

## Challenges in the implementation of EU Law at national level

### KEY FINDINGS

The better regulation package has important consequences for the Commission's enforcement policy: more emphasis on compliance-based mechanisms and a strategic use of legal sanctions; the phasing out of EU Pilot; and greater use of financial sanctions for Article 260(3). New data analytics tools should also increase effectiveness of transposition tracking in future, examining correctness as well as timeliness of transposition, which is crucial to effective implementation of EU law.

2017 and 2018 infringement data, from complaints to financial sanctions, remains broadly in line with the previous five years. The main sectors that resist efforts to solve infractions once an infringement case has been launched are environment, transport / mobility and financial stability. The top sectors referred to Court in 2017 are environment, internal market, justice and transport. Italy, Hungary and Poland had the most cases referred to Court in 2017. In 2018 (to date) environment, energy and transport were the top sectors referred to Court with Italy, Hungary and Spain having the most cases against them.

Research on the role of national parliaments in improving implementation remains partial and contested. National parliaments experience implementation problems when the nature of the EU law is complex; when it is in an area of high national political sensitivity and thus political contestation; is a significant departure from existing law within the state; and where parliaments lack sophisticated and well organised administrative structures for EU law scrutiny. Gold-plating of EU measures may significantly hinder the implementation of EU law and national parliaments should strive to avoid this practice. More positively, production of clear and detailed correlation tables alongside early engagement with legislative proposals may positively aid implementation of EU law. Inter-ministerial coordination problems, national (conflict) culture and learning are issues that only national parliaments can resolve for themselves.

In order to assist Member States with implementation, the Commission has invested in national judicial training, improving administrative capacity within Member States, and routinely developing implementation plans to assist national administrations in identifying potential barriers to implementation. Reducing complexity of EU law in order to achieve effective implementation is a key objective of better regulation and the European Parliament, as co-legislator, can assist in this task. As the institution responsible for holding the Commission accountable in the execution of its guardian function, the European Parliament should widen its focus from infringement data to include assessment of the new compliance based mechanisms of enforcement. It must ensure the Commission has a transparent and evidence-based approach to utilising these mechanisms, and provides Parliament with an assessment of the contribution such mechanisms make to ensuring effective implementation of EU law.



## Introduction

This briefing note will provide an analysis of the specific implications of the better regulation package for the European Commission's (Commission) enforcement policy. It will provide an analysis of the current state of play of implementation of EU law using the latest available data.<sup>1</sup> The briefing note will discuss the main barriers to achieving effective implementation affecting national parliaments and how the EU institutions can assist national parliaments with these problems. Finally, it will make some key policy recommendations for further empowering national and EU institutions in ensuring timely and correct application of EU law.

The effective implementation and application of EU law is of concern to national parliaments and EU institutions alike. Delivering on promises made at the supranational level in an array of policy fields - from creation of citizen's rights, stabilising the financial sector and protecting the environment - is crucial in order to maintain the EU's legitimacy. The European Parliament (EP), as co-legislator and as the institution responsible for holding the Commission to account in respect of its role as guardian of the treaties, has a particularly important role to play in ensuring implementation of EU law in the Member States. The Legal Affairs (JURI) Committee is responsible for adopting a report<sup>2</sup> which responds to the Commission's annual report monitoring the application of EU law. The EP also receives direct petitions via the Petitions Committee (PET) from citizens concerning the application of EU law; the European Ombudsman reports to Parliament to provide an independent assessment of the administrative management of enforcement of EU law. Finally, the EP alongside national parliaments, is a key actor in ensuring effective implementation of EU law through production of simpler, streamlined legislation. Cooperation between the two legislators in this regard is vital avenue for further enhancing the application of EU law.<sup>3</sup>

The Commission is the primary EU institution concerned with enforcement of EU law. As guardian of the treaties (Article 17 TEU), it has the duty to ensure the effective application of EU law. The main legal provisions associated with this duty are Article 258 TFEU (the infringement procedure) and Article 260 TFEU (the financial sanction). The infringement procedure has a formal structure set out in the treaties; the Commission must first send a letter of formal notice, and then a reasoned opinion to the Member State before referring the case to the Court of Justice for judgment. The Commission has complete discretion as to whether to launch an infringement case.<sup>4</sup> Prior to the launching a formal infringement procedure, the Commission will attempt to solve any infraction by engaging in a bilateral dialogue with the Member State(s) concerned. Prior to 2008 this bilateral negotiation mainly took place in organised package meetings on an *ad hoc* basis between Directorate General officials and Member State representatives in a relatively unstructured format. In order to streamline these bilateral discussions, between 2008-2017, the Commission introduced the EU Pilot which aimed to conclude investigations into potential non-compliance within 40 weeks, before either opening a formal infringement case or closing the file.<sup>5</sup>

There are three different types of failure to fulfil obligations: failure to notify measures transposing a directive; non-conformity / non-compliance (legislation is not in line with the requirements of EU legislation); and incorrect / bad application cases (legislation is not being applied correctly). Failure to notify measures may result in the Commission launching a joint action under Article 258 TFEU and Article 260 (3) wherein the Commission may request a penalty payment and a lump sum sanction to be imposed on the Member State.<sup>6</sup> The Court may not impose a higher fine than that requested by the Commission. In non-conformity and bad application cases the Commission may launch a separate action under Article 260 (2) TFEU, after sending the Member State a formal letter to indicate that the State has not complied with the Court's Article 258 judgment. The Commission can request a lump sum and penalty payment but the sanction amount is ultimately determined by the Court.<sup>7</sup>

*Transposition* of EU law – ensuring that directives are transposed into domestic legislation – is a crucial first step to ensuring effective implementation and application of EU law on the ground. Once transposition has taken place, implementation takes place when local decision makers, administrators and national courts apply the law in practice. *Implementation* of EU law is primarily concerned with non-conformity and bad application cases. Whilst

<sup>1</sup> The briefing note takes data from Report from the Commission 2017– Annual report monitoring the application of EU law COM(2018) 540, the Commission's infringement database, and the Court of Justice's database for 2018 data.

<sup>2</sup> The latest report of the JURI Committee is 'Report on monitoring the application of EU law 2016' (2017/2273(INI)) Committee on Legal Affairs Rapporteur: Kostas Chrysogonos, A8-0197/2018 4.6.2018

<sup>3</sup> There are other associated provisions in the treaty (eg Article 102 in Competition law) but these will not form part of this briefing paper.

<sup>4</sup> Case C-329/88, Commission v Greece [1989] ECR 4159, Case C-317/92, Commission v Germany [1994] ECR I 2039, Case C-562/07, Commission v Spain [2009] ECR I-9553.

<sup>5</sup> Communication from the Commission - A Europe of Results – Applying Community Law COM/2007/0502 final, Report from the Commission 'EU Pilot Evaluation Report' (2010) COM 70 final, Report from the Commission 'Second Evaluation Report of EU Pilot' SEC (2011) 1629/2.

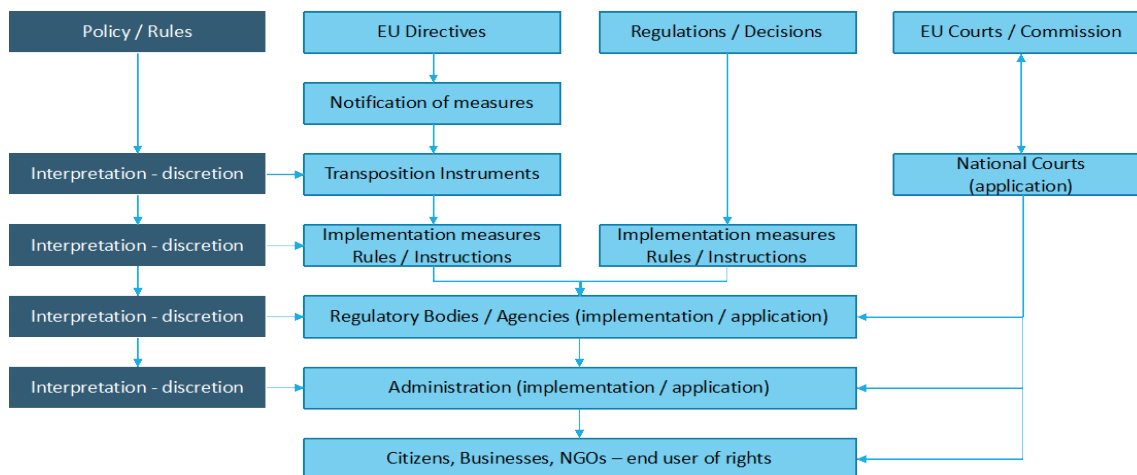
<sup>6</sup> Communication from the Commission EU law: Better results through better application (2017/C 18/02) p 15

<sup>7</sup> Case C-387/97 Commission v Greece [2000] ECR I-05047, Case C -304/02 Commission v France [2004] ECR I-6263.

regulations and decisions do not require transposition, they still require implementation by actors beneath the level of the national or sub national legislator. National parliaments may be involved in drafting additional implementation measures. Implementation can be defined as encompassing practical implementation (final policy formation on the ground) and policy delivery (putting into practice of the policy).<sup>8</sup>

EU law is thus implemented and applied by a multitude of state and non-state actors that make a variety of decisions and policy choices, within the legislative framework, that may achieve or frustrate the aims of the policy drafted at the EU level. Ensuring implementation of EU law that conforms to original intention of the drafters is fraught with difficulty: each actor beyond national legislators ultimately influence the way in which EU law is applied on the ground.

Stages of implementation and scope for drift



Effective implementation of EU law continues to present challenges in the multi-level governance environment of the EU. From an enforcement perspective non implementation is more difficult to detect than non, partial, or incorrect transposition of directives. There are multiple opportunities for drift or contestation of the original policy as implementation moves down through the layers of Member State administration. It relies on individuals and other stakeholders to bring implementation problems to the Commission’s attention post transposition through complaints or petitions to Parliament, or time and resource consuming investigations into particular legislative instruments across states. The successive layers of interpretation and discretion beyond that controlled by national parliaments continues to create the opportunity for non-compliance.

### Better regulation and implementation of EU law

The better regulation package of the Commission sought to change how the EU institutions formed policy and produced legislation.<sup>9</sup> In its latest Communications, the Commission has increasingly focused on the final part of the policy cycle, and in particular, how to achieve effective implementation of EU law.<sup>10</sup> Legislation made at the EU level and correctly transposed by the Member States is only effective if implementation of that legislation takes place. In other words paper compliance, where transposition measures appear to be on time and correct, fails by itself to achieve effective implementation. A major focus of better regulation is simplification of EU law as this reduces the scope for drift as law proceeds downwards through the Member State.

The renewed focus on effective implementation of EU law since 2016 has resulted in policy changes in how the Commission executes its duty as guardian of the treaties. Three significant changes are pertinent:

- a more strategic approach to use of the infringement mechanism
- the gradual phasing out of the EU Pilot;
- routine requests of penalty payments *and a lump sum payment* in respect of failure to notify cases under Article 260 (3).<sup>11</sup>

<sup>8</sup> Bondarouk, Elena, Mastenbroek, Ellen 'Reconsidering EU Compliance: Implementation performance in the field of environmental policy'(2018) 28 *Env. Pol. Gov.* 15–27.

<sup>9</sup> Communication from the Commission - Better regulation for better results - An EU agenda COM/2015/0215 final, Communication from the Commission Better Regulation: Delivering better results for a stronger Union COM/2016/0615 final.

<sup>10</sup> Communication from the Commission, Completing the Better Regulation Agenda: Better solutions for better results COM(2017) 651 final.

<sup>11</sup> 'Better results through better application' n 6 p 2, 14-16.

These policy changes are important to note because they provide context to interpret the latest data.<sup>12</sup> Changes in the strategic use of the infringement mechanism may also have a significant impact on how the EP and national parliaments contribute to ensuring the effective implementation of EU law going forward.

The better regulation package has an explicit emphasis on developing compliance-based mechanisms to achieve effective implementation of EU law, thus moving away from legal sanctions and use of the infringement procedure. Alongside existing bilateral dialogues and package meetings, the Commission is utilising agencies and networks as part of its tools and techniques to enforce EU law.<sup>13</sup> Guidance, implementation plans and other 'soft law' mechanisms are also apparent, as well as repeated engagement with expert groups and workshops. The historical focus on transposition tracking, and the general database surveillance approach (for example through semesterisation and scoreboards) is still an important aspect of enforcement going forward with new data analytics tools under development.<sup>14</sup> Decentralising implementation into the Member States through the improved Solvit network and direct (non judicial) mechanisms for citizens to act as enforcers of EU law via on-line dispute resolution are also in evidence.<sup>15</sup> This compliance focus is welcome and required - limited Commission resources requires other actors to help enforce EU law. Moreover, when it comes to solving implementation problems, local actors through networks, agencies, workshops and so on, are best placed to ensure application of EU law with the Commission coordinating these initiatives.

The Commission has announced that the infringement procedure will complement these compliance-based mechanisms with:

*'a more strategic approach to the Commission's infringement policy, focusing on systemic problems...objective of the Commission's new infringement policy is to ensure swifter compliance where it matters, to be able to deliver on its policy priorities. This new infringement policy is not a stand-alone initiative, but is firmly embedded in a series of other actions...to ensure that EU law is applied timely, correctly and effectively.'*<sup>16</sup>

The Commission explicitly sets out the direction of its strategic approach by identifying the following priorities:

- Infringements that obstruct the implementation of important EU policy objectives or undermine the four fundamental freedoms
- Failure to communicate transposition measures (failure to notify) and incorrect transposition of directives
- Failure to comply with a judgment of the Court of Justice as referred to in Article 260(2) TFEU
- Serious damage to EU financial interests or violated EU exclusive powers<sup>17</sup>

These priorities can be traced back as far as the White Paper on Governance<sup>18</sup> and previous communications on enforcement from the Commission and are not specific to the better regulation package. The difference is only in the acknowledged strategic approach (as opposed to all infringements) in order to provide a real added value to individuals and businesses.

### State of play: an overview of infringement data for 2017

The Commission's latest annual monitoring report details the five priority areas for 2017 as jobs, growth and investment; a connected digital single market; energy union; internal market; and economic and monetary Union. In using the data contained in the 2017 annual report, we should be mindful that this is not a complete record of non-compliance in the Member States.<sup>19</sup> Rather the data provides an illustration of what the Commission has chosen to pursue as a strategic priority. The following sections of the briefing paper will provide an analysis of trends in relation to complaints, the EU Pilot, infringement and sanction data.

<sup>12</sup> '2017 Annual report monitoring the application of EU law' n 1.

<sup>13</sup> On agencies and their enforcement powers see Scholten, Mira and Luchtman, Michael. (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Cheltenham: Edward Elgar, 2017).

<sup>14</sup> 'Better results through better application' n 6 p 15.

<sup>15</sup> Communication from the Commission 'Action plan on the Reinforcement of SOLVIT: Bringing the benefits of the Single Market to citizens and businesses' COM/2017/0255 final.

<sup>16</sup> 'Better solutions for better results' n 10 p 12.

<sup>17</sup> 'Better results through better application' n 6 p 14.

<sup>18</sup> European Governance: A White Paper COM(2001) 428.

<sup>19</sup> Smith, Melanie 'The visible, the invisible, the impenetrable: innovation or rebranding in centralised enforcement of EU law?' in Drake, Sara and Smith, Melanie (eds) *New Directions in Effective Enforcement of EU Law and Policy* (Cheltenham: Edward Elgar, 2016) 45-76.

### Complaints

The Commission registered 3 786 new complaints in 2017 which is consistent with the number of new complaints in 2016 (3 783). Italy, Spain and France were the most complained about Member States. The largest number of complaints were in the sectors of justice and consumers (864), environment (518), and employment (484). Overall, only 39 complaints resulted in an EU Pilot file being opened. The top three sectors concerned were tax, internal market and industry and entrepreneurship which maps onto the strategic areas outlined above. The Commission states that the EP, through petitions and questions, alerted the Commission to potential non-compliance in the fields of environment, migration, taxation, and internal market.

### EU Pilot

In 2017 the Commission announced it would no longer launch all infringement investigations using the EU Pilot and instead would move straight to the formal infringement procedure unless to do otherwise was especially useful.<sup>20</sup> Presumably the Commission found EU Pilot presented further opportunity for Member States to elongate their period of non-compliance.<sup>21</sup>

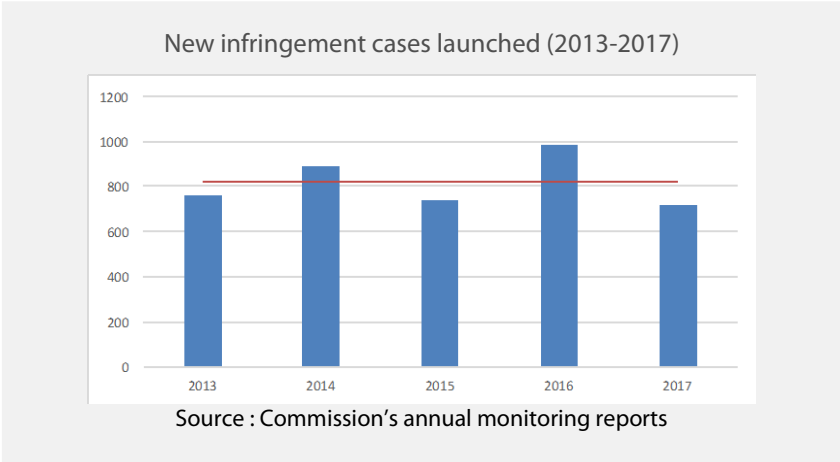
Since this policy change, the Commission launched only 139 new EU Pilot investigations in 2017, as opposed to 520 in 2016. As the legacy cases continue to be resolved, we can see a dramatic drop in open EU Pilot files, from 1 502 in 2013, to just 178 in 2017. Of these 178 open files, the top three sectors were environment (63), energy (33) and climate action (24), again reflecting the Commission's strategic approach. 60 EU Pilot files led to the launch of infringement procedures with the environment (27), energy (7), and communications (6) occupying the top three sectors. By the end of 2017, 841 EU Pilot files were open with Italy (70), Spain (55), and France (50) with the most files open against them. Environment (240), justice (127), and tax (94) were the top three sectors concerned.

### Infringement cases

The total number of new infringement cases launched by the Commission actually fell in 2017, with 716 new cases, representing a 27% fall since 2016 (986 new cases). However, there is not a significant difference year on year in the number of cases the Commission launches.

The mean number of infringement cases launched offers a more accurate indicator of whether infringements are increasing or decreasing year on year. In fact, over the last five years the mean number of cases is 819.6, showing that the trend in launching infringement cases is fairly stable over time, irrespective of better regulation.

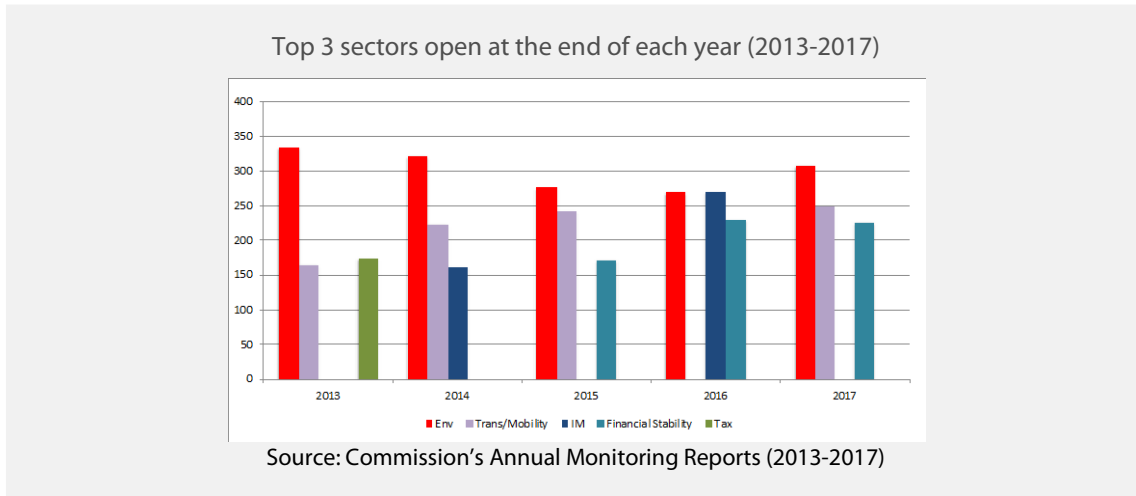
The total number appears to fluctuate depending on the number of new directives (or directives coming to the end of the transposition period) in any given 12 months. In 2016, for example, there were 847 late transposition cases but there were 70 directives with a transposition deadline within that year. In comparison, with only 36 directives with a transposition deadline in 2017, the number of late transposition cases fell to 588: a 31% fall. When we compare the fall in number of cases overall (27%) and the fall in late transposition cases (31%) we can see a causal effect. A spike in failure to notify cases can therefore skew the data, especially now the Commission tends to launch 'bulk' cases, against 20+ Member States in relation to one directive.



<sup>20</sup> 'Better results through better application' n 6

<sup>21</sup> As predicted in the literature on the introduction and operation of EU Pilot see Smith, Melanie 'Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process' (2008) 33 *European Law Review* 777-802. Smith, Melanie 'The evolution of the infringement and sanction procedures: of pilots, diversions, collisions and circling' in Annull, Anthony and Chalmers, Damian (eds) *The Oxford Handbook of EU Law* (Oxford: OUP, 2015) 350-375.

In 2017 the top three sectors where new infringement cases were launched were environment (173), mobility and transport (155) and financial stability/services (84), with this same pattern repeating at the stage of reasoned opinion. This data is again consistent with previous years, with these sectors having the most cases open against them at the end of the year.

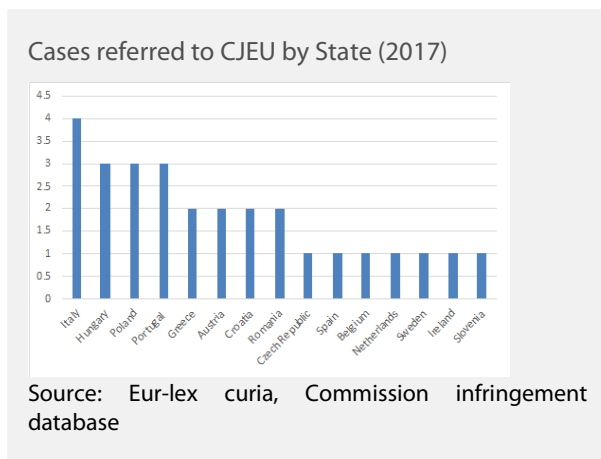
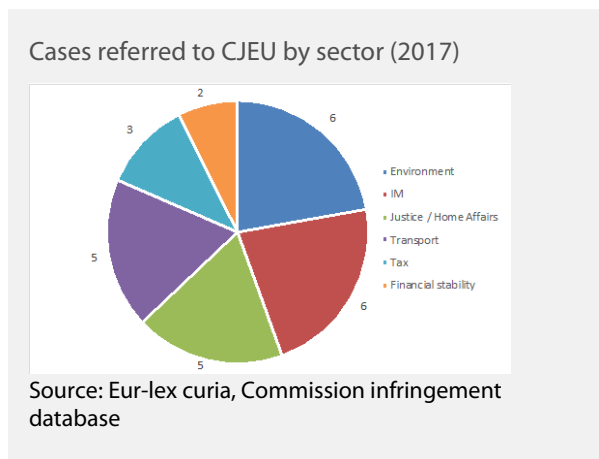


This data indicates that environment is consistently a problematic sector when it comes to resolving infringements, alongside transport. Environment has been the top, or second top sector, from as far back as 1998.<sup>22</sup> Since 2015, the package of measures concerned with the stabilising the financial sector has come into force and are a strategic priority: this can be seen in the notable increase in cases remaining open at the end of each year.

Different Member States exhibit different patterns of behaviour in relation to the type and number of open infringement cases. For example, although Estonia has the highest number of open infringement cases (93), 32 of these are actually failure to notify cases, with 61 cases of non-compliance or bad application cases. By contrast, Italy has a third less cases in total (62), but almost all of these (53) are bad application cases – meaning there is a high degree of paper compliance in Italy but not actual implementation in practice. Tracing through the infringement data we can see Italy has many judgments against it yet Estonia does not: concentrating only on transposition data gives a false perspective on implementation problems. By the end of 2017 there were 1 559 infringement cases open. Estonia had the highest number at 93, and Denmark the lowest at 28, with a mean number of 56 cases per state.

### Referrals to court in 2017

In 2017 the Commission submitted 28 cases to the Court under Article 258 TFEU. The top sectors were environment, internal market, justice and transport. The Member States with the most cases referred to Court were Italy, Hungary and Poland.

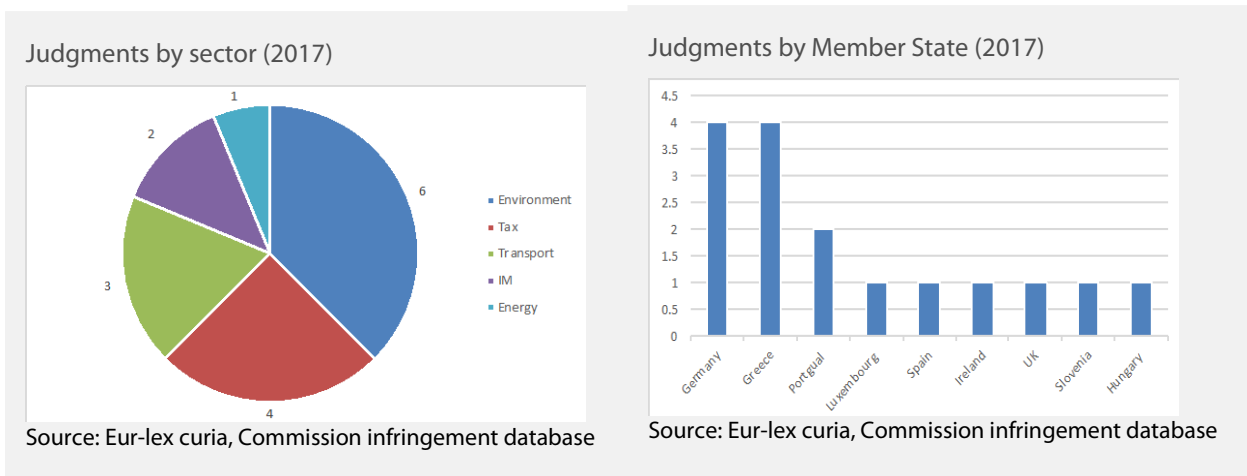


<sup>22</sup> Smith, Melanie *Centralised Enforcement, Legitimacy and Good Governance in the EU* (London: Routledge, 2009).



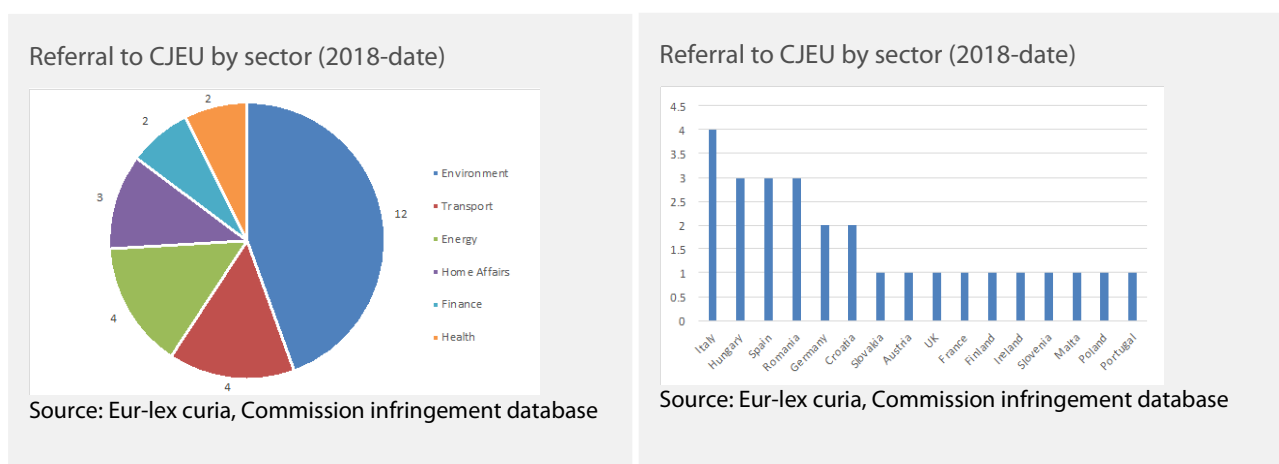
### Judgments of the court in 2017

In 2017 the Court gave 16 judgments under Article 258<sup>23</sup> and one under Article 260 (2).<sup>24</sup> All were in the Commission's favour. The Member State with the most judgments against them were Germany, Greece and Portugal. The top three sectors were environment, tax, and transport.



In summary, the 2017 data shows us that the same sectors are a repeated problem from the complaints stage, through EU Pilot, and through referral to Court and final Court judgment. Environment continues to be the most problematic area in terms of securing compliance at an earlier stage despite the Commission's extensive use of compliance-based tools for this sector such as the Environmental Implementation Review<sup>25</sup>, agencies and networks. Internal market and transport also regularly appear at the most serious stage of the infringement procedure, which is consistent with longitudinal data over time.<sup>26</sup> Tax and financial stability are also sectors that appear more in the last five years and seem to pose similar problems; they are complex areas of law and usually an area of national political sensitivity, making them especially difficult to resolve.

The Commission does not report on 2018 data until July 2019. However, infringement referrals under Article 258 TFEU to Court as between 1 January 2018 – 17 October 2018 are outlined below. There is a significant spike in environment cases although these could be resolved by the year end. Three cases have (so far) been sent a formal letter under Article 260 (2) against Spain, Italy and Slovenia, all concerning the environment. One case against Ireland has been referred to Court under Article 260 (2) again concerning the environment.<sup>27</sup> One financial sanction under Article 260 (2) has been imposed by the Court against Greece (environment) at EUR 3 276 000 six-month penalty and EUR 5 million lump sum.<sup>28</sup>



<sup>23</sup> The Commission includes a withdrawn case against Bulgaria which I have omitted – C-130/17 Commission v Bulgaria nyr as it was an order confirming withdrawal of the case.

<sup>24</sup> C-388/16 Commission v Spain nyr (lump sum of EUR 3 million) is a case on freedom of establishment.

<sup>25</sup> [http://ec.europa.eu/environment/eir/index\\_en.htm](http://ec.europa.eu/environment/eir/index_en.htm).

<sup>26</sup> See *Centralised enforcement, legitimacy and good governance in the EU* n 22 ch 5.

<sup>27</sup> C-261/18 Commission v Ireland nyr on impact assessment for the windfarm at Galway.

<sup>28</sup> C-328/16 Commission v Greece 22 February 2018 nyr.

## Identifying barriers to implementation at national level

Measuring implementation performance within Member States continues to be problematic for the Commission and researchers alike. Early studies on national implementation focused on establishing broad theories, especially tied to transposition data (failure to notify)<sup>29</sup> or sector or provision specific compliance.<sup>30</sup> This partial investigation of compliance cannot shed light on trends in implementation, since timeliness does not correlate to correctness, or application of that legislation 'on the ground'. The available research on implementation of EU law is hampered in its accuracy because of the predominance of granular assessments of one directive or group of directives; studies that concentrate on Western European states traditionally categorised as having the least problems with implementation;<sup>31</sup> and binary studies that assess only transposition (particularly timeliness rather than correctness). Research tends to concentrate on the environmental sector in particular, and disproportionately on the Water Framework Directive, so conclusions are not generalisable across states and policy sectors.<sup>32</sup> A systematic review of studies on implementation performance concluded that whilst there is considerable research on the detailed substance of measures taken to implement EU law – i.e. the transposition instruments at national level and whether these reflect the intentions of the directive - the elements of scope and effort have been neglected.<sup>33</sup>

### Factors influencing implementation of EU law

Broadly we can identify 10 factors from the research that have an effect on whether Member States implement EU law correctly. These factors are: institutional decision-making capacity; goodness of fit; preference fit; administrative efficiency; low complexity of EU law; favourable culture (toward rule of law and conflict management); few inter-ministerial coordination problems; national enforcement and monitoring; EU monitoring and enforcement; learning.<sup>34</sup> Furthermore, only 'goodness of fit' and the 'institutional decision-making capacity' are factors that are robustly substantiated across multiple case studies.<sup>35</sup> These gaps in the research literature mean that it is as yet impossible to state with any accuracy why Member States fail to properly implement EU law at the stage of transposition and after. However, based on these broad findings the following sections will highlight the barriers to implementation and the actions that can be taken by EU institutions and national parliaments to mitigate these problems.

### Key barriers and recommendations for change: National Parliaments

There are various possibilities for national parliaments to aid the effective implementation of EU law according to the 10 factors explained above. The internal decision-making structures of national and sub national parliaments is a matter for domestic politics to address. Goodness of fit - that is whether the policy already fits into the national legislative framework, and preference fit - that is whether this is an issue of political contestation between national political parties - are factors which reference the national political conditions within Member States. These continue to exert influence over the implementation of EU law.<sup>36</sup> Inter-ministerial coordination problems, national culture and institutional learning are again factors which only national parliaments can solve (see recommendations below). Certainly, national parliaments play a critical role in ensuring timely and correct transposition of EU law. Four factors can be identified wherein national legislators can have an effect (positively or negatively) on implementation of EU law:

<sup>29</sup> König, Thomas and Luetgert, Brooke 'Troubles with Transposition? Explaining Trends in Member-State Notification and the Delayed Transposition of EU Directives' (2008) 39 *B.J.Pol.S.* 163–194.

<sup>30</sup> Börzel, Tanja A, Hofmann, Tobias, Panke, Diana 'Caving in or sitting it out? Longitudinal patterns of non-compliance in the European Union' 2012 19 *Journal of European Public Policy* 454–471.

<sup>31</sup> Falkner, Gerda and Treib, Oliver. (2008) 'Three worlds of compliance or four? The EU-15 compared to new member states' 46 *Journal of Common Market Studies* 293–313, which conflicts with more research findings in Zhelyazkova, Asya, Kayab, Cansarp and Schrama, Reini 'Notified and substantive compliance with EU law in enlarged Europe: evidence from four policy areas' (2015) 22 *Journal of European Public Policy* 1127–1147 which finds that CEE states do not lag behind EU 15 states.

<sup>32</sup> Angelova, Mariyana, Dannwolf, Tanja, König, Thomas 'How robust are compliance findings: a research synthesis' (2012) 19 *Journal of European Public Policy* 1269–1291.

<sup>33</sup> 'Reconsidering EU Compliance' n 8

<sup>34</sup> 'How robust are compliance findings' n 32.

<sup>35</sup> *Ibid*

<sup>36</sup> Zbiral, Robert 'Comparing the intensity of scrutiny for 'domestic' and implementing bills: does transposition of EU law reduce political contestation in national parliaments?' (2017) 24 *Journal of European Public Policy* 969–988, Mastenbroek, Ellen, Versluis, Esther Spendzharova, Aneta 'Clawing Back Lost Powers? Dutch Parliamentary Scrutiny over the Transposition of EU Social Policy Directives' (2014) 37 *West European Politics* 750–768, Dörrenbächer, Nora Mastenbroek, Ellen, Toshkov, Dimiter 'National Parliaments and Transposition of EU Law: A Matter of Coalition Conflict?' (2015) 53 *JCMS* 1010–1026.



- Gold-plating
- Correlation tables
- Administrative structures or capacity
- Early engagement with legislative proposals

### Gold-plating

The better regulation package and the follow up evaluations on implementation of EU law has identified the problem of so called 'gold-plating'.<sup>37</sup> This refers to the practice of national legislators enhancing the requirements of measures introduced at a level beyond that which is required by EU law. This can happen for a variety of reasons, but most prominent is the effect of domestic politics, i.e. preference fit or goodness of fit. For example, where a measure is deregulatory in an area of national sensitivity (e.g. tax or financial stability), national parliaments may introduce requirements and restrictions which inhibit (or prevent entirely) the effective implementation of that law on the ground. Gold-plating can mean extending the scope of the substance of the measure, wider domestic terms than required by EU law, and proscribing sanctions or reporting requirements that increase the overall regulatory burden and make implementation of EU law more difficult.<sup>38</sup>

### Correlation tables or explanatory documents

Another factor which is identified as a long standing problem of EU compliance is production of correlation tables, or as they are now called, explanatory documents. The Commission requires Member States to produce 'explanatory documents' when they notify measures for transposition which explain where and how the national legislature has transposed the requirements in directives into national law with detailed reference to particular laws and clauses within laws. This enables the Commission to effectively monitor the Member State for accuracy of its transposition. Clauses requiring a correlation table have been sacrificed in the negotiation between the EU institutions in the process of legislating. Despite several inter-institutional agreements<sup>39</sup> on the need to include correlation tables from national legislatures, the record of national legislatures supplying these is still far from ideal. In its latest annual report, the Commission dedicates a section recalling the failures of states to supply these documents, and the 'uneven quality' of those that have been supplied.<sup>40</sup> Supplying this documentation is crucial to the effective monitoring of EU law by the Commission (one of the 10 factors which ensure effective implementation of EU law).

### Administrative structures and capacity

The administrative structures and associated decision-making capacity of national administrations has been identified as a relevant factor that aids implementation. In particular the organisation of national legislature's handling of EU law scrutiny and implementation, and the degree of fragmentation in the decision-making structures (e.g. between national, sub national and devolved legislatures and administrations) can directly affect how efficient national parliaments are in transposing EU law. Similarly, the administrative and political capacity to process information on complex and 'conflictive' directives can also increase or decrease a national parliaments ability to implement EU law in a correct and timely manner.<sup>41</sup> Research that disaggregates 'parliament' into the relevant ministries has shown that the quality of leadership of the Minister, past experience and budgetary allocation of the department has a direct causal effect on the speed of implementation of EU law.<sup>42</sup> In common with other studies on transposition, this research also identified that greater centralisation of decision making was a key success indicator in achieving swift implementation. The more 'veto players' that were introduced into the decision-making chain, the slower transposition.

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<sup>37</sup> Thomann, Eva Zhelyazkova, Asya 'Moving beyond (non-)compliance: the customization of European Union policies in 27 countries' (2017) 24 *Journal of European Public Policy* 1269-1288.

<sup>38</sup> 'Moving beyond non-compliance' n 37 p 1272. Thomann suggests that gold-plating does not necessarily equate to non-compliance: this depends on how the measure is implemented.

<sup>39</sup> Interinstitutional Agreement Between the European Parliament, the Council of the European Union and the European Commission On Better Law-Making of 13 April 2016 12.5.2016 OJ L123/1 p 43 on gold-plating 'when, in the context of transposing directives into national law, Member States choose to add elements that are in no way related to that Union legislation, such additions should be made identifiable either through the transposing act(s) or through associated document'.

<sup>40</sup> Annual monitoring report (2017) n 1 p 2-4.

<sup>41</sup> Finke, Daniel 'Institutional conditions for effective parliamentary oversight of European Union politics' (2018) 41 *West European Politics* 1-24.

<sup>42</sup> Thomas, Martha 'The efficiency of ministries in transposing EU directives: Evidence from Ireland' (2018) 33 *Public Policy and Administration* 190-215.

## Early versus late engagement with policy proposals

Research has shown conflicting results regarding the influence of early engagement with national parliaments on legislative proposals, especially where issues are ‘complex, salient and conflictive’, i.e. that the law is complex but has a high profile in national politics and is the subject of contestation between parties. Where parliaments have good administrative organisation and decision making capacity, and a strong tradition of scrutiny of EU law (strong parliaments), early involvement with legislative proposals can actually speed up the implementation process.<sup>43</sup> It can move contestation up to an earlier stage of legislating and therefore improve the conditions for smooth implementation. However, in parliaments categorised as weak – where decision making capacity is slow and the administrative organisation of parliament does not allow for strong scrutiny of EU law – then early engagement may actually slow down transposition and implementation by alerting ‘sleeping dogs’.<sup>44</sup> In other words, early engagement is not a universal solution for all national parliaments and can sometimes have the opposite outcome by slowing down transposition and implementation.

## Key barriers and recommendations for change: EU institutions

In line with the 10 factors identified in the research, only three are directly in the control of the EU institutions:

- Low complexity of EU law
- National enforcement and monitoring
- EU enforcement and monitoring

The Commission has committed resources to continually improving judicial training (national enforcement and monitoring) and improving administrative capacity within Member States.<sup>45</sup> More enforcement at the national level is also supported in consumer law through on-line dispute resolution and the Solvit network for internal market. The better regulation package aims to make EU law simpler to increase smooth implementation. The Commission has also moved to a strategic use of its enforcement powers with concomitant emphasis on compliance-based implementation strategies that operate below the level of national parliaments (agencies, networks and so on). Financial aid is targeted to help address specific difficulties particularly in relation to environmental compliance.<sup>46</sup> In order to assist national Parliaments, the Commission produces detailed implementation plans to work collaboratively with national administrations to identify in advance possible problems and solutions to implementation with specific directives.<sup>47</sup>

The EP also has an interest in ensuring effective implementation of EU law. The EP has two distinct roles: as legislator and as an accountability forum to hold the Commission accountable as it performs its role as guardian of the treaties. As a legislator, the EP should aim to reduce complexity of EU law though it is difficult to predict how big a role this will be in future. The better regulation package will increasingly produce bespoke legislative interventions aimed solely at implementation, ostensibly to close the policy loop, many of which are done by Commission implementing regulation alone.<sup>48</sup>

As an accountability forum, the EP should also be mindful of increasing information asymmetry between the itself and the Commission as the Commission moves away from using the EU Pilot and the infringement procedure as its main tools of enforcement.<sup>49</sup> As compliance-based mechanisms take on a greater role in achieving implementation of EU law, the reporting system needs to evolve to track these developments. For example, reporting should include robust analyses of the effect of implementation plans; the concrete assessment of networks and agencies’ implementation work; the scope and substantive contribution of workshops etc.<sup>50</sup> Exposing this ‘hidden’ part of the Commission’s role as guardian of the treaties is an important way in which the Parliament can maintain influence on ensuring the implementation of EU law.

<sup>43</sup> Finke, Daniel and Dannwolf, Tanja ‘Who let the dogs out? The effect of parliamentary scrutiny on compliance with EU law’ (2015) 22 *Journal of European Public Policy* 1127–1147 is a study on Germany.

<sup>44</sup> Finke, *ibid* i.e. actors that would otherwise not have raised an objection to implementation.

<sup>45</sup> ‘Better results through better application’ n 6 p 14–16.

<sup>46</sup> Cavoški, Aleksandra ‘An assessment of compliance strategies in the environmental policy area’ 41 (2016) *European Law Review* 252–274.

<sup>47</sup> Annual Monitoring Report 2017 n 1.

<sup>48</sup> For example in internal market Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) OJ L 354, 28.12.2013, 132–170, Commission Implementing Regulation (EU) 2015/983 of 24 June 2015 on the procedure for issuance of the European Professional Card.

<sup>49</sup> European Parliament Report on monitoring the application of EU law 2016 (2017/2273(INI)) Committee on Legal Affairs Rapporteur: Kostas Chrysogonos A8-0197/2018 p 10.

<sup>50</sup> Some academic work has begun on this in Heidbreder, Eva G. ‘Strategies in multilevel policy implementation: moving beyond the limited focus on compliance’ (2017) 24 *Journal of European Public Policy* 1367–1384 which looks at centralization, agencification, convergence and networking as frames to analyse implementation.

An thematic analysis of the EP's reports (2008-2018) on monitoring the application of EU law provides an insight into Parliament's accountability role.<sup>51</sup> The table below summarises the 9 main themes identified in a textual analysis of the reports, and the types of issues these broad themes deal with in detail (sub-themes). The final column (hierarchy) details the frequency of the appearance of these themes within the text of the reports.

Response of EP to the Commission's annual monitoring reports (2006-2016)

Main Themes	Sub-themes	Hierarchy
Policy discussion	Environment, Charter, Gender Equality, Migration, Austerity, Single Digital Gateway, Justice	51
Accountability of Commission	Commission – EP relationship, transparency of data	44
Effective Enforcement	Correlation Tables	39
Pilot	Data	37
Good Administration	Legislation on Administrative Procedures, citizens- openness	23
Petitions		19
Better regulation		18
National enforcement	EP – national parliament relationship	14
Rule of law		12

The most surprising thing to emerge from this data is that the EP has used JURI's specific reporting mechanism to raise generic policy issues which do not directly relate to effective enforcement of EU law. The second highest ranked theme is the problem of information asymmetry where the EP is requesting data access or general transparency in relation to enforcement. The third theme addresses 'effective enforcement' which is almost entirely concerned with the production of correlation tables and data. Fourth, is the EU Pilot. As EU Pilot is phased out access to Pilot data will become largely irrelevant in terms of enforcement of EU law. Better regulation and associated compliance tools are presently ranked seventh out of the nine most frequently issues raised. Going forward, such interventions will need to take on increasing significance if the EP is to play its important role as an accountability forum.

Ensuring effective implementation of EU law requires constant vigilance from all actors – EU institutions and national parliaments alike. Effective implementation starts with good legislative design based on empirical data that enables the legislator to anticipate potential barriers. For some Member States, early engagement with policy proposals can aid implementation. Greater cooperation between EU and national institutions, through production of correlation tables and absence of gold-plating is also beneficial. Ensuring implementation beneath the level of the national parliaments requires complex, multi-level governance strategies which the Commission is trying to enact through its compliance-based mechanisms. The EP must evolve its accountability and information gathering mechanisms in order to keep pace with this changing enforcement environment.

<sup>51</sup> This analysis was done using Nvivo software for qualitative analysis in a 4 stage process, which is the standard research software used by qualitative researchers. Nvivo enables researchers to code the text of documents by assigning values / themes / indicators to parts of the text and cross referencing this coding to other relevant categories for analysis. The full results of this data analysis will be available in Smith, Melanie 'The changing role of the European Parliament and Enforcement of EU Law' forthcoming (2019).

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