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Is There Really a Significant Policy Implementation Problem in the EU?

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The rule of law is the very foundation stone on which the European community has been built.[1] 'Integration through law' is the European Union landmark function, and every action is based on treaties approved voluntarily and democratically by all EU member countries.[2] Therefore, as Gerda Falkner argues, 'if the law visibly degenerates into a 'dead letter', then the project loses its basic function'.[3]

With the purpose of critically discussing whether there is a significant policy implementation problem in the EU, I will focus, firstly, on to what extent, how and why the failure to respect European rules is present in the Member States' reality. Secondly, in order to assess the level of non-compliance that could or not be considered a problem, I will briefly address the debate about which kind of European governance would be adequate to face current and future challenges. My conclusion is, in contrary to Jan Zielonka's,[4] that the European Union should continue combining plurilateral and hierarchical modes of governance in their different forums and areas. Although some diversity should be allowed and even cherished, once Member States – through the European Council and/or the European Parliament – have approved a specific regulation, decision or directive, it should be taken seriously and be properly implemented. At the moment, this is not the case, particularly on the 'ground level' application of EU laws, which could ruin the credibility and even threaten the existence of the European Union.

The European Union exists 'first and foremost to further the interests of its member states'; however, states 'pay a price' for EU membership.[5] There is a substantial loss of national decision-making powers, and states are obliged to participate and apply some policies that their representatives could occasionally consider damaging for their national interests. For instance, according to Neil Nugent, some countries with coastal waters believe that they are not being fairly treated by the Common Fisheries Policy, and several governments opine that it is time to end or completely reform the Common Agricultural Policy because it distorts the EU budgetary expenditure to their disadvantage.[6] In any case, national decision-makers judged that more was to be gained from being part of the European Union than from being excluded from it, and since the 1950s more and more countries have decided to join.

There is a loss of national sovereignty, but we should not forget that Member States count with many opportunities to 'feed into the EU policy processes and play a part in influencing policy outcomes;[7] this happens at nearly all policy phases: agenda setting, policy formulation, decision negotiation, decision-taking and implementation. Regarding this last point, it is worth remembering that national authorities, supervised by the European Commission, are the ones responsible for implementing European Union law. 'The Commission oversees', and 'national and subnational authorities do most of the front line work'.[8] Only in a few policy areas – competition being the most important – does the Commission implement policies itself.

A detailed analysis of the decision-making process of the EU is by all means beyond the scope of this essay, however, it is important to note that legislation is adopted in three forms: regulations, that are binding on all member states; decisions, that are binding only on those to whom they are addressed; and directives, that are binding and enforceable acts in order for the results to be achieved, but require transposition into domestic law. Member States 'are given discretion on the instruments they can use for the implementation of a directive's goals'[9], but have to

notify the Commission of 'the national legislation, regulations, or administrative provisions that have been adopted to give them formal effect' in due time.[10]

The European Commission is in charge of monitoring whether Member States, who have primary responsibility for the correct and timely application of EU Treaties and legislation, respect EU law obligations.[11] It scrutinizes non-compliance with European Union policies on its own initiative, on petitions from the European Parliament, or where shortcomings are reported by citizens, businesses and stakeholder organisations.[12]

If a possible infringement is detected, the Commission seeks an early settlement with the Member State concerned through the means of a structured dialogue (EU Pilot)[13], in order to avoid 'stoking up national resentments'.[14] If the Member State disagrees or fails to implement a solution, the Commission is able to launch formal infringement procedure: first, through a letter of formal notice; second, reasoned opinion; and, third, a referral to the Court of Justice. However, according to the Commission, this last step is rarely taken: 'in the last few years, more than 85% of cases were resolved before the litigation stage'.[15]

Having introduced the European Union policy-implementation and monitoring internal mechanisms, I will analyse to what extent, how and why the failure to respect European rules is present. Non-compliance with EU rules – Falkner states – has recently happened 'at an increasing number of levels; with increasing frequency and greater visibility to a broad audience; and in fields of very direct relevance for basically all citizens and politicians'.[16] In her opinion, this situation affects the EU's credibility, since 'not only Member State governments and other national institutions break EU rules', but it is also the case at times with EU institution.[17] Falkner specifically analyses six important deviations: non-compliance with summit decisions; agreed rules regarding the Economic and Monetary Union (EMU); non-compliance with the continuity of historical compromises and with EU's basic democratic values; failure to implement and enforce EU laws in the Member states; and lack of respect for European Court of Justice (ECJ) judgements.[18]

Former Commission President Manuel Barroso denounced that heads of state and governments on a daily basis undermine decisions and solutions adopted at summits, sometimes even directly afterwards, creating a 'problem of credibility' and 'confidence' in the EU.[19] The European Council has to decide unanimously, according to the treaties; therefore, the criticism is just a façade built to appease national public opinion about unpopular issues, or these governments are being outvoted in the Council, which is against EU rules.[20] Either national governments or an EU institution fail, but the result is either way a sign of 'disunity' that debilitates the European Union as a whole.[21]

Probably the agreed rules in which compliance is more politicized are those related to the EMU, where many examples can be cited. For instance, once it was in force, 'compliance with the criteria specified in the Maastricht Treaty did not significantly improve. The annual budget deficit ceilings were by no means always respected' in Member States, not even the most prosperous ones.[22] However, not only governments fail, but EU institutions do also. As Falkner explains, the European Central Bank (ECB) was surrounded by an important controversy about the 'no bail-out clause' of the EU treaties – 'any type of credit facility in favour of governments shall be prohibited, as shall the purchase directly from them by the ECB or national central banks of debt instruments'.[23] The ECB 'covered bond purchase program' was seen by some as a non-conformity with this clause.[24] In Falkner's opinion, the public legitimacy of the EU 'may be in danger' if law-suits become a regular feature of the EU politics.[25]

The core ambition of the European Union since its origins in the 1950s was the creation of a single market, 'with a limited degree of re-regulation in fields such as competition policy and social policy'.[26] The United Kingdom explicitly agreed, but now threatens to undo all this in order to pursue a 'market-only model'.[27] Should a Member State be able to 'shop' the directives and policies it wants to apply and refuse the ones it does not? This issue will be discussed later on in relation to the theoretical debate about which kind of European governance would be adequate.

Importantly connected with the previous point is the protection of the fundamental principles and values of the European Union: 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[28] The Treaty on the European Union makes perfectly clear that only those European countries that respect

and are committed to promote the democratic values of the EU will be eligible for membership.[29] Should the EU allow Member States to withdraw from applying these principles? Can they be enforced? Falkner points out the severe controversies about the state of democracy in Hungary and Romania. Both countries have been subjected to pressure by the European Commission, which decided to avoid formal proceedings and work with caution. The European Union offers 'at least checks and balances outside individual countries'[30], although the EU treaties 'do not offer an effective framework to fight threats to democratic principles'[31], since the procedural rule for determining a breach of the EU's basic values is unanimity – except for the vote of the Member State concerned.[32] The Commission's powers to monitor and correct implementation are, therefore, limited.

It is precisely these restricted powers and its privation of economic and human resources –compared to its considerable policy responsibilities[33] – which burdens the Commission's capacity to conduct very much surveillance on the Member States' compliance with their EU law obligations, from treaties to a specific directive[34] In John Peterson's opinion, 'the weakness of the Union's central institutions contributes to a pathology of non-compliance which plagues EU governance more generally'.[35] Falkner agrees with the diagnosis and states that, 'overall, there is no reason as yet to believe that EU law is actually obeyed in a regular manner, particularly when the application and enforcement is concerned'.[36]

At least regarding the first step of compliance with most EU standards – the transposition of directives into national law[37] – 'there is good news'.[38] According to the last Annual Report on Monitoring the Application of EU Law (2013), published by the European Commission at the end of 2013, 1.300 infringement cases remained open. The number of open infringement cases has continued to fall, from nearly 2.100 cases in 2010 to 1.775 cases in 2011 and to 1.343 cases in 2012.[39] As Falkner exposes, this means that 'the portion of non-compliance that is discovered and followed up by the European Commission is tackled more efficiently, both by itself and the Member States'.[40]

Italy (104), Spain (90), Greece (79), France (77) and Belgium (75) are the Member States with the higher number of open infringement cases, including both late transposition infringements and incorrect transposition/bad application cases. Notwithstanding the larger amount that the latter represents, the former are a 'top priority' for the Commission as it 'remains a persistent problem'.[41] In any case, despite variations between states – Denmark, Germany and UK having better average transposition records – especially in terms of speed, this is not a major problem since 'transposition rates for all member states are consistently over 90%'.[42]

The implementation difficulties of the EU are thus, according to Falkner and Nugent, on the 'ground level' application of EU laws by national and subnational authorities. [43] The question to ask at this point is 'why': what factors explain this suspected gap between decision-making and proper application by Member States? Over the last years, there has been a strengthening of the 'control mechanisms', 'administrative procedures for applying this legislation' and an increase in the 'flows of information between the Commission and national agencies'.[44] In fact, the Commission partly attributes the overall decrease of formal infringement procedures during the past five years to the EU Pilot initiative.[45] However, it is difficult to deny the structural weaknesses that the system suffers. These need to be tackled in order to make possible in the long term that all laws are fully and properly implemented.

First of all, it is relevant to note that 'many implementation problems arise not from deliberate deception, but from incorrect understanding and application of the EU's highly complex body of legislation'.[46] Some scholars, such as Berglund and Dimitrakopoulos, emphasize the importance of *learning effects*. The former highlights that rule systems need time to develop, and the latter argues that 'domestic administrations learn over time by interacting with the Commission'.[47] In spite of the Commission monitoring and promotion of best practices, national administrations still remain very different in size, competences, working patterns and cultures, which obviously leads to diverse administrative capacities.[48] Case studies also confirm that *administrative efficiency* has 'the expected positive effect on compliance'.[49]

Mariyana Angelova's study about the robustness of compliance findings considers, nevertheless, that the most prominent explanatory variables are the *institutional decision making capacity* and *the goodness-of-fit* arguments.[50]

In the first case, there is strong evidence that institutionally restricted governments, by a number of veto players or a federalist system of governance, have lower likelihood of compliance. In the second case, the *goodness-of-fit* variable – that includes the directive's correspondence either with national policy legacies, interest group structures, policies or transposition-related financial costs/benefits – has been successful in proving that 'non-compliance increases with the difference between the domestic status quo and the policy goals of the directive'.[51]

Vigorous policy implementation could sometimes 'be damaging to national interests', especially regarding high-profile and sensitive policy areas – such as agriculture or competition – therefore, national agencies sometimes are not 'over-zealous in taking action against suspected irregularities'.[52] Moreover, a large number of detected irregularities – even by national agencies – will affect negatively to the prestige of the Member State, which may have direct consequences on future negotiations. This situation generates the so-called 'competence-interest conflict': the Commission (and other EU institutions) which have the strongest interest in proper implementation lacks the policy tools to do it. Member States have the tools, but only weak incentives.[53]

This is certainly the case when the alleged irregularity is fraudulent use of EU funds by Member States, which are responsible for spending about 80 percent of the EU's annual budget – approximately 85 billion Euros.[54] It is reckoned that fraud[55] counts for 5 percent of the EU budget;[56] although, as Peterson points out, estimates are 'wildly speculative and unreliable'.[57] The Court of Auditors' annual audits underline that 'EU funds are not wasted through accidents or corruption very often'.[58] The problem lies in the above-explained 'off-hand attitude of Member States to compliance', 'rules that are poorly-drawn' – in addition to the sheer volume of overlapping laws regulating a certain area of activity, e.g. over 50 directives in force on labelling, or nearly 40 on professional qualifications – and 'weak central control over revenue and expenditure'.[59]

In Peterson's opinion, the main problem is that because in the EU everyone is responsible, no one is ultimately responsible. States have pooled sovereignty, but not accountability; and there are 'few clear hierarchies or straight lines of answerability'.[60]

Albeit the Maastricht Treaty enabled the European Commission to refer disobedient Member States to the European Court of Justice – the third step of the formal infringement procedure – it has been 'extremely cautious in exercising these powers', even though being quite successful in court.[61] The reason is that 'even the less wealthy state can in fact afford to keep paying the EU's fines', hence the actual goal is keeping Member States cooperative and avoiding unnecessary confrontation.[62]

Peterson judges that the only way that fraud can be really contained is by conceding more resources and powers to the Commission, and this conclusion could be easily extrapolated to implementation more generally.[63]This argument, however, is not universally accepted between scholars and policy-makers alike, as he himself recognizes. At the end of the day, the real question is which kind of European governance would be adequate to face current and future challenges. As Jan Zieloka exposes, there are many modes of governance identified in the existing literature, but – at least for the purpose of this essay – they can be reduced to 'two main and contrasting types': hierarchical type of governance and plurilateral form of governance.[64]

It is now widely accepted, Shout and Jordan highlight, that the EU has evolved into a 'multi-level system of governance', in which central bodies depend on the cooperation and joint resource mobilization of policy actors outside their hierarchical control, a system more open and less hierarchical, to reach their policy objectives.[65] In the second half of the 1990s, the European Union began to become involved in a number of policy areas – especially macroeconomic policy coordination – where governments of Member States were willing to cooperate, but would not agree to legislate.[66] Post the 2004-7 enlargement, the situation worsened since it was increasingly apparent that new Member States 'do not want to see a powerful centre in Brussels applying uniform policies across the entire EU space'.[67] After experiencing a tight hierarchical rule under communism, Zielonka explains, many of these States did not feel comfortable excessively losing national sovereignty.

As Tanja Borzel argues, the EU's 'nature of the beast' cannot be captured by one particular type of governance, as the tension between hierarchical and plurilateral modes of governance continue to be strong in Brussels.[68]

Supporters of hierarchical governance – Peterson being one of them – want the EU central institutions to have broader powers and more economic resources, with clear lines of control and responsibility that would facilitate the proper implementation of binding decisions. They often argue that greater flexibility and differentiation between Member States is the first 'step towards disintegration'.[69]

In the plurilateral form of governance model, there is no pyramid-like governmental structure; it is based on 'interpenetration between various types of political units and loyalties'.[70] Compliance is largely voluntary and based on incentives –which are supposed to produce better results that sanctions and coercion.[71] For its advocates, cultural and socio-economic diversity is a plus, and diversified types of citizenship – with different rights and duties – are perfectly possible. They consider that globalization, modernization and interdependence 'undermine the rationale and utility of a hierarchical type of governance'.[72] In their opinion, it is unrealistic to think that 28 Member States, very dissimilar from each other, would be able to find and impose one-size-fit-all solutions.

The European Union, in the last two decades, has adopted many features of the so-called plurilateral system of governance. It has opted for a hybrid solution able to balance the advantages and disadvantages of both systems, paying particular attention to the power tensions and necessities of each policy area. In my opinion, this path, although complex, is the right one to follow. Even though some diversity should be allowed and cherished, once Member States have agreed on a specific regulation, decision or directive, it should be taken seriously and be properly implemented, even if in certain respects it is against the governmental or national interests. As this essay has shown, the EU system of governance suffers structural weaknesses that have not only permitted but provoked non-compliance with EU rules at an increasing number of levels, with greater visibility, and in fields of very direct relevance for all citizens and politicians, both by Member States and EU institutions.

In conclusion, in spite of the limitations of the European Commission to monitor compliance through direct surveillance, scholars and policy-makers are certain about the existence of a significant policy implementation problem in the EU, particularly on the 'ground level' application of EU laws. The issue could have fatal consequences; hence, under no circumstances shall it be disregarded. Since the rule of law is the very foundation stone on which the European community has been built and 'integration through law' is the European Union landmark function, letting EU legislation or decisions become 'dead letter' could hopelessly jeopardize the credibility, and even the existence, of the entire European project.

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[2]Ibid.; European Union website [http://ec.europa.eu/enlargement/policy/policy-highlights/rule-of-law/index_en.htm].

[3] G. Falkner, 'Is the EU Losing its Credibility?', p. 13.

[4]J. Zielonka, 'Plurilateral Governance in the Enlarged EU', *Journal of Common Market Studies* 45, 1 (2007), p. 206.

[5]N. Nugent, *The Government and Politics of the European Union*, Palgrave Macmillan (2010), p. 255.

[6]Ibid.

[7]Ibid., p. 273.

[8]Ibid., p. 221.

[9] M. Angelova et al, 'How Robust are Compliance Findings? A Research Synthesis',*Journal of European Public Policy* 19, 8 (2012), p. 1269.

[10] N. Nugent, *The Government and Politics of the European Union*, p. 320.

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[14] N. Nugent, *The Government and Politics of the European Union*, p. 321.

[15] European Commission website [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/index_en.htm].

[16] G.Falkner, 'Is the EU Losing its Credibility?', p. 14.

[17]Ibid.

[18]Ibid., pp. 14-24.

[19]Ibid., p. 15.

[20] 'Governments will 'stand up to Brussels' if benefits accrue to them in party political, electoral or interest groups terms'. J.Peterson, 'The EU: Pooled sovereignty, divided accountability', *Political Studies* 45 3 (1997), p. 562; G.Falkner, 'Is the EU Losing its Credibility?', p. 16.

[21] G.Falkner, 'Is the EU Losing its Credibility?', pp. 15

[22]Ibid., p. 18.

[23] Article 123 Treaty on Functioning of the European Union (TFEU), in G.Falkner, 'Is the EU Losing its Credibility?', p. 18.

[24] G.Falkner, 'Is the EU Losing its Credibility?', p. 18.

[25] Ibid., p. 19.

[26] Ibid., p. 24.

[27] Ibid.

[28] Ibid., p. 19.

[29] European Commission website [http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm]

[30] Ibid., p. 21.

[31] Ibid.

[32] Ibid., p. 19.

[33] J. Peterson, 'The EU: Pooled sovereignty, divided accountability', p. 564.

[34] N. Nugent, *The government and politics of the European Union*, p. 321.

[35] J. Peterson, 'The EU: Pooled sovereignty, divided accountability', p. 561.

[36] G. Falkner, 'Is the EU Losing its Credibility?', p. 22.

[37] Explained in the first part of this essay.

[38] G.Falkner, 'Is the EU Losing its Credibility?', p. 22.

[39] Report from the Commission: '31st Annual Report on Monitoring the Application of EU Law (2013)', p. 11.

[40] G.Falkner, 'Is the EU Losing its Credibility?', p. 22.

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[42] N. Nugent, *The government and politics of the European Union*, p. 320.

[43] Ibid., p. 322.

[44]Ibid., p. 321.

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[46] N. Nugent, *The Government and Politics of the European Union*, p. 321.

[47] M. Angelova et al, 'How Robust are Compliance Findings? A Research Synthesis',*Journal of European Public Policy* 19, 8 (2012), p. 1276.

[48] N. Nugent, *The Government and Politics of the European Union*, p. 322.

[49] M. Angelova et al, 'How Robust are Compliance Findings? A Research Synthesis', p. 1278.

[50] Ibid.

[51] Ibid., pp. 1274

[52] N. Nugent, *The government and politics of the European Union*, pp. 321

[53] J. Peterson, 'The EU: Pooled sovereignty, divided accountability', pp. 577

[54] Ibid., pp. 561

[55] Defined as 'improper or dishonest behaviour leading to the use of EU resources for unforeseen or unintended purposes, whether or not the behaviour is legal'. Ibid.

[56] N. Nugent, *The government and politics of the European Union*, pp. 321

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[58] Ibid.

[59] N. Nugent, *The Government and Politics of the European Union*, p. 321.

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[61]G. Falkner, 'Is the EU Losing its Credibility?', p. 23.

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[66] N. Nugent, *The Government and Politics of the European Union*, p. 297.

[67] J. Zielonka, 'Plurilateral Governance in the Enlarged EU', p. 198; N. Nugent,*The Government and Politics of the European Union*, p. 260.

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[69] J. Zielonka, 'Plurilateral Governance in the Enlarged EU', p. 195.

[70] Ibid., p. 192.

[71] Ibid.

[72] Ibid., p. 197.

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