached the Migration Agency with the view that the current practice, proved both by the submitted cases and by the information found on the agency's website, is contrary to EU law. The Migration Agency has referred to their increased workload and limited resources, and the issue remains unresolved.

Source: the SOLVIT database, Case 1964/15/DE



4.5.2 Bringing a case to national courts

The Commission refers to the national courts (and public authorities) as having the main responsibility for the application of EU law. Unlike SOLVIT which cannot compel anyone to comply, national courts have the power to set aside national rules. Courts must rule on all complaints brought before them and CJEU practice suggests that they also have an obligation to raise compatibility issues in a case *ex officio*, i.e. on their own initiative, where relevant.¹⁸¹

Furthermore, national courts may assess the compatibility with EU law of both individual decisions by public authorities and general national regulations or laws. In so doing, national courts are bound to set aside national decisions or rules which are contrary to EU law.¹⁸² In that respect, national courts can be qualified as “national EU courts”. Judges of first instance and lower courts can, whenever they have doubts about a point of EU law, use the preliminary ruling mechanism to challenge the case-law of their supreme and constitutional courts.

Typically, an appeal before a national court will be done in accordance with the national procedural rules. This means that the same rules regarding the choice of court (e.g. seat and level of the competent court), standing (e.g. who may bring a matter before court), rules on hearings and on appeal will in principle apply regardless of whether an EU law assessment is involved or not. The main difference from a purely national case is the possibility for the judge to refer a question of correct interpretation of EU law to the CJEU (preliminary ruling procedure), and a right, under certain circumstances, for an individual to claim compensation for violation of their EU rights (see under Sanctions).

Effectiveness

Again, we look at the ability of the case handling tool to enable action against suspected non-compliance. To our knowledge, there are no statistics on the number of cases related to EU law dealt with by national courts, but there are several indications that it is one of the main routes for enforcement. In a 2011 survey, 69 percent of the responding judges and prosecutors within administrative law said that they deal with issues of EU law at least once every three months, and that the frequency keeps increasing.¹⁸³ Another indication, probably representing the very tip of the iceberg, is provided by the roughly 400 new

cases of preliminary rulings for the CJEU every year. Given the predominance of EU law in vast areas of law, it is likely that a majority of appeals against the decisions of public authorities in these areas involve at some point or another an EU law assessment. Aside from these areas, it is also likely that such assessment is present in many (if not most) national cases involving a business or private person from another Member State appealing a decision by a public authority.¹⁸⁴

This does not mean that national courts conduct a compliance assessment in each of these cases,¹⁸⁵ but that they have the competence, and even the obligation, to do so in case of a potential conflict between EU law and national rules. Thus, national courts constitute a formidable net with which to catch possible EU law infringements. The preliminary ruling-mechanism in addition, increases the likelihood that those infringements will be dealt with appropriately.

In practice, however, there are a number of obstacles to the efficiency of national courts in ensuring compliance from below. Those include

- investment of costs and time for the complainant,
- limited resources and knowledge of the national courts in dealing with EU law, and
- some degree of reluctance of national judges in applying EU law.

Firstly, the problem of costs and time: costs incurred by private parties in court proceedings may deter bringing a compliance matter before court. Unlike SOLVIT which is free of charge and limited in time (ten weeks), court proceedings may be demanding in terms of legal fees and time. This is all the more true in cases involving EU law assessments as those often require an unusual, and therefore expensive, expertise. Times needed for national courts to reach decisions in administrative cases vary significantly between the Member States, ranging from 112 days in the best performing Member State to 1 775 days in the worst, with a simple average of 458 days.¹⁸⁶ It is furthermore not unlikely that cases involving EU law incur higher risks of delay due to the likelihood of appeals to courts of higher instance and the possibility of the judge referring the matter to the CJEU for a preliminary ruling.

Challenging a decision of a public authority on legal grounds (as opposed to factual grounds), and even more so challenging the validity of a law,

is an uncertain venture. EU law is not always clear and foreseeable. It may not be widely understood by all parties involved, including the court. Given this uncertainty, the outcome of a court case on the legality of a national rule is not necessarily predictable.

Faced with proceedings that may take many years and cost several thousand Euros for an uncertain result, it is in our experience not uncommon for companies to opt against bringing a matter before the courts. In some cases, there may even be a goodwill factor that may speak in favour of businesses accepting an administrative decision, even if this violates their EU rights.¹⁸⁷ Similarly, it is challenging for private persons to face a costly trial without support.

Thus, even if national courts constitute the main means of redress for private parties, a number of factors may deter them from challenging the legality of national rules before courts.

Secondly, the problem of EU law knowledge in the courts: EU law is a complex area for national lawyers for several reasons. It does not always follow the same logic or obey the same methods of interpretation as national rules. It also sets a number of principles that are generally absent from national law. For instance, the principle of supremacy of EU law¹⁸⁸ requires a national judge to set aside a national law found to be in breach of EU law, hereby giving the national courts (especially those of lower instance) a competence that is seldom matched by their national legal orders.

Specialised authorities and courts may be very knowledgeable about the technicalities of specific areas of EU law but will not necessarily be familiar with more fundamental principles which are as essential for compliance. A national environmental agency or environmental court would for instance master complex pieces of EU legislation on CO₂ emissions or nitrate levels in water. It may however not enjoy the same familiarity with the EU principle of direct effect or the *ex officio* obligations to apply EU law.

Courts of general jurisdictions may hear any type of case and deal with a vast area of legal issues. In most countries, administrative courts may rule on questions touching upon EU law but this does not mean that the courts are always up-to-date with the CJEU's latest interpretations. There is a risk that a court hearing a case may not be able to identify its EU law dimension nor apply EU rules in a correct manner.

This problem has long been recognised and EU training of judges and legal personnel is an enforcement tool with a long history.¹⁸⁹ Yet, as late as 2011, 63 percent of judges and prosecutors stated that did not have any initial training in Union law prior to taking up their functions. As many as 32 percent of judges said that they knew only to a minor extent – or even not at all – when to apply EU law directly and only 20 percent said they knew very well when to do so.¹⁹⁰ In 2005, the National Board of Trade conducted a national survey which showed the widespread need for improving the Swedish judges' understanding of EU law.¹⁹¹ Obviously, unawareness, inexperience, misunderstandings or wrongful interpretation will ultimately affect the level of compliance of national rules with EU law.¹⁹²

Thirdly, the problem of reluctance to apply EU law: In some cases, a misapplication of EU law by a national court may result from some reluctance in applying rules that are considered alien to the national legal order. National judges, especially in courts of lower instance, may for instance hesitate to set aside a national law in favour of EU rules. Judges of higher instance may also be protective of the legal order which is their responsibility to safeguard.

Several surveys, studies and national cases bear witness to this reluctance.¹⁹³ For instance, it took more than 30 years for the French Supreme Administrative Court to acknowledge the principle of supremacy of EU law.¹⁹⁴ Until then, national rules prevailed over EU law in France. Similarly, the German Federal Constitutional Court has in a series of cases set a number of (national) conditions in order to acknowledge the supremacy of EU law.¹⁹⁵ Some signs of reluctance have also been examined in respect of use of the preliminary references mechanism by national supreme courts who are obliged to refer questions of interpretation to the CJEU when relevant, but do not always do so.¹⁹⁶

4.5.3 Judicial cooperation: the preliminary rulings mechanism

While national courts act as the national legal “arm” of enforcement of EU law, the CJEU has the monopoly on interpreting EU law. The CJEU's **preliminary ruling procedure** fulfils a twofold need: to ensure the utmost uniformity in the application of EU law and to establish for that purpose effective cooperation between the

CJEU and national courts.¹⁹⁷ The procedure supports internalisation of EU norms in national courts, and contributes to indirect screening of national rules and case law.

If the question concerns interpretation of an EU rule and it is raised in a case pending before a court of a Member State against whose decisions there is no judicial remedy under national law, that court is under obligation to bring the matter before the CJEU, *unless* the correct application of EU law is “so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved” according to the doctrine of *acte clair* (certain conditions must be fulfilled¹⁹⁸). The Commission oversees the way in which national courts make use of this doctrine. Although the Commission has also previously recognised that preliminary rulings might not always be the most effective basis for cooperation between national courts and the Court of Justice, nowadays, the cooperation has more and more shifted towards stricter forms giving more power to the Court to ensure uniformity of EU law and thereby ensure stricter compliance.

Effectiveness of the preliminary ruling procedure

About 400 references for preliminary rulings are made each year, with this number increasing over time and now accounting for more than half of all cases heard by the Court.¹⁹⁹ The procedure is generally considered to play a central role in the development and enforcement of Union law (Steiner, Woods & Twigg Flesner 2006), “the most important judicial instrument in the development of a unified legal system in the EU” (SIEPS 2016a), or the “jewel in the crown” (Andersen 2012).

The procedure is in many ways highly effective. Firstly, the tool is at the disposal of the individual judge, thus relatively easily put to use. Secondly, the Court has some leeway in how to construct an answer that will effectively contribute to resolving the dispute, in that it that can reformulate questions, replace²⁰⁰ or supplement²⁰¹ the provisions indicated by the national court in its preliminary question by those provisions of EU law which are actually relevant. The Court may also make supplementary “observations” with regard to questions of EU law not raised by the national court in its preliminary question. Thirdly, the ruling has real consequences. Once rendered, it forms part of the national proceedings and will be applied by the referring court, as well as by other courts dealing

Example

Cassis de Dijon – a preliminary ruling with far-reaching consequences

A prominent example of the legal effects of a preliminary ruling is the *Cassis de Dijon*-case (120/78), one of the cornerstones of the Single Market *acquis* establishing the doctrine of mutual recognition and the system of mandatory requirements. This case develops further the principle of equivalence set up in *Dassonville* (8/74). It lays down the principle that a Member States must allow a product lawfully produced and marketed in another Member State. This principle of equivalence applies in the absence of full harmonization of rules. In the same case, the Court refined *Dassonville* by narrowing down the situations in which Member States are allowed to prohibit a product where this is justified by mandatory requirements or effects, such as health, safety, environmental or consumer protection.

with the case at a later stage. If the national court fails to comply with the judgement giving the preliminary ruling, it will be in breach of EU law and an infringement proceeding can be brought against the Member State concerned. Moreover, the judicial decision in the national court, including the way in which that decision deals with the judgement given by way of preliminary ruling is binding *erga omnes*, e.g. to everybody and not only to the parties of the proceedings.

However, the procedure might not always deliver these results if the answer provided by the Court is brief, abstract or difficult to interpret. Even when the answer is helpful in the case itself, Member States may not necessarily learn any lessons from it, especially when the interpretation does not easily fit into their legal order. For instance, Swedish national courts have several times requested preliminary rulings on the compliance of national gambling rules with Article 49 TFEU.²⁰² After several complaints from different Member States on the same issue, the Commission opened an infringement procedure against Sweden to change its rules.²⁰³ This example may show that even if the procedure is a strong enforcement tool in a specific case, it cannot guarantee subsequent compliance by central government, judicial or administrative authorities in cases of the same nature.

Another problem is that national judges are sometimes unaware of the opportunity to refer questions or are unwilling to do so. In the 2011 survey, as many as 40 percent of respondents said that they knew only to a minor extent – or not at all – *when* to refer to the CJEU and 60 percent knew only to a minor extent or not at all *how* to do so. The higher the respondents sit in the judicial hierarchy, the better their knowledge of the procedure, but still 20 percent of higher instance judges or supreme instance judges (who have an obligation to refer such questions) said that their knowledge of when to do so was minor or non-existent.²⁰⁴

The same survey also provided indications that judges may often be unwilling to defer to the CJEU. One reason may be long proceedings. The CJEU’s handling time is on average at least 15 months, and while significantly shorter than in the past, the proceeding does considerably slow down the national court’s own handling of the case.²⁰⁵

Interestingly, the Court is not indifferent to the political reality. Member States, who will have to draw lessons from the judgement once rendered, can intervene by submitting “observations” in cases they consider important for them. SIEPS (2016a) demonstrates that this option is used to counsel, guide or push the Court in a particular direction. The Court is generally affected by Member States’ views in its decisions, and for example where several Member States argue in the direction of preserving national sovereignty (as opposed to more legal integration), the Court is more likely to lean this way.²⁰⁶

4.5.4 Conclusion: strong in theory, could be more effective in practice

In theory, there is a strong and cohesive system in place for private parties to claim their EU rights. A combination of obligations has given national courts the role of local EU courts. In practice, several shortcomings affect the effectiveness of

the system, such as costly and lengthy proceedings (although for preliminary rulings, much shorter than in the past), lack of knowledge about EU law, and lack of will in the courts to fully play the part they are obliged to play. Therefore, judicial review by national courts may not be as effective for EU law as for other areas of law. The strength of the system therefore depends on the loyalty and the competence of national judicial systems.

SOLVIT has a strong record of informally improving application of the *acquis* on a case-by-case basis, but, as shown, SOLVIT is not adequately linked to the rest of the system and the structural problems in Member States that SOLVIT reveals are therefore not solved through the other case handling mechanisms either.

4.6 Sanctioning tools

The EU is unique among supranational organisations in having a legal system which enables real sanctions for established non-compliance. They are, however, fairly recent creations.²⁰⁷ The purpose is to provide deterrence, and to penalise persistent non-compliance. Each tool is described and overall conclusions are drawn at the end of the sub-chapter.

Financial sanctions for infringements

When the Court has found, based on a proceeding initiated by the Commission, that a Member State has infringed EU law, that Member State is obliged to adopt the measures specified by the Court. If the Member State does not comply, the Commission may open new proceedings (a “second referral”, Article 260.2 TFEU), requesting the court to impose financial sanctions on the Member State, either in the form of a lump sum or a daily penalty.²⁰⁸

Financial sanctions against Member States according to this procedure have been imposed

Figure 9: Sanctioning tools by phase

TIMELY TRANSPOSITION	CORRECT TRANSPOSITION	APPLICATION
Financial sanctions		
Fast track financial sanctions		
Compensation through state liability		
“Name and shame”		



about 25 times so far, most in the latter years.²⁰⁹ Lump sums imposed between 2011 and 2014 ranged between €250 000 and 40 000 000 (a simple average of €11 million). In the majority of cases there was also a penalty, imposed periodically until the time the Member State fully complies.²¹⁰ Considering that several hundreds of new infringement proceedings are launched each year, and up to a hundred referred to the Court, only a minute fraction of cases thus reach the sanction stage. As in the earlier stages, there are considerable time lags. However, the threat of sanctions is anything but negligible, considering the large sums and the fact that the Commission's viewpoint usually wins over the Member States'.

Andersen (2012) argues that the real significance of sanctions, as with the infringement procedures, is to promote dialogue and voluntary compliance, rather than to punish. "Sanctions thus sustain the managerial approach".²¹¹

Fast-track financial sanctions for late transposition

An innovation of the Lisbon Treaty which entered into force 1 December 2009, is the option for "fast-track" financial penalties for failure to notify transposition of a directive on time (Article 260.3 TFEU). The Commission may propose and the CJEU may impose financial sanctions even in the first referral of the case to the Court. This strengthens incentives for Member States to transpose directives on time. The Court's subsequent judgement would simultaneously recognise the existence of the breach and impose the sanction. The Commission has

explained how it will make use of this option, saying that proposed penalties should be a deterrent and that sanctions would, as a matter of principle, be proposed in all cases, except perhaps in special circumstances.²¹²

Interestingly, while the Commission opened 2695 late transposition cases between 2011 and 2014 and referred 62 of those to the CJEU, all proposing rather heavy daily penalties²¹³, no sanctions under Article 260.3 have yet been imposed. The Member States have in each case transposed the directive before a judgement could be delivered (in many more cases even before the referral to court was made).

Use of this tool coincides with a general (although neither universal nor constant) improvement in Member States' records in transposing Single Market directives on time.²¹⁴ It is probable that the tool provides some, although not complete, deterrence.

Compensation through state liability

Because of doctrines established by the CJEU on direct effect, supremacy of EU law, and member state liability, often referred to as the "Francovich doctrine" or state liability, citizens and companies can initiate proceedings in a national court against their state administration when they consider that EU law has been wrongly applied by a national authority or not implemented at all by that State.²¹⁵

A number of conditions must, be fulfilled for an individual to be able to obtain compensation. The infringement must be obvious, serious and the direct cause of harm.²¹⁶ It is generally difficult

to win in court against a state and this is true here as well.²¹⁷ The body of law is furthermore complex to grasp and utilise even for an expert.²¹⁸ Companies may hesitate to irritate the state in whose territory they wish to do business.²¹⁹

Apart from legal studies, there is little information or data available on the actual use of the state liability sanction. Nothing is published in the Commission or CJEU annual reports. There appears to be no EU network or expert group to share or build such information. Potential users may not be aware of it.²²⁰ Overall, it appears to be seldom used. In Sweden, a handful of cases are initiated each year.²²¹ Lock (2012) finds that until 2011 (20 years after the Francovich case), the CJEU had decided 33 preliminary references on this issue. There may also be other cases, where no preliminary reference was made. Based on analysis of these cases, Lock argues that the Francovich option is not an effective tool for private enforcement, only (sometimes) a remedy for the concerned party. The small number of cases, the very high thresholds established for a liability claim, and the low success rate, all contribute to this conclusion.

State liability doctrine was introduced through CJEU case law and has never been codified. Member States were at the time mostly hesitant, even hostile, to the option, which often had no equivalent in national systems. This reluctance on the part of governments might explain the dearth of information about the possibility to obtain this type of compensation. The Commission has previously campaigned to raise such awareness; for example, in 1996, a comprehensive information campaign called Citizens First served, among other things, to update citizens and businesses of their EU rights and encourage them to enforce them through national courts and claim state liability.²²² However, while legal information to citizens has since then generally been much improved, e.g. through the e-Justice Portal, the Francovich option in particular does not seem to be at the forefront.²²³

“Name and shame”

A softer type of sanction is the use of publications comparing Member States on various parameters, thus exposing bad performances. The Single Market Scoreboard is the main instrument in the Single Market area. Annual reports by the

EU institutions can also have an intention to name and shame. It is not known however to what extent governments actually feel “shamed” by a bad score. Experiences from Sweden suggest that a bad score may lead to efforts to improve, but generally carries less weight with sectoral experts and ministries than with internal market experts. Also, political attention varies over time with priorities, and the Scoreboard results generally receive little media coverage, probably because what the Scoreboard actually means is not easily understood by a wider audience.

4.6.1 Conclusion: deterring and penalising certain instances of non-compliance

The purpose of sanctioning tools is to penalise persistent non-compliance, and to provide deterrence. As for the first objective, some revealed non-compliance is financially penalised but most is probably not. Financial sanctions are used sparingly by the Commission, as a last resort. The purpose of the tool, as it is used by the Commission, thus appears to be deterrence and (occasionally) remedy, not punishment.²²⁴ As such, it appears to be working rather well. The low number of judgements – so far none at all in the case of late transposition – indicate that Member States are affected by the threat and usually comply well and punctually enough to avoid sanctions. However, this is not to say that it is good and soon enough for stakeholders.

The main strength of the sanctioning might be how it interacts with other mechanisms, e.g. the Single Market Scoreboard, SOLVIT and the Pilot. Koops (2014) describes it as having a “mutually reinforcing effect on the functioning of the respective systems”.²²⁵

While state liability appears to be rarely used to penalise non-compliance, it might still have a deterrent effect on Member States, although its (probably intentional) low visibility probably renders such threats less imminent. As for peer pressure tools, their actual influence will depend on the context.

Having analysed all enforcement tools, we now turn to an analysis of their effectiveness in relation to the compliance deficit.

5

Final conclusions

The credibility of the European Union is being challenged in many ways. Going in quest of compliance would be one way to strengthen the Union and to deliver those benefits which citizens and companies are entitled to under the Treaties.

To provide evidence needed for such an endeavour, this report analyses the state of the art regarding Member State compliance with, and EU enforcement of the Single Market *acquis*. The following section presents our conclusions about the nature of Member State non-compliance, how effective the current enforcement system is, and how well it addresses the identified problems. Conclusions are divided into general observations, good practices, and areas of concern.

5.1 General observations

The analysis has shown that **compliance deficits in the Single Market are at times substantial and may lead to significant problems** for companies and citizens. The revealed non-compliance represents only the tip of the iceberg, especially since we have not even studied non-compliance by other actors than the Member States.

However, a certain degree of non-compliance can be expected in any system. The multi-level set-up of the EU, spanning several legal and political systems, adds a structural challenge. The complex and ambiguous nature of many legal acts will affect both the quality of the application, and how effective an enforcement tool can be expected to be. Thus, benefits predicted by

“completing” the Single Market will never be 100 percent realised and expectations regarding new enforcement strategies should be realistic. The political question is, of course, how much non-compliance can be tolerated? After all, the lack of complete compliance has not prevented the Single Market from delivering benefits.²²⁶

The current enforcement landscape exhibits an impressive range of tools, covering all stages of the implementation process and enabling prevention and enforcement both from below and above. The Commission can support, persuade, coax, and sanction Member States towards compliance. The Single Market area has several effective tools of its own, such as IMI, the notification system for draft technical regulations, SOLVIT and the Single Market Scoreboard.

The enforcement landscape is also highly complex, having expanded over many years and probably without a coherent plan. Just like the Single Market itself, it might be said to have a “non-design”²²⁷, which makes it challenging to understand and use for practitioners (it was certainly a challenge to map it).

Compliance issues have always been political (as an example, even in Court of Justice proceedings, Member States intervene to further their political agenda and negotiate with the Commission and each other), **but enforcement efforts also seem to be increasingly politicised.** The Commission has branded itself as more political than in the past, which among other things means working for “a European Union that is bigger and more ambitious on big things, and smaller and more modest on small things”.²²⁸

Furthermore, the Commission states that its enforcement policy needs to evolve in line with this focus on priority files.²²⁹

While the Commission is free to set its own priorities and naturally needs to take its limited resources into account, there are **risks involved with aligning enforcement action with political considerations**. The Commission needs to balance carefully its political agenda with its important role as Guardian of the Treaties. Available data, interviews with key persons in EU institutions and Member States, as well as our experience as a SOLVIT centre indicate that the current Commission is pursuing fewer Pilot and infringement cases, especially in areas that are considered sensitive, notably regarding obstacles to the free movement of persons. If infringements are not pursued, even if “small”, this undermines the legitimacy of other aspects of the system as well.

Member States are also political in their non-compliance. When an issue is politically salient domestically, this makes it more likely that both transposition and application will be less ambitious.

Member States are in general reluctant to criticise each other, not to mention initiate infringement procedures against each other. They prefer the Commission in the role of the enforcer. Interestingly, exceptions are found in two highly institutionalised fora: the Court proceedings, and the notification procedure for draft technical regulations.

It is a long-standing problem that Member States do not adequately assume political

ownership of the Single Market, even if it is essentially their *own* market.²³⁰ National politics is often wholly separate from EU level politics, and governments sometimes ignore with impunity at home what they agreed to in Brussels, or, conversely, blame the EU for unpopular policies. No enforcement system is better than its users. Based on available data, non-compliance with basic Single Market norms can be remarkably persistent over time. The national courts and authorities are supposed to be the local arms of EU enforcement, but sometimes exhibit lack of will to fully play their part, especially when there is a lack of clear signals from central authorities. Impact assessments of new national regulations are more inclined to take the Single Market perspective into account in those cases where there are sanctions in the process.

Not even the “best” tools can address non-compliance where the Member State is intentionally resisting change. For example, the impressive line-up of tools developed for implementation of the Services Directive did not eliminate even all of the more obvious violations. Similarly, despite the combination of a political target, the fast-track sanction and the monitoring of the Single Market Scoreboard, late transposition continues to be a problem, even if less acute than before.

It is, however, often genuinely difficult for Member States to do right, both because of the rules and because of capacity. EU rules are made in one legal system and applied in others. Also, due to the complex nature of the *acquis* and the great variety of cases to which it should be



applied, what is correct application is rarely straightforward. Compliance can become a matter of interpretation, and depend ultimately on work performed by individual civil servants and legal personnel. All academic case studies of compliance found some problems related to capacity, and some Member States score rather low on administrative capacity when compared internationally.²³¹ Lack of EU competence in national judicial systems is a significant obstacle to enforcement from below.

There is a trade-off between legitimacy of the system on the one hand and actual results on the other. The public sphere, even more so the EU sphere, generally moves slower than needs and expectations in society. While the drawn-out times at each stage of the infringement process and in the working of the preventive tools might provide time for learning and amicable solutions between Member States and Commission, the delays can undermine stakeholder confidence. Also, confidentiality can enable honesty, compromises and trade-offs which may improve actual compliance, but this lack of transparency also creates problems with legitimacy.²³²

5.2 Good practices

Preventive and sanctioning (or soft and hard) approaches are mutually supportive. The tools that work best combine these two perspectives. A prime example is the notification procedure for draft technical regulations where the combination of real sanctions and a supporting framework that enables learning, results in continual monitoring of new regulations (even in the form of peer review between Member States) and a gradual, if not complete, “Europeanisation” of national administrative practices. The Commission’s case handling system can also be seen in this light. The EU Pilot improves the fact-finding phase, thus promoting dialogue and amicable solutions.²³³ The high closing rates in the system should among other things be understood in the light of the financial sanctions which were simultaneously made more effective.

Political targets matched by systematic follow-up can sometimes change behaviours. The targets set at the highest political level for the maximum level of the transposition deficit have almost been achieved, with the help of the Scoreboard (and, again, the fast-track financial

sanctions). The fate of the European Semester recommendations shows that this method is not always successful, however, perhaps due to the higher political salience of most of the Semester’s recommendations compared to the Scoreboard.

Resource-intensity pays off. The screening and mutual evaluation process for implementing the Services Directive took a great deal of effort, but out of all tools employed, it seems to have been the most effective. It generated knowledge that was used for devising new policy, educated national administrations in employing a Single Market perspective, and prevented as well as removed non-compliance. Another example is the notification for technical rules which is an ongoing process and requires constant vigilance and work. By contrast, SOLVIT and the EU Pilot see their effectiveness partly hampered by lack of resources (albeit in different ways).

There are examples of transparent and effective tools, e.g. the notification procedure for technical regulations, the preliminary ruling procedures, and evidence-based capacity building of legal personnel.²³⁴

5.3 Areas of concern

Too little is known about the preventive effects of current enforcement tools. Evaluation of enforcement efforts is not a strong point of the EU, despite the Better Regulation Agenda’s focus on evidence-based policy. In the most recent Single Market strategy, for example, the Commission merely states which tools it intends to employ, without discussing or showing their effectiveness.²³⁵ Considering how much resources preventive tools may consume, more should be done to find out and communicate what works.

More is known about the deterrent effect of the sanctioning system, but this effect is called into question as the Commission brings fewer cases of revealed non-compliance to conclusion. Since soft tools can be strengthened by links to sanctioning tools, this is a problem for the efficacy of the whole enforcement landscape.

There is a tendency to deal with non-compliance in superficial ways, where possible. Problems which can be easily measured are addressed, such as late transposition, to the detriment of less obvious problems. In a similar way, the case-handling system is effective in closing

cases in the earlier stages of the chain. This is not the same as saying that it is effective in solving non-compliance. Early closing is only unambiguously positive if it promotes real compliance, and this is difficult to ascertain since the solutions are not made public.

There is a lack of attention to regulations, as opposed to directives, both in the Commission and academic research. Increased use of regulations is sometimes pointed to as a positive thing for compliance, yet the lack of transposition phase combined with a need to interpret even harmonised rules could generate its own kind of compliance difficulties. These risks are, as far as we can ascertain, not at all researched. This knowledge gap is more urgent in the Single Market area than in others, since it has seen a significant relative shift towards regulations over directives, to the extent that regulations now outnumber directives three to one.

There is a lack of attention to application of the *acquis*, as opposed to its transposition. This is true both regarding research, enforcement strategies, monitoring, and the Commission's priorities in case handling. Transposition is something that Member States do once, whereas application takes place daily and involves a larger group of possible wrongdoers. It is therefore not likely that this distribution of attention between transposition and application reflects the real distribution of non-compliance. Our experience from Sweden shows that a lot can and does go wrong at this stage, for a multitude of reasons, sometimes despite the best intentions. Several preventive tools can involve administrative agencies which is positive considering their role in application.

There is an almost stunning lack of attention to compliance at the local level. Neither academic research nor the EU enforcement tools appear to adequately recognise the structural difficulties following from the EU's multilevel set-up where local government is responsible for application of nearly 70 percent of the *acquis* yet local self-governance can make it difficult for the central government (thus also the EU institutions) to ensure compliance. It is statistically highly unlikely that local misapplication would result in infringement proceedings. Local level also rarely seems to be consulted, or addressed

by preventive tools, which seems as a missed opportunity. Our own experiences in supporting correct application indicates a need for tailored support, which is, of course, resource-intensive. Awareness is generally low regarding tools that could be useful for local civil servants, such as IMI or the Commission's interpretative guidelines. Most of this might be the fault of national governments, yet the EU system could attempt to compensate for these shortcomings.

Citizens and companies are vital players in detecting non-compliance, yet their interests seem inadequately cared for. The most important venue for enforcement from below is the national court. In theory, there is a strong and cohesive system in place to claim one's EU rights, but in practice costly and lengthy proceedings deter private parties from going to court. In theory, it is even possible to obtain compensation in cases of Member State infringements which are obvious, serious and the direct cause of harm for the private party, yet in practice this happens rarely and few persons would know how to make it happen. For citizens, especially, SOLVIT presents an attractive option, being free of charge with a strong record of informal problem-solving, but, as shown, SOLVIT is not adequately linked to the rest of the system and if the complainant's problem is a structural problem, the system effectively fails that person. The low number of business cases in SOLVIT might indicate that they prefer the court option. However, it might also be due to low awareness of SOLVIT, or that business prefers to adjust to demands of national authorities even if these infringe their EU rights.

All enforcement agencies depend on input from stakeholders for monitoring of what happens on the ground. In the EU, the complaints fed into the Commission, the European Parliament and SOLVIT constitute a formidable source of knowledge regarding barriers to free movement and correct application. Yet, the Commission deals with an increasingly small share of registered complaints. Moreover, complainants are not fully made aware of the content of corrective actions agreed between the Commission and the Member State. To sum up, there is a risk that the flow of information from below is discouraged and the confidence of complainants undermined by how their contribution is handled.

6

Options to explore

The National Board of Trade would like to see Member State compliance with Single Market rules elevated to a prime EU concern. In this section, we describe, based on the conclusions above, some options the EU could explore in analytical and policy work to prepare for such a quest.

- EU stakeholders could discuss how the **Commission's role as Guardian of the Treaties** can be safeguarded in the evolving political EU context, i.e. how an appropriate balance can be struck between the Commission's twin roles of proposing and enforcing the *acquis*.
- **Resources are being freed** both nationally and in the EU when the Commission initiates fewer infringements proceedings and fewer new legislative initiatives. If the EU institutions and Member States wish to put compliance higher on the agenda, these resources could be set aside for enforcement and for devising new working methods.
- **Political targets** could be set and monitored for other aspects of compliance than the transposition deficit. The European Semester, with all its limitations, could provide a platform. Devising meaningful targets is not easy, but suggestions have been made.²³⁶ It might not be possible to engage a wider audience, but the process should involve the technical experts.
- How to create more political ownership in the current political climate is perhaps the million Euro question. One part of the answer could be to create more *practical* Member State ownership. More enforcement responsibility could be placed in Member State authorities, rather than in Brussels. Ideas have previously been put forward before for creating "**Single Market Centres**" in all Member States with preventive and monitoring functions.²³⁷ These might play a role in bridging both the political and legal gap between systems, could target the "small" things not addressed by the Commission, and focus on application in administrative and local authorities. The centres should probably wield some kind of sanctioning power, for example by being able to forward concerns to the Commission.
- Mistreated individual companies and citizens might be empowered by an **ombudsman function**. An ombudsman could support private parties in taking their complaints to court, and/or initiate cases *ex officio*. Such a function might be housed in a Single Market Centre, and might have a role in addressing issues not targeted by the Commission.
- **National regulatory impact assessments** could be better utilised for making national stakeholders more aware that EU law is national law, and for screening new draft regulations for their legal and practical compatibility with Single Market principles.²³⁸ At EU level, these efforts could be supported e.g. with joint guidelines and exchanges of experiences. Single Market Centres could probably play a role as well.

- **SOLVIT** is a key tool for monitoring Member States and solve problems for citizens and companies. Its effectiveness could be improved by securing more rigorous follow-up by the Commission of structural cases that SOLVIT cannot solve. SOLVIT could be linked in a more standardised and regular manner to the database CHAP and the EU Pilot regarding structural cases.
- The **local level** is key to policymaking and enforcement. Work initiated by the Committee of the Regions regarding multilevel governance might be used as a basis for, for example, developing monitoring and supporting tools that include local level. Including local level is primarily a task for the Member States, but EU institutions might play a supporting role.
- **Individual capacity building** of national administrative personnel is a never-ending task, as knowledge needs to be renewed continually. The evidence-based and coherent EU plans for educating legal personnel might inspire similar efforts targeted for example at local civil servants.
- **Institutional capacity building** could be strengthened in Member States' administrations and courts. EU networks and efforts involved in good governance, e.g. the European Court of Auditors, could be encouraged to integrate compliance issues in their work to a greater extent.²³⁹
- To promote evidence-based enforcement, some **issues could be further studied**: whether regulations exhibit specific non-compliance patterns, and how any such could be addressed and monitored; cost-benefit analysis of commonly used preventive tools; how existing managerial enforcement tools could be better linked to sanctions for non-compliance; how sanctions could be strengthened, for example by it being possible to impose retroactively for infringements already removed when established; evaluate experiences from introducing financial liability for local and administrative authorities found in breach of EU law.

Notes

- 1 Juncker (2014) and European Commission (2016b).
- 2 See European Commission (2016b) In line with the Juncker Commission's focus on priority files ("big on big, small on small"), current approaches to Commission' enforcement policy need to evolve with a view to more timely and effective enforcement.
- 3 See National Board of Trade (2015a) for an analysis of the economic benefits of the Single Market.
- 4 The Treaty of the European Union, Article 4 states that "the Member States shall 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. (...) The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."
- 5 See e.g. the Commission's Rule of Law Recommendation to Poland (27 July 2016) regarding its constitutional court. For a discussion of non-compliance at the highest political level, see Falkner (2013).
- 6 For definitions, see also European Parliament (2013), Pelkmans and de Brito (2012).
- 7 In the hierarchy of norms, rules enshrined in the EU Treaties ("primary law") are superior to those contained in EU legislation ("secondary law").
- 8 The Single Market *acquis* is defined as measures considered to have an impact on the functioning of the Single Market, as defined in Articles 26 and 114 TFEU. This includes the four freedoms and supporting policies that have a direct impact on the Single Market (such as taxation, employment, social policy, education, culture, public health, consumer protection, energy, transport, environment except nature protection, information society and media). (European Commission, 2016).
- 9 See discussion in European Parliament (2013).
- 10 Various terms exist for these instruments, e.g. enforcement efforts (Pelkmans and de Brito, 2012), compliance promoting tools (European Parliament, 2013), dispute settlement mechanisms (Jervelund et al, 2012), compliance mechanisms (Koops, 2014), and implementation measures (Andersen, 2012).
- 11 For a review of the literature, see Mastenbroek (2007), Versluis (2005) or Hartlapp (2007).
- 12 Committee of the Regions (2009) explores the concept of multilevel governance.
- 13 Certain areas of EU competition law are applied by EU institutions. Reliance on existing administrative and political infrastructure may be efficient and enable better proximity to citizens, flexibility, and responsiveness to local preferences (de Visser 2009).
- 14 Committee of the Regions (2009).
- 15 Constant case-law, see for example case C-252/89 Commission v. Luxembourg [1991] E.C.R. I-3975.
- 16 Moreno (2012).
- 17 See SOU (2009).
- 18 The UK's *Localism Act* 2011 (Parts 2 and 3) and France's *Loi 2015-991 du 7 août 2015 portant nouvelle organisation territoriale de la République* (chapter 2, article 112).
- 19 Committee of the Regions (2009), EIPA (2009), Eurobarometer (2011).
- 20 Furthermore, Member States and institutions can through the means of declaration in an annex to the legal act state how they intend apply or interpret certain provisions.
- 21 For some examples, see National Board of Trade (2015d).
- 22 As recognised in the Better Regulation agenda (European Commission 2015a).
- 23 European Commission (2015d).
- 24 National Board of Trade (2015b).
- 25 EU compliance research has been described as "forty-seven variables that completely explain five case studies", with a half-serious suggestion that any "scholar who adds a new variable or a new interaction should be required to eliminate two existing variables" (Meier, cited in Versluis, 2007).
- 26 Toshkov (2010), and Toshkov, Knoll and Wewerka (2010)
- 27 Complementarity is well recognised in enforcement literature — e.g. George's (1991) "coercive diplomacy", Brunée's (2000) "persuasive continuum", and Audretsch's



- (1986) “enforcement ladder”. See Andersen (2012), Versluis (2005) and Koops (2014).
- 28 Hartlapp and Falkner (2009). See also Andersen (2012) and Smith (2015).
- 29 For example, Falkner, Treib, Hartlapp and Leiber (2005) showed, based on 90 cases resulting from six social policy directives, that infringement proceedings were only initiated in 60% of the cases found to be in breach of the directives.
- 30 The Compliance Database and the Implementation Database list, code and analyse around 80 qualitative studies (covering 350 cases) and 40 quantitative studies. 80% of all qualitative studies dealt with either environmental or social policies. Countries with unusually strong or weak general transposition and implementation patterns (outliers) were relatively understudied.
- 31 This study was Versluis (2007). The majority of quantitative studies dealt only with transposition, and among qualitative studies, only one third went beyond the formal transposition phase.
- 32 See also Smith (2015) and European Parliament (2013) .
- 33 Versluis (2005) and Börzel (2001).
- 34 That is, directives emanating from the 1986 Single European Act (Commission’s Annual report, cited in Tallberg, 2003).
- 35 European Commission (2016a).
- 36 Hartlapp and Falkner (2009) find that many Member States notify the Commission before they have completed transposition.
- 37 See chapter 4.2 regarding explanatory documents.
- 38 The “compliance deficit”, as measured by the Single Market Scoreboard, denotes the share of directives for which the Commission has launched infringement proceedings for non-conformity , as a percentage of the number of Single Market directives notified to the Commission as either “transposed” or “not requiring any further implementation measures”. European Commission (2016a).
- 39 See examples of how delaying may “pay off” in Nicolaides and Oberg (2006).
- 40 The study distinguishes between actual implementation (transposition) of the directive as opposed to more ambitious barrier reduction within the scope of the directive. The actual implementation in Member States was identified through the mutual evaluation exercise (see also chapter 4.3).
- 41 Toshkov, Knoll and Wewerka (2010)
- 42 The SOLVIT network (see chapter 4.5) has seen a 525% increase in cases over 10 years. Other functions, including Your Europe Advice and the European Consumer Centre Network also receive more complaints. (European Commission 2016).
- 43 Unless, of course, application problems are covered by studied infringement cases. None of the studies in the Implementation and Compliance databases seems to study regulations. It is however difficult to search for such studies, since “regulation” is used not only for this specific type of EU legislation but as an umbrella concept.
- 44 Eurobarometer (2011).
- 45 European Parliament (2013).
- 46 See National Board of Trade (2014) for a description of the problem.
- 47 Pelkmans and de Brito (2012) p. 120
- 48 Jervelund *et al* (2012) p. 15-16.
- 49 Salience refers to the visibility and importance attached to an issue. Issues which are politically salient can be blocked (or expedited) nationally (see Versluis, 2007).
- 50 In the case of Sweden, the compliance with rules touching on wolves, data retention or personal identification numbers might serve as examples.
- 51 For the period 1997-2004, these four accounted for over 45% of all infringement proceedings of the EU-15 (Nicolaides and Oberg, 2006).
- 52 National Board of Trade (2005a).
- 53 National Board of Trade (2005b).

- 54 SOU (2009) and *Förvaltningskommittén* (cited in SOU 2009).
- 55 SOU (2016).
- 56 The National Board of Trade cannot sanction misapplication, only attempt to persuade through analytical work.
- 57 See also SOU (2009).
- 58 See also SOU (2009).
- 59 Social security issues accounted for 58% of all cases dealt with by SOLVIT in 2016 (European Commission 2016).
- 60 National Board of Trade (2016a).
- 61 The Swedish transposition process and its problems are analysed in SIEPS (2012).
- 62 Toshkov, Knoll and Wewerka (2010).
- 63 Member States also act as the EU legislator together with the European Parliament. These roles are outside the scope of this report.
- 64 For example, the doctrine of state liability which was developed by the CJEU, despite the Member States governments previously having rejected introducing such a principle in the treaties (see Tallberg 2003).
- 65 For example, the practice of the Commission's annual reports on monitoring the application of EU law were established on request from the Parliament (Andersen 2012).
- 66 It is made clear both in the Commission's strategies (European Commission 2003, 2007 and 2012) and its annual reports that priorities change over the years, and that this affects the types and number of cases which are pursued.
- 67 Tools introduced were press releases, scoreboards and annual reports (Tallberg 2003). Previously, non-compliance had been seen as too sensitive to show openly.
- 68 Craig and de Búrca (2011) The most researched "new" form of governance concern the Open Method of Coordination, which was first introduced to manage the competitiveness targets in the Lisbon (later EU2020) agenda.
- 69 See European Commission 2003, 2007 and 2012.
- 70 For example strengthened sanctions in the Lisbon Treaty. See endorsements in Council conclusions (Competitiveness) 29 February 2016, minutes from the Internal Market Advisory Committee 15 April 2015. See also Tallberg (2003)
- 71 In the WTO for example there is, by contrast, no connection between the hard enforcement of dispute settlement and the soft Trade Policy Review Mechanism, which means that findings from the TPRM cannot be used for enforcement purposes.
- 72 In Tallberg (2002), this step is called legal action but this less suitable to capture informal tools, such as the EU Pilot and SOLVIT.
- 73 Inspired by Hartlapp (2007), we added persuasion to the first step. The constructivist model is not very clear on how norms become internalised, only that it happens through interaction and over time. Tallberg's model only incorporates the other two schools, but as many preventive tools also have a persuasive character, we merged them.
- 74 This study is based on 39 interviews with Commission and Member States officials and 16 legal instruments from different policy areas of which the Single Market is one.
- 75 Interinstitutional agreement on Better Law-Making, 13 April 2016.
- 76 Already in the European Commission (2003), the aim was to use this tool more, for discussing any problems with transposition and all infringements detected or suspected in a Member State for a given sector. Meetings are organised often in certain countries, and never (in the last years) in others, e.g. Sweden. In European Commission (2015e) it was proposed to conduct yearly "compliance dialogues" with each Member State, which reads like an extension of the package meetings.
- 77 European Parliament (2013) and our interviews.
- 78 There is no legal basis for these groups, and the terminology is not clearly defined — the terms committees, networks, working parties and expert groups are sometimes used interchangeably. We follow DS 2003:3 where expert groups are said to be solely affiliated to the European Commission, distinguishing them from the Social and Economic Committee, the Committee of the Regions, the working groups of the European Council, the European Parliament committees, and the comitology committees.
- 79 European Commission (2003).
- 80 Out of a total of about 650 expert groups which are convened by the Commission and where national administrations take part. Single Market groups typically meet 2-6 times a year and can for example coordinate and monitor enforcement of EU legislation by national authorities. See Register of Commission Expert Groups.
- 81 See e.g. ESO (2003) and Metz (2015).
- 82 Expert group E00938 "Implementation and application of EU Law", See Register of Commission Expert Groups.
- 83 European Parliament (2013).
- 84 In Eurobarometer (2011), local level respondents felt that the guidelines they had for implementation were not always adequate or did not take into account local circumstances. Our interviews also point at this problem.
- 85 European Commission (2007). This was also proposed by Monti (2010).
- 86 Through consolidations, repeals and replacement by regulations, the number of directives was reduced from 1497 to 1099 between 2002 and 2015, whereas the number of regulations expanded from 299 to 3175 in the same period (2015 figures taken from European Commission 2016, and the 2002 figure from Pelkmans and de Brito, 2012).
- 87 The process was initiated by the Mandelkern report (2001), and is now channelled through the Better Regulation Agenda. The Mandelkern report also asked for "All Member States to introduce by June 2003 an effective system of impact assessment for national regulation adapted to their circumstances."
- 88 With one exception: the EU required regulatory reform and impact assessments to be implemented in the candidate countries on their way to accession (Renda, 2006). The OECD advocates the use of RIAs, see e.g. its Regulatory Policy Outlook 2015.

- 89 See conclusions in Jacob et al (2008), Italian, Irish and Dutch Presidencies of the Council of the European Union (2004), Renda (2006) and Renda (2015).
- 90 Renda (2006). As an example, Swedish authorities issuing regulations must evaluate whether their proposal is in line with or goes beyond EU requirements. However, there is no such obligation for regulatory activities on the parliamentary level and government proposals (SIEPS 2010).
- 91 Jacob et al 2008. See also criticism of Swedish RIA incorporation of EU law considerations in NNR och Regelrådet (2012).
- 92 Proposed in Renda (2006).
- 93 See European Commission (2011d) and ensuing annual reports. Legal bases are Articles 81 and 82 TFEU.
- 94 European Commission (2016a).
- 95 European Commission (2015c) and Eurobarometer (2011).
- 96 Eurobarometer (2011).
- 97 European Parliament (2013).
- 98 European Commission (2009).
- 99 For example the provisions setting up criteria for residence (National Board of Trade, 2012).
- 100 European Commission (2016a).
- 101 Not least at local level, see Eurobarometer (2011).
- 102 For example the transposition group for Payment Services Directive met 10 times in one year and collected 300 questions. For the Services Directive, 20 bilateral meetings with Member States and 9 expert group meetings were arranged (European Commission 2010).
- 103 Obligation laid down in secondary legislation, stemming from Article 4.3 TEU and Article 17.1 TEU, see case C-427/07 Commission v. Ireland, point 107 [2009] E.C.R. I-06277, case C-456/03 Commission v. Italy, paragraph 27, [2005] E.C.R. I-05335 and case C-407/97 Sparber and Others, paragraphs 15 and 16.
- 104 For example, Regulation (EU) 2015/751 on interchange fees for card-based payment transactions, Articles 13-15.
- 105 Based on European Parliament (2013), our interviews and own experiences.
- 106 Joint political declarations (2011/C 369/02 and 2011/C 369/03).
- 107 See European Commission 2013, 2014, 2015f and 2016b.
- 108 The obligation is so far only put into recitals of legal texts.
- 109 See European Commission 2013, 2014, 2015f, 2016a and 2016b. Providing such explanations online, for prioritised areas, was a proposal in European Commission (2012a) but the Commission has not witnessed any increase in these.
- 110 European Parliament (2013).
- 111 Based on European Parliament (2013), our interviews and own experiences.
- 112 See European Commission 2013, 2014, 2015f and 2016b. Investigations shall not be confused with EU inspections. They are allowed only in a few policy areas (collection of VAT, food safety, animal welfare, safety in maritime and air transport, nuclear installations, according to European Commission 2011).
- 113 See Smith (2015). In the Commission's annual reports, no information is given regarding criteria for when investigations are initiated or the connection to REFIT.
- 114 In December 2014, the Commission launched an online complaint portal "Your EU rights: problem solving and complaints".
- 115 Article 227 TFEU.
- 116 This can be compared to the Union's population of 500 million and its 25 million enterprises.
- 117 423 EU Pilot cases out of 1208 were based on complaints in 2014, of which 223 were taken forward (European Commission 2015f).
- 118 European Parliament (2013).
- 119 Stakeholders may comment through the Commission or their Member State.
- 120 Case C-194/94, CIA Security, paragraph 54 [1996] E.C.R. I-02201.
- 121 Older data from the Commission (no recent available) show that Member States change their proposals in 95% of cases where the Commission published a reaction (National Board of Trade (2015c). Jervelund et al (2012) found that 15% of cases led to a trade barrier being prevented.
- 122 The Commission published 156 reactions on 817 notifications in 2010 (Member States: 225), 168 on 675 in 2011 (Member States: 193), 167 on 755 in 2012, 203 on 734 in 2013, and 225 on 691 in 2014 (Member States: 145). National Board of Trade (2015c) and Pelkmans and de Brito, 2012.
- 123 See e.g. European Parliament (2015).
- 124 National Board of Trade (2015c); Pelkmans and de Brito (2012); Andersen (2012).
- 125 See e.g. National Board of Trade (2015c).
- 126 89% out of 288 new notifications during 2015 had already been adopted. Five Member States have notified nothing since the procedure came into force in 2009. See also European Court of Auditors (2016). European Commission (2015e) proposed to make the process more similar to the one for Directive 2015/1535.
- 127 Versluis (2005) and Börzel (2001).
- 128 European Commission (2016a). There is also a Consumer scoreboard, but it measures outcome and perceptions and is thus less related to enforcement issues.
- 129 The Commission points to these factors as possible explanations (European Commission 2016a).
- 130 See European Parliament (2014) and (2008).
- 131 European Parliament (2014), Pelkmans and de Brito (2012). European Parliament (2013) finds that timely transposition is more common in policy areas with scoreboards than in areas without them.
- 132 The Schwab and Cofferati reports — see European Parliament (2014).
- 133 European Parliament (2016).
- 134 European Parliament (2013) writes (p. 98): "The Commission, at least in some areas, seems to have decided not to monitor transposition and implementation of Regulations; or at least not in the same way as Directives. This does not have any legal basis in the Treaty."

- 135 E.g. Andersen (2012) and European Parliament (2013) argues that the approach seems apt for other policy areas. The Council “AGREES that the inclusion of mutual evaluation in selected areas, where appropriate, and on the basis of an adapted methodology, could be an effective tool of EU law enforcement, while at the same time RECOGNISES the additional efforts this exercise might mean to Member States” (Council Conclusions, 10 March 2011).
- 136 European Court of Auditors (2016).
- 137 European Commission (2011b); Pelkmans and de Brito (2012); European Court of Auditors (2016).
- 138 Monteagudo et al (2012).
- 139 European Commission (2013b).
- 140 European Commission (2015b) found Member State performance to be “mediocre”.
- 141 Not all Member States were equally thorough, and certain differences exist in the reporting of the Member States (European Commission, 2011b). See also Pelkmans and de Brito (2012).
- 142 Member States preferred a spirit of mutual trust, as opposed to a “name and shame” approach (European Commission, 2011b).
- 143 European Court of Auditors (2016) and annexed responses from the Commission. See also National Board of Trade (2016b).
- 144 According to European Commission (2014b), the Pilot must be used in all cases where additional factual or legal information is required for a full understanding of an issue at stake concerning the correct application, implementation of EU law or the conformity of national law with EU law. The Pilot replaced the procedure of sending letters between the EU and national administrations.
- 145 CHAP, which also collects complaints and enquiries.
- 146 The legal bases are Article 17 TEU and Article 258 TFEU.
- 147 European Commission (2014b) and (2015f).
- 148 For example, during 2015, letters of formal notice were sent to 18 Member States for late transposition of the Asylum Procedures Directive, 19 Member States for late transposition of the Reception Conditions Directive, and to 27 Member States for late transposition of the Energy Efficiency Directive (according to Commission press releases of monthly infringement packages).
- 149 E.g. Case 141/78 France v. United Kingdom [1979] E.C.R. 2923; Case C-388/95 Belgium v. Spain [2000] E.C.R. I-3123; Case C-145/04 Spain v. United Kingdom [2006] E.C.R. I-7917; C-364/10 Hungary v. Slovakia [2012]. Kochenov (2015) argues that horizontal infringement mainly occurs in cases where the Commission chooses not to act and that most of the cases have been highly controversial.
- 150 Koops (2014).
- 151 We focus on initiated cases (i.e. Pilots and new letters of formal notice) rather than pending cases because the former better show the priorities of the Commission. The journey of a case after initiation depends equally on the actions of the Member State.
- 152 All infringement data is subject to uncertainty. COM-SG 3 clarified for this report that the total number of new letters of formal notice cases reported annually include the cases for late transposition.
- 153 E.g. European Commission (2015e) and (2016b).
- 154 European Commission (2016b). See also European Commission (2014c).
- 155 Falkner, Treib, Hartlapp and Leiber (2005). Andersen (2012) finds that the Commission sometimes uses infringements politically, to encourage Member States to behave in a certain way on issues and in negotiations.
- 156 As outlined in Juncker (2014).
- 157 Own calculations from European Commission 2011, 2012b, 2013, 2014, 2015f and 2016b. We have used the Commission's classification of Single Market issues, meaning e.g. that environment, justice, transport and taxation issues are not included.
- 158 There is no data for dividing Pilot cases as to whether they relate to treaty articles, directives or regulations. The Secretariat General of the Commission in charge of the Pilot explained that such statistics could be obtained only by an individual examination of cases, which was not possible resource-wise.
- 159 The Secretariat General of the Commission (division SG-3) provided this data for 1650 new letters of formal notice, while stressing that the break-down is approximate as the type of violation may change between the letter of formal notice and the reasoned opinion. Note also that the figures do not completely correspond to total figures provided in European Commission (2015f) and (2014).
- 160 Börzel and Knoll (2012) present figures for 1978-1999: 57% late transposition, 8% incorrect transposition, 14% wrong application of directives, and 21% wrong application of treaty articles, regulations and decisions.
- 161 These numbers might not reflect exactly how resources are divided. An indication that late transposition cases are easier to close is that a break-down of pending Single Market cases (as opposed to initiated ones), is less dominated by this category (for example pending cases in October 2015 : 31% late transposition, 19% incorrect transposition, 22% bad application of directives and 28% bad application of treaty articles, regulations and decisions. See European Commission 2016a).
- 162 3175 out of a total of 4274 in December 2015 (European Commission 2016a).
- 163 European Commission (2007).
- 164 European Commission (2016a and 2016b). There are similar figures in earlier period: 88 % of cases between 2006 and 2010 were closed before referred to court (Pelkmans and de Brito, 2012).
- 165 The declining number of new cases at each stage in 2014 is illustrative: 1208 Pilot cases; 893 letters of formal notice; 256 reasoned opinions; 57 referrals to the CJEU; and 38 rulings under Article 258 FEUF delivered by the CJEU (European Commission 2015f). For data reasons it is not possible to follow the path of individual cases.
- 166 European Commission (2011c).
- 167 According to interviews for this report with Commission officials.
- 168 Declining from 2100 open cases at the end of 2010 to 1368 cases open at the end of 2015 (European Commission (2016b).

- 169 The European Parliament has insisted that the Commission should adopt binding rules for the Pilot, making it transparent on what grounds files are closed. Not even national authorities other than the Pilot contact point are generally allowed access (see European Parliament 2013 and 2012 and Smith, 2015).
- 170 The Commission now has longer average response times than the Member States (European Commission, 2011 and European Parliament 2013).
- 171 European Parliament (2013).
- 172 Indicators "Duration of infringement proceedings" 30.7 months and "Time taken to comply with Court ruling" 21 months (European Commission, 2016a).
- 173 Andersen (2012).
- 174 Hofman (2013) cited in SIEPS (2016a).
- 175 Annual reports of judicial activity, the 2015 and 2010 editions regarding cases reported under heading "Judgements concerning failure of a Member State to fulfil its obligation".
- 176 European Commission (2016a).
- 177 European Parliament (2015) lists as possible reasons for the limited number of businesses turning to SOLVIT lack of awareness of the service, a possible lack of legal certainty in the procedure, possible lack of expertise of the centre and doubt on the part of a business that a national authority would really help a non-national company.
- 178 European Commission (2016a).
- 179 Centre for Strategy & Evaluation Services (2011). Similarly, based on an online survey by the national centres and the Commission's resolution statistics, Martinsen and Hobolth (2013) argue that in a majority of MS, SOLVIT is to a considerable degree able to turn misapplication of EU law into right application.
- 180 Unless the case was first entered into the Commission's database CHAP and then forwarded to SOLVIT. In those situations, the case will re-enter CHAP. See SOLVITs case handling manual s 35 ff.
- 181 See for instance the ruling of the CJEU in joined cases C-222 to 225/05 Van der Weerd and Others, [2007] E.C.R. I-04233.
- 182 See joined cases C-10 to 22/97 Simmenthal [1998] E.C.R. I-06307.
- 183 The corresponding figure for judges dealing with all types of law was 47% (European Parliament, 2011).
- 184 E.g. decisions affecting the import of goods, the recognition of foreign professional qualifications or the taxation of a foreign person.
- 185 Most likely, EU law will not be mentioned in the rulings.
- 186 European Commission (2016c), figure 6. Data are for 2014 (2013 in the case of Greece. The indicator shows the estimated time (in days) needed to resolve a case in court, meaning the time taken by the court to reach a decision at first instance.
- 187 For instance a fear of endangering good relations with a public authority or of encountering bad publicity. Note however that these factors are not specific to EU law.
- 188 See the landmark ruling by the CJEU in case 6/64 Costa v. ENEL, [1964] 00585.
- 189 European Commission (2011d). Stepping up training of legal professionals in partnership with Member States was a key recommendation in Monti (2010).
- 190 European Commission (2011d).
- 191 National Board of Trade (2005b).
- 192 Note that the lack of knowledge of the parties intervening before courts (and their attorneys) can also contribute to incorrect application of EU law. Indeed, it may in practice be difficult for a court to identify a breach of EU law if none of the parties have raised this issue in the first place.
- 193 European Commission (2011d), National Board of Trade (2005b), SOU (2009), SIEPS (2016b).
- 194 Conseil d'État ruling in the Nicolo case (1989).
- 195 See for instance Bundesverfassungsgericht ruling in the Solange II case (1986).
- 196 Statistics show a great disparity between the supreme courts of the different Member States. This may of course be explained by the fact that the obligation to refer to the CJEU is not absolute but also shows that national courts are not always immune to the scepticism that is present in some Member States. See SIEPS (2016b).
- 197 Case C-221/88 Busseni [1990] E.C.R. I-00495. The legal basis is Article 19 © (b) TEU and Article 267 TFEU.
- 198 The "CILFIT doctrine", Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, [1982] E.C.R. 03415.
- 199 385 preliminary references were made in 2010, followed by 423, 404, 450, 428 and 436 in the years thereafter (Court of Justice of the European Union, 2016, pp. 93-95). Out of totally 20131 cases, 9146 constituted preliminary rulings, 8949 direct actions, and 1895 appeals.
- 200 Case 294/82 Eidenberg [1984] E.C.R. 01177.
- 201 Case C-190/00 Balguerie and Others [2001] E.C.R. I-03437.
- 202 Criminal proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08), [2010] E.C.R. I-06921.
- 203 75 complaints from 20 Member States (Infringement proceeding no 20044087).
- 204 European Parliament (2011).
- 205 Court of Justice of the European Union (2016) showed the average length of procedures to be 16.3 months in 2011, 15.2 months in 2012, 16.3 months in 2013, 15 months in 2014 and 15.3 months in 2015. In 2003, it was almost 26 months. The improvement has been achieved by a series of reforms aiming at speeding up the different stages of the procedure and an increase of the number of judges. Following the latest three enlargements of the EU, the number of judges almost doubled: from 15 to 28, with the corresponding rise in the Court's judicial staff. The deadlock has subsequently decreased, but the Court has been living to a certain degree on borrowed time as it restricted the admissibility criteria for requests for a preliminary ruling from new Member States. In Case C-302/04 Ynos Ynos kft v János Varga, [2006] E.C.R. I-00371, the Court declared having jurisdiction only to cases where the facts of the original case before the national court have occurred after the accession.
- 206 The study builds on qualitative coding of 3845 legal questions posed to the Court in the years 1997-2008.
- 207 While infringement procedures were introduced in the Rome Treaty 1957, the possibility to impose financial

- sanctions (lump sums or daily penalties) on Member States was not introduced until the Maastricht Treaty entered into force in 1993. The first judgement was brought in 2000 against Greece C-387/97, [2000] E.C.R. I-05047.
- 208 As an example, the minimum lump sum to be proposed in 2015 against a theoretical Swedish infringement would be € 2.7 million. This would equal ~0.2% of 2014 costs for governing the country and be based on the seriousness of the infringement, the importance of the rules breached, its duration and the Member State's ability to pay. (European Commission, 2015g).
- 209 14 out of 25 were imposed 2011-2014 (Falkner 2013 reports that there were 16 judgements by the end of 2012. The number of judgements 2013-14 was derived from the Commission's annual reports).
- 210 See European Commission 2012b, 2013, 2014, 2015f and 2016b.
- 211 Andersen (2012) p. 223 and 32.
- 212 European Commission (2011e).
- 213 See European Commission 2013, 2014, 2015f and 2016b. Daily penalties have been proposed in the range between €4224 and €315,036. No lump sums proposed yet.
- 214 The improvement, towards the target of only 0.5% transposition deficit, is shown in European Commission (2016a). No statistics seem to be published by the Commission regarding transposition deficit of EU directives in other areas than the Single Market.
- 215 CJEU case law on vertical direct effect and state liability e.g. Francovich, Brasserie du Pêcheur, Köbler cases, see Craig and de Búrca (2011). Provided that they are sufficiently clear and unconditional, provisions of regulations and decisions can be directly effective, and the same applies to directives, but only in "vertical" legal relationships, that is, in actions between a private party, on the one hand, and a Member State on the other hand (Wilman, 2015) The CJEU has invoked various treaty provisions to justify this system, but it has not been codified outside case law.
- 216 SOU 1997:194.
- 217 According to interview with Olof Simonsson, at Justitiekanslern, the state of Sweden has probably never lost such a case in a national court, but cases may be settled when the state's case is weak, and then there is no public record of the settlement.
- 218 Craig and de Búrca (2011). It is especially complex for directives and direct effect. According to some cited scholars, state liability is a "residual remedy" that only complements regular national systems for compensation.
- 219 Andersen (2012).
- 220 SOU (2009).
- 221 EU law cases are not distinguishable in Swedish statistics, but lumped together with other claims for damages (interview with the Swedish Office of the Chancellor of Justice).
- 222 Tallberg (2003); Andersen (2012).
- 223 The issue is not mentioned as a Commission priority in any of the last decade's annual reports on monitoring the application of EU law, nor is there any information on the e-Justice Portal.
- 224 See also Koops (2012).
- 225 Koops (2012).
- 226 National Board of Trade (2015a).
- 227 The incompleteness and the multilayer character of the Single Market amounts to what Pelkmans (2016) calls a "non-design".
- 228 Juncker (2014). In this speech, Juncker also said: "The Commission is political. And I want it to be more political. Indeed, it will be highly political". See also European Commission (2014c).
- 229 European Commission (2016b).
- 230 See e.g. Monti (2010). Pelkmans (2016) refers to it as a lack of recognition that the Single Market is the "joint asset" of the Member States, a common resource.
- 231 For example, in Kaufmann et al (2010) seven Member States are not found among the top quartile of all countries in the world regarding rule of law and government effectiveness.
- 232 As a part of a solution, European Parliament (2013) suggested for example to publish package meetings agendas, conformity checking studies and implementation plans, to strengthen public accountability without undermining "constructive secrecy".
- 233 Andersen (2012), Koops (2014).
- 234 European Commission (2011d).
- 235 European Commission (2015e).
- 236 European Parliament (2014).
- 237 Jervelund et al; European Commission (2012a).
- 238 European Parliament (2015) suggested to "set up a domestic mechanism to test national draft legislation with respect to not just the legality but also their practical effects on the functioning of the single market in its own economy. This is best done in the framework of national impact assessment, which should include a "single market test" with explicit consultation of business and other stakeholders".
- 239 See e.g. proposal in Renda (2014) regarding an initiative on administrative capacity and regulatory reform at all levels of government in the EU.

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