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**European Rules as ‘The Law of the Land’? Towards
Optimalisation of EU Member State Compliance**

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ABSTRACT

This paper deals with Member State compliance with the rules stemming from the European Union. It outlines possible routes towards optimisation, and explores how current structures and practises may be transformed and adapted so as to arrive at a situation where a maximal effectiveness of European norms is ensured. It first clarifies key notions such as compliance, non-compliance and effectiveness, highlights the various actors involved, and reflects on the current knowns and unknowns in this field of research. Subsequently, in discussing various optimisation strategies, it shuns the outmoded 'unitary actor'-approach, but differentiates between the various layers of public authority within Member States: legislative offices, executive and administrative bodies, the judiciary. Special attention is devoted to two specific topics: 1) a novel Dutch legal framework that strengthens the control of the centralised government over subnational actors, and 2) private enforcement as a means to stimulate greater observance of EU norms. Lastly, in the final paragraph, a number of limitations and negative ramifications of the dominant vision on the duties of Member States are pointed out, and a case is made for a small but subtle paradigmatic shift. The ultimate contention of this paper is that, if EU rules are one day truly to be considered as 'the law of the land' in each and every Member State, there should remain sufficient room for 'diversity in unity' as to how these rules are being applied, and equally, for a broad representation of the interests of the many, instead of just the subjective interests of the few.

KEYWORDS

Compliance; European Union law; Implementation; European integration; Europeanisation; Optimisation

INTRODUCTION

For many lawyers, politicians and policy officials in the European Union, it has always remained a glorious pipe dream to achieve and maintain a maximal effectiveness of all the rules adopted. In accordance with United States' constitutional terminology, this would denote a situation in which the laws and principles originating from the EU are no longer considered foreign and external to the national legal systems, but are regarded everywhere as part of 'the law of the land'. Such a situation, in which Member State compliance is both optimal and natural, has remained a desideratum up to the present day, however utopian it may have seemed from the outset. In the meanwhile, an abundant literature on compliance has been steadily amassing. Especially in the past decade, scholars have been hyperactive in researching, proving and disproving the relevance of numerous parameters

believed or alleged to influence Member State practises, implementation strategies, and the success ratio of various types of EU rules (for overviews, see Mastenbroek 2005; Sverdrup 2007; Treib 2008). Yet, studies on the general prerequisites and facilitating factors for successful compliance *in abstracto* have so far not been conducted. Moreover, the research up until now has had but two main focal points, namely 1) the transposition, implementation and execution of EU rules (treaty provisions, directives etc.), and 2) the practise of national and European administrative bodies, such as the Commission and governmental departments, decentralised offices and (quasi-)autonomous entities. By consequence, the literature at present is replete with black holes on at least two counts: first, as regards studies on the actual enforcement of EU rules, the application thereof 'on the ground', in everyday reality – despite recent calls to broaden our view and incorporate this dimension in future research (e.g. Treib 2008: 18-19; but see Versluis 2007). Second, too little is known about the conduct of the judiciary, i.e. the state of compliance with EU rules by judicial bodies, the third and supposedly 'least dangerous branch' of government (Bickel 1962). The latter gap may be due to the fact that legal scholars, after a relatively strong presence at the birth of this field of research (e.g. Krislov et. al. 1986; Snyder 1993; Weiler 1994) appear to have withdrawn in the mid-1990s, and chiefly left the debate to political scientist and students of public administration.

The present article, written from a lawyer's perspective, is a first attempt at overcoming the current dearth: by taking a comprehensive view on what constitutes a member state, encompassing all three governmental powers (legislative, executive, judicial), and also, by considering compliance as both process and output, from the adoption of the rules concerned, up to and including their factual application and enforcement. Nonetheless, the author considers as the main void to be filled an outlining of the route towards optimisation, leaving empirical issues aside for now, and bypassing the (unresolved as ever) debate on what the decisive factor(s) might be that trigger, tempt or induce Member State authorities to comply. This approach is, to a great extent, predicated upon the author's conviction that it may well be impossible to locate the 'holy grail' and conclude that particular debate once and for all, at least on short notice. Said 'grail' might not even exist at all: for all we know now, compliance may well come down to an inchoate multitude of factors, factors which are so random and so reliant on time, space and context that it is impossible to make sound inferences valid for all other situations. This supposition is strengthened by the fact that the accession of new EU members in 2004 and 2007, rather than bringing us closer to uncovering the true and universal parameters at play, has shed less light than was originally hoped for, as evident from the clashing assertions in the recently published research concentrated on the performance of the EU-10 and EU-2 (contrast e.g. Sedelmeier 2006 and Toshkov 2008 on the one hand with Falkner & Treib 2008 on the other).

In what follows, we shall first clarify a number of terminological and methodological issues, inter alia the notion of effectiveness, the constitutive elements of compliance, the EU rules and instruments concerned, and the various actors at play. Next, we shall discuss the main sticking points encountered in earlier scholarship on compliance, and canvass the present knowns and unknowns in the field. Hereafter, we will look at the avenues and opportunities for optimisation, addressing the main layers of authority and various branches of government in the Member States in successive order. The outmoded unitary actor approach, though still adhered to by some theorists of European integration, is thus deliberately left aside. For our purposes, it is decidedly unhelpful at any rate to regard Member States as monolithic structures, and cling to the highly fictitious idea that they possess a single drive and mindset.

During our exploration of the possibilities for optimisation, several improvements and modifications will be suggested. Hereby, two specific topics will receive separate attention, namely a new Dutch legal framework aimed at ensuring compliance with European law by decentralised public bodies, and also, the highly topical issue of private enforcement of EU law. In the final paragraph of this paper, some limitations and negative aspects of the pursuit of optimal compliance will be sketched. Particularly, the dominant approach in the EU as regards ensuring full effectiveness will be critiqued, arguing that this approach may have many more detrimental and counterproductive effects than is commonly acknowledged.

BOOTING UP: SOME TERMINOLOGICAL AND METHODOLOGICAL ISSUES

Effectiveness

What is meant by the term 'effectiveness' with regard to legal rules? The celebrated scholar Francis Snyder has taken it to mean the fact that 'law matters', that 'it has effects on political, economic and social life outside the law, apart from simply the elaboration of legal doctrine' (Snyder 1990:3). In the 'real world' under consideration here, that of the European Union, we may distinguish between several types of effectiveness, such as the enactment of EU policy into legislation by the European institutions, the execution of EU regulations by the Member States, the transposition of EU directives into domestic law; recourse to litigation in national courts on the basis of EU rules, or the use of EU law by economic undertakings, other organisations and individuals, in the sense, following Max Weber, that they orient their behaviour in relation to European law (cf. Rheinstein 1966:3-5). As such, effectiveness is an issue of public policy, but it is an issue which is certainly not unique to the EU and common to most contemporary states. A

main cause of ineffectiveness is generally found to be the tension (perennial, but only properly acknowledged in the modern age) between centralised steering and decentralised action (see e.g. Teubner 1983; Handler 1986). In the EU, this tension was thought to be mitigated by the principle of 'institutional autonomy', entailing that European law is principally applied and enforced through national regulatory frameworks, with only a residual role for supranational supervision, monitoring and control mechanisms. Thus, in the system of shared administration that characterises the integrated European legal order, the primary responsibility for law observance lies with the Member States themselves (Jans et al. 2007:200; see also Rideau 1985:864; Treib 2008:5). In this respect, the European multi-level system resembles the German system of co-operative federalism, in which federal legislation is carried out by the administrations of the *Länder*, much more than the US model of dual federalism, where each level has its own bureaucracy to put the respective laws into practice (Scharpf 1988). This absence of a strictly hierarchical, command-and-control type of relationship is thought to be beneficial to the EU rules' effects on political, economic and social life, as in the application of these rules, a considerable amount of flexibility is retained. Simultaneously, this does place a greater strain on a member state's scarce resources, which are distributed unequally across the EU, and often even unequally distributed within a single country (Shapiro 2004:255-7).

Compliance

The concept of 'compliance' is closely related to the notion of effectiveness, and denotes a state of conformity or identity between an actor's behaviour and a specified rule (Raustiala and Slaughter 2002: 539). Thus, the compliance perspective also starts from a given norm and asks whether the addressees thereof actually conform to it (Treib 2008:4). Compliance aims at achieving effectiveness. Effectiveness may however also exist without compliance proper, for example, if a practice already happens to be in conformity with what a norm requires.

The general rule on compliance in EU law is that a Member State is accountable for any deficiency or negligence, at whatever level of government it may lay. Thus, it may not plead its internal, decentralised or functional devolution of power so as to escape the obligations incumbent upon it with regard to the application and enforcement of European norms and instruments (EU Treaty: Article 4; ECJ, *Konle v Österreich*, 1999, and *Commission v Italy*, 2002, amongst others). Under limited circumstances however, non-compliance may be tolerated: in those rare situations in which there exists an 'absolute impossibility' to meet the goals of the European rule concerned, in particular due to technical reasons (ECJ: *Blackpool*, 1993), when the European rules themselves allow for derogations (e.g. Directive 91/689, article 7: "In cases of emergency or grave danger, Member States

shall take all necessary steps, including, where appropriate, temporary derogations from this Directive, to ensure that hazardous waste is so dealt with as not to constitute a threat to the population or the environment”), or when non-compliance can be justified on exceptional grounds corresponding to a general interest that is superior to the general interest represented by the European rule (ECJ: *Leybucht*, 1989).

Non-compliance

Compliance constitutes a major challenge to Member States. The fact that they are bound to transpose directives entails that they may not fail to enact the transposing legislation, neither transpose a directive inadequately, partially or untimely. On the other hand, uniform application requires some real dedication from national administrations, courts and potential litigators, and can be hampered or facilitated by parameters inherent to the particular political system or culture. Thus, non-compliance can occur all too easily, and takes various forms. Krislov et al. identified numerous different manifestations, including lack of implementation, lack of application, lack of enforcement, pre- and post-litigation non-compliance, defiance and evasion (Krislov et al. 1986:61 ff.). Their taxonomy is however rather murky, and their distinction between the various types is far from clear-cut. It would seem more useful to focus on the various stages following the adoption of a (new) European rule, wherewith the myriad of possibilities for failure and deficiency may emerge to the fullest extent.

What may be dubbed the ‘implementation trajectory’ can be broken down into four phases (Jans et al. 1999:32 ff.): transposition (obligatory in case of EU directives, illegal as regards EU regulations and decisions); operationalisation (the designation of competent authorities and entrusting these with the execution, application and enforcement); application (putting the new rules in practise, outlining and/or updating possible internal policy guidelines); and finally, enforcement (monitoring transgressions and sanctioning transgressors). In each of these stages, the conduct of the responsible authority can be tardy, incomplete, or partially or wholly incorrect. Non-compliance by national courts can take the specific forms of delay, evasion or (partial) non-application of rules and precedents. Volcansek has brought further refinement to the latter analysis by distinguishing accidental malpractice from more deliberate defiance (Volcansek 1986:8-9).

Actors

As indicated already above, an equally wide-ranging list could be drawn up of all actors involved in the successfully completion of the implementation trajectory in a given Member State. Nonetheless, the most relevant players at differing levels of public authority have come to be well established.

Scurrying through the classic branches of government, it concerns the legislature, the executive and the judiciary. Typically though, legislative, executive and administrative offices and bodies may be found at more than one layer (especially in federal states) and subdivided further into central and decentralised ones. Effectiveness of EU law is then only guaranteed if all of these function within normal parameters, and operate in tandem where necessary. Further below, we shall address these in close succession, exploring existing obstacles and bottlenecks and outlining possible routes towards optimisation.

Rules

Finally, there are the types of rules adopted on the European plane that Member States have to comply with. As touched upon already, EU regulations and decisions 'merely' require execution, application or enforcement, and the same holds true for certain provisions in the European treaties themselves. Directives also demand transposing legislation. All of these rules may be 'directly effective', meaning that they can be invoked before national courts of law, albeit not 'horizontally', i.e. between individuals, where directives are concerned (ECJ: *Marshall*, 1986; *Faccini Dori*, 1994). Yet, only few rules in the treaties enjoy such effect, though there are many certified cases of the (more common) 'vertical' direct effect, i.e. that the provisions may always be relied upon in court against public authorities.

There exists, moreover, the nebulous category of 'soft-law', policy instruments lacking officially binding status, which are employed ever more frequently in the past decade and appear to be incrementally gaining in legal stature (Senden 2004; Senden 2005). Nonetheless, one encounters such great diversity here that no inferences can be made on their general implications and as regards the obligations they impose. The treaties also remain completely silent on the issue.

Lastly, there are the orders and judgments of the EU courts (the European Court of Justice, the General Court, the Civil Service Tribunal) that should be adhered to. Although a system of precedent did not exist originally and officially still does not exist today, ECJ case-law has successfully set an evolution into this direction in motion, and EU courts' pronouncements are nowadays regarded as binding precedents by most national judges (Craig and De Búrca 2008:467-474).

COMPLIANCE: KNOWN AND UNKNOWN

Compliance is officially monitored by the European Commission, which, since 1997, annually draws up Internal Market Scoreboards (e.g. European Commission 2009). It may also investigate and pursue possible situations of non-compliance through the so-called infraction procedure, contained in

Articles 258-260 of the Treaty on the Functioning of the Union (formerly Articles 226-228 of the EC Treaty). It may do so either of its own motion, on the basis of a complaint from individuals, or following information submitted by Member States or Members of the European Parliament. Owing to these monitoring and verification mechanisms, much statistical information on infringements of EU law by Member State has become available, but unfortunately, these overall give only a limited view of the actual state of affairs. Infringements unnoticed by and/or not brought to the attention of the Commission do not appear in the official figures. Furthermore, the Commission enjoys discretion as regards the formal instigation of proceedings, and it may refrain from doing so at any given time. By consequence, as regards the factual state of compliance, the 'unknowns' still appear to greatly outnumber the 'knowns', and the evidence in figures is sketchy at best.

Many theorists on compliance have nonetheless sought recourse to the statistics on infraction procedures and drawn far-reaching conclusions on the basis of official data on non-transposition and subsequent court cases (e.g. Mendrinou 1996; Ciavarini Azzi 2000; Börzel 2001; Tallberg 2002; Beach 2005). More realism is displayed by Falkner et al. (2005:18), who assert that 'Commission statistics (...) only represent the bit of non-compliance the Commission can see and wants to publicise'. Mastenbroek too has rightly criticised the research as revealing only the 'tip of the iceberg' (Mastenbroek 2005:1115), and Treib has estimated that scholars concentrating solely on transposition rates and notification data may be turning a blind eye to some 40 percent of all actual cases of non-compliance (Treib 2008:16). In all, nobody knows the true size of the compliance deficit, and more systematic research on the actual level of non-compliance is to be welcomed (Falkner et al. 2005:18).

Unfortunately, there has yet to emerge a methodological consensus on how compliance can best be measured. Some prefer a qualitative approach, focusing on a small number of directives in a single policy field and studying compliance in a select number of Member States. Others engage in quantitative studies, comparing compliance across countries and policy sectors. The involvement of both too many and too few EU legal instruments hampers the possibility to draw general conclusions – yet, what number of instruments would be 'about right' to focus on is unclear. In all likelihood, cross-sectoral studies are much more helpful than single-sector ones, but each sector is characterised by its own idiosyncrasies, and it remains tricky to pick out those sectors that are truly suitable to be compared. By consequence, theories on compliance developed so far have turned out to be 'sometimes true theories' at most (Falkner et al. 2007), valid for some countries, but certainly not for all. The empirical results do however convincingly show that there are huge inter-country disparities, but that

strong similarities exist nonetheless among (members of) different groups of countries. Falkner and Treib (2008) have distinguished four 'world of compliance': the world of law observance (predominated by a culture of respect for the rule of law), the world of neglect (where such a culture is absent), the world of domestic politics (where political preferences of government parties and other powerful players determine compliance) and the world of dead letters (where obligations are met on paper, but not put into actual practice).

The certainties are thus few and far between. The size of the compliance deficit and the correct methodology with which it could be assessed currently belong to the category of the unknowns. The knowns are that there exists a compliance deficit, and that several patterns of compliance persist among the Member States. Since every legal system is familiar with the gap between the law in the books and the law in action in every legal system, there is no greater cause for concern here than elsewhere: long delays and attempts at shirking the rules are a matter of everyday business (Treib 2008:5). As Snyder asserted, it would be rather more remarkable if, in this respect, the EU would be any different from other legal systems (Snyder 1993:26). This is not to say however that no efforts should be made to minimise the discrepancy, and to tackle those problems and obstacles that are capable of being overcome. This is the focal point of the next section of this paper, where, drawing from previous research, and in an attempt to fill a vexing lacuna in compliance literature, improvements of current structures and practises and specific strategies towards optimisation will be outlined. As announced, in line with earlier suggestions not to overemphasise formal transposition data and statistics and neglect the side of actual application and enforcement, we shall take all stages of the implementation trajectory into account (although through the prism of optimisation and not to investigate empirical claims). Also, as said, one cannot fail to acknowledge that the different stages involve different actors; by studying these at multiple levels, we will move beyond simplistic causal models, highlighting and unravelling the complex web of administrative, institutional and actor-based factors that determine the success of certain EU rules and the lack of success of others' (Falkner et al. 2002; 2004). Finally, also in contrast with earlier research, we shall also incorporate the perspectives of the judiciary, and address the issue of compliance by national courts. It was already recommended more than a decade ago to point out those inadequacies that can at least be partially resolved or closed (Snyder 1993:26). Thereby, one simultaneously sheds light on why these defects exist. For public officials, building on this analysis, it should prove possible to stimulate a further aligning of the various worlds of compliance, in spite of the cultural variables that are specific to a country or group of countries and may justifiably be considered immutable. In so doing, more counterweight would be given to those states profiting from suboptimal

control and enforcement structures on the side of the EU bodies and institutions.

TOWARDS OPTIMALISATION

Legislative Offices

Despite the clear obligations imposed by EU law on any national office not to act contrary to European rules and objectives (EU Treaty: Article 4; ECJ: *Simmenthal*, 1977), from an internal perspective, official law-makers still enjoy a free rein to engage in such transgressions, as long as no clear national rules and principles stand in their way. For this reason, the insertion of so-called 'Europe-clauses' in national constitutions is a practise to be encouraged; for entrenching references to European law in the charter that ranks as the highest piece of legislation in a country, ensures that the possible (in)validity of (proposed) legislation is not just considered in light of domestic practises and provisions. Experiences in Belgium and Italy have demonstrated that whenever the membership of the EU and the incumbent responsibilities are 'constitutionalised', the chances decrease for the future that contravening rules of national laws are adopted (Vandamme 2008; Rossi 2009). Exceptions to this rule do exist, most notably in the Netherlands, a country characterised by an extreme openness to European law, despite the absence of any explicit reference thereto in the Dutch 'grondwet' (basic law) (see e.g. Claes and De Witte 1998). Nonetheless, a solid anchoring of EU tasks and exigencies in national (constitutional) law surely facilitates their being lived up to. The big boon thereof would be that legislative offices are no longer able to ignore them at their discretion; henceforth, such would entail a violation of domestic law (obligations that have been enshrined in the highest law of the land) as well. This also increases a sense of 'co-ownership' of particular norm conflicts, which may spur the drive towards their resolution.

A second important element concerns knowledge distribution and adequate information management. Of course, the individual members of governments and parliaments must remain highly vigilant themselves, but they should be kept abreast of novel EU rules and policies by others as well. The responsibilities and duties of EU bodies in this regard have been enshrined in the European treaties long ago, and the system is further enhanced by the new 'early warning system' that the Lisbon Treaty provides for (see Protocol Nr. 1 'On the Role of National Parliaments in the European Union, and Protocol Nr. 2 'On the Application of the Principles of the Subsidiarity and Proportionality', annexed to the newly consolidated EU Treaties). Preferably then, the awareness among staff officials in national legislative branches of possible European dimensions to the issues to be addressed is at maximum level. This entails first of all that their permanent education and training

include modules on EU law and policy. Special attention for (obtaining) such awareness could also be incorporated in the standard recruitment and human resource policy. Next, the forming and expansion of networks of law-making experts (already existent in some fields, e.g. IMPEL for the environment) is highly desirable, offering a broad forum and direct contacts for exchanging best practises (cf. De Visser 2009). Such initiatives already received the thumbs-up long ago, and the subsequent processes have been described as bureaucratic interpenetration, structural coupling or inter-organisational exchange (Levine and White 1961). Finally, all relevant data resources should be generally accessible and fully kept up-to-date. All pointers, guidelines and benchmarks for (future) national legislation supplied by the various EU institutions, agencies and bodies should thus be immediately disseminated and followed-up upon, which requires permanent vigilance at the departments concerned with drafting, attending and revising legislation. Because of the widespread availability, affordability and sophistication of modern information and communication technologies, there is no excuse anymore for public sector organisations not establishing the necessary internal linkages or ensuring the proper knowledge infrastructure. Some Member States have rushed ahead in impressive fashion, enabling jurists to tap into splendid data resources, provided for by dedicated agencies set up to transmit specific EU law expertise (e.g. 'Europa Decentraal' in the Netherlands, a knowledge and training centre that aims to supply decentralised authorities with know-how).

Executive and Administrative Bodies

Much of what has been said just now in relation to legislative offices can be repeated when it comes to national executive and administrative bodies. Particularly, the quality of the training of civil servants and the range of resources at their disposal is of crucial significance for (improving) the compliance ratio. Likewise, structural transnational cooperation between administrative and executive bodies, both on the horizontal (= between Member States) and the vertical plane (= between Member States and EU authorities), could guarantee that more and more potential infringements of EU law are staved off (Jans et al. 2007:222). In eurospeak, it is common to refer to the term of *parténariat*, partnership, in this context (Snyder 1993:36). Again, many of such linkages are already up and running (e.g. EUROPOL and EUROJUST as networks for police and judicial cooperation, as well as various other EU agencies dealing with e.g. food safety, trademarks and designs, transport, chemicals and fundamental rights). Dialogues with Member States are undertaken in the preparation of transposing legislation, and 'sectoral' or 'package meetings' also occur regularly, scheduled encounters between Commission and national officials to review progress in

the application of directives and other secondary law instruments. Reciprocal staff exchanges also take place.

In the executive and administrative domain, quite a lot then has already been achieved. We have witnessed the creation of special bodies dealing with EU issues, and of special sections within existing departments. Thus, for example in the United Kingdom, trusted quantities such as the Ministry for Agriculture and Fisheries, the Department of Customs and Excise and of Trade and Industry underwent spectacular transformations already in the mid-1970s (Bender 1991:13). Other illustrious precedents, extremely instructive for the newly acceded EU Member States, are the *secretariat general du comité interministériel pour les questions de co-opération économique européenne* in France (see Meny 1988:285-294; in 2005, it was finally transformed into the *secrétariat général des affaires européennes*) and the *dipartimento per il coordinamento delle politiche comunitarie* in Italy (see Chiti 1989:90). Much however remains to be done, even in the 'old' EU-15. Especially for federal or decentralised Member States, the prior suggestions could yet prove inadequate, and not even a rock-solid entrenchment of EU commitments in the basic law may suffice there to optimise the daily dealings of a plethora of executive and administrative bodies at the various levels of government. Arguably, following an old Dutch maxim that 'it is good to trust a person, but better to keep him under close control', the installation of a more rigid legal framework would produce better results still. This is at least the choice that has been made recently in the Netherlands' decentralised system of governance, with the launch of the 'wet NERpe'.

- **Leading by Example: The Dutch NERpe**

Translated into English, the Dutch abbreviation 'NERpe' stands for 'compliance with European rules by public entities' (Naleving Europese regels door publieke entiteiten). The proposed law, expected to enter into force in early 2010, has to be read to the background of the rather dire Dutch compliance record, as well as the imminent challenges presented by the (in)famous Services Directive of the EU (see e.g. Barnard 2008; De Waele 2009). The objective of the NERpe is to strengthen the hold of the central authorities in The Hague over all other public sector actors that are involved, at any stage, in the implementation trajectory of European rules. In case of deficiencies, whether deliberate or inadvertent, it provides for a capacious tool-box that enables a swift (though fairly authoritarian) form of resolution. The general practise will be that a cabinet minister, sometimes after conferral with one of his equals at a different department, issues a binding instruction to the public entity concerned when it does not live up to its EU law obligations, or when it does so untimely. The entity concerned may explain itself and give its views on the matter, but if it fails to convince and the

instruction is still not complied with within the time-limit specified, the required remedy shall be put in place immediately on the order of the central government (Articles 2 and 5).

The NERpe was designed with a special view to the sectors of state aid and public procurement, where substantial financial interests are involved, and the Dutch record is rather unimpressive, to say the least (Telgen 2004). Member States will, as explained above, be continually held accountable for any mishaps nonetheless, even if attributable to quasi-autonomous governmental bodies. The NERpe will however fulfil a particularly important role in guaranteeing the proper observance of the Services Directive. This EU instrument, which was to be fully implemented by the end of 2009, requires that the entire public sector of a Member State verify whether existing, new or modified national rules are in accordance with the provisions of the Directive, and send notifications thereof to the European Commission. The bureaucratic impact of this Herculean exercise has opened up the floor for manifold violations of European rules, even if purely accidental, on an unprecedented scale (cf. De Waele 2009). The NERpe law may thus be interpreted as the latest of 'damage-control' mechanisms.

The severe impact of direct intervention, subordinating the entity concerned to a higher command, irrespective of competences specifically attributed to it, entails though that it be employed with extreme caution. The law also rules out interference with court practise and correction errors of judges, which appears more than sensible in light of the age-old principle of the separation of powers.

As remarked before, all EU Member States should have the instruments at their disposal that guarantee a situation optimal compliance. The Netherlands already possesses a generic legal framework for supervision and control in inter alia the municipal and provincial law (the 'Gemeentewet' and the 'Provinciewet'), but the NERpe offers an ultimate and extremely powerful means. It could, and perhaps should, be emulated by other Member States. Belgium and Germany already have similar systems in place. In France however, the competences of decentralised authorities have expanded greatly since the 1980s, yet they are merely obliged to inform the central government of important decisions, and there exist only specialised and fairly weak control mechanisms in case of omissions or gross negligence. The same goes *mutatis mutandis* for Spain, and for the United Kingdom in the post-devolution era. For these and other countries, it is contended that it would be worthwhile to take a pit-stop on the road towards optimisation, and take a closer look at the merits of the Dutch NERpe.

The Judiciary

As clear as day, to get any closer to a situation of full compliance, the importance of efficient and well co-ordinated administrations can hardly be underestimated (Treib 2008:11). What goes for policy officials and civil servants in the other branches of government, equally holds true then for courts: the awareness among magistrates and legal practitioners of the EU dimension of their work should be maximized (Biondi 2009:225; Prechal 2006:431). The European Parliament has recently called for 'a systematic incorporation of an EU component into the training for, and examinations to enter the judicial professions'; for a 'further strengthening of that component from the earliest possible stage onwards, with an increased focus on practical aspects', and for that component to 'cover methods of interpretation and legal principles which may be unknown to the domestic legal order, but which play an important role in Community law' (European Parliament 2008; see also Working Group 2008:7). Similarly, Prechal has argued for a revision of the place of that subject area in existing law degree programmes (Prechal 2006:433-434). Swifter and easier to achieve would seem to be a greater dissemination of European law knowledge to those in the field. Of course, they may equally profit from the resources and linkages already referred to above (e.g. services that EUROPOL may render, dedicated agencies like 'Europa Decentraal' in the Netherlands, organisations such as the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union and the Network of Presidents of Supreme Courts). Attention should also be drawn to the Dutch 'Eurinfra'-project, which has resulted in the appointment of resident experts on EU law in all national courts, and an expansion and permanent sedimentation of the necessary resources (Winter 2006; see also Prechal et al. 2005). However, the EU Courts themselves could contribute here as well by drafting US-style 'restatements' of their case-law (complimentary publications that outline the 'state of the art' on a particular topic), preferably handing new versions out on a regular basis.

For the uniform interpretation and effective application of EU law, the pursuit of a continual inter-judicial dialogue between national magistrates would most likely have a favourable impact (cf. Benvenuti & Downs 2009:65-71). Domestic courts are however also expected to cooperate with their EU counterparts, especially through the so-called preliminary references mechanism (Treaty on the Functioning of the EU: Article 267). In the early 1980s however, the EU courts have taken a huge leap of faith, by allowing national courts to resolve disputes on their own without asking for guidance in Luxembourg, as long as the issue is 'manifestly clear' or if the EU courts themselves have already ruled on the issue in a similar case (ECJ: *CILFIT*, 1981).

It is contended here that national courts would be increasingly good at enforcing Member State compliance if even greater trust was placed in them,

which would imply further relaxation of the so-called 'CILFIT-criteria', and greater reticence from the side of the Commission as regards initiating infringement proceedings for deviant court behaviour (cf. ECJ, *Commission v Italy*, 2004; *Commission v Spain*, 2009). For arguably, the latter only breeds opposition, and upsets the balance of power in Member States: since the main branches of government cannot freely correct the judiciary, due to the sacrosanct principle of judicial independence, holding these branches liable for judicial acts nonetheless delivers a 'shock to the system' which may result in increased resistance, hostility and non-compliance. The former suggestion, a relaxation of the so-called CILFIT criteria, is nowadays advocated by multiple authors (e.g. Broberg 2008:1390; see also Working Group 2008). This would mean that national courts would be entitled to make even fewer references and only when strictly necessary, thus reducing delay in national court procedures (ordinarily, the preliminary reference procedure takes more than a year before the national court will receive an answer from Luxembourg: see ECJ, Annual Report 2008). In addition, if they then would be able to propose answers themselves to the ECJ when making a reference, the whole process could be considerably sped-up as well (Working Group 2008:7). Of course, this would equally pose the risk of greater non-compliance, rather than the converse situation. Lessons may well be drawn here from Sweden, where stronger motivation requirements were introduced for judges attempting to resolve EU law disputes without making a reference to the European courts (cf. Broberg 2008:1395). In similar vein, it is perhaps already time to ditch the *Köbler*-doctrine – though still in its infancy – through which litigants can hold EU Member States liable for any judicial errors related to questions of EU law (ECJ: *Köbler*, 2004). This newly created remedy could be welcomed for strengthening court compliance, but may equally cause further court-clogging at both national and European courts (Wattel 2004:186). If nevertheless retained, there is good reason to demand that the ECJ itself render judgments that are clear, understandable, convincing and solidly argued. The *Köbler* judgment fails to live up to that standard (Wattel 2004:178-182), and the general trend, sadly, appears to be one of decline (Bobek 2008:1639-1640).

- **Private Enforcement: A Questionable Route?**

Over the past years, the European Commission has presented itself as a zealous proponent of private enforcement of EU legal norms, especially as regards the rules of competition law (European Commission 2005; 2008). National competition authorities can impose penalty payments and (administrative) fines on undertakings violating the competition rules, yet actions for damages brought by private parties before national civil courts are alleged to be just as effective. It is estimated that increased litigation in national courts by individual consumers and undertakings even ensures a

better observance of the rules concerned, diminishing the enforcement burden for public authorities. This tactic has been gradually facilitated by the EU Courts, starting in the early 1990s, by enabling private actors to sue negligent Member States for financial compensation (ECJ: *Francovich*, *Brasserie du Pêcheur*), progressively moving on in the next ten years, galvanising inter-party litigation (ECJ: *Courage v Crehan*, 2001; *Muñoz*, 2002; *Manfredi*, 2006). Here too, of course, success will depend heavily on the aptitude, training and vigilance of national judges.

A slight hesitancy is however cropping up here, and not wholly unjustifiably. For indeed, if all those negatively affected by non-compliance of others would more quickly take matters into their own hands, compliance would increase, and public enforcement could indeed become largely redundant. This would however reinforce a 'litigation culture' in the EU similar to that in the US, setting an unfamiliar, sparking a more distrustful sentiment in European society. In addition, it should not be forgotten that it is lawyers who benefit mostly from an increase in court cases, whereas after lengthy and costly litigation, client satisfaction is far from assured (cf. Wigger and Nölke 2007). Also, a greater stimulus of private enforcement would result in higher administrative and logistical burdens for the judiciary, which can probably not be easily shouldered in all Member States without extra expenditure. Finally, across the board, a further harmonisation of national procedural law is likely to prove an exigency, leading to a further erosion of Member State autonomy in this particular field (cf. Jans et al. 2007:369-370).

These pitfalls are both real and substantial. Private parties could then in many other ways be induced to live up to EU principles more fully. Targeted communication strategies and specific financial incentives (from the European or national level) may, for instance, stimulate voluntary and more spontaneous observance of the rules in force. After an elaborate and concentrated (inherently moral, though not necessarily moralistic) appeal, transgressors may become more fully aware of the added value for their own conduct of business of full rule observance by others. The Kantian moral imperative could then kick in, bringing us closer to the utopian world of optimal compliance at a much more rapid pace. Thus, though private enforcement holds great promise, there appear to be more serene ways towards attaining the goals pursued.

BUT HAS THE EU GOT IT RIGHT?

The latter points already shed doubts on some of the overall EU objectives. Even when those concerned would fully commit themselves to all the strategies outlined above, leading eventually to a world of more perfect

Member State compliance, three major limitations and potentially harmful ramifications of said strategies must ultimately not be overlooked.

Firstly, even if Member States are to go ‘all the way’, a great responsibility continues to lie with EU bodies and agencies as well, and for several years already, the quality of EU governance and legislation has been a subject of hefty debate. When then the rule-making output of the European branches of government is of itself substandard, and when their record is not without fault as regards communicating efficiently and offering full and proper guidance to their national counterparts, the latter surely cannot be held accountable automatically for the occurrence of any non-compliant practises. As indicated, the Commission already stages so-called ‘package meetings’ with domestic civil servants, where the latter are given room to evaluate on EU rules and comment on their practical applicability, but this amounts at most to curing the symptoms, not the underlying ailments. It is thus essential to come up with clear, well-churned, meticulously drafted EU legislation that links in smoothly with national rules and policies. Despite the recent disproving of the so-called ‘goodness of fit’-hypothesis, which claimed that the successful implementation of European rules is largely determined by pre-existent national laws and attitudes towards EU integration (see Knill and Lenschow 1998; Haverland 2000; Falkner et al. 2005), this does not entail that the quality and acceptability of those rules is completely irrelevant, and it remains advisable to seize each and every opportunity for enhancement in this regard. A similar responsibility falls to dedicated EU agencies and bodies: the more their daily running of business is in shipshape order, the more Member State officials could profit from it. Moreover, a lack of monitoring and surveillance increases the possibilities for abuse, rendering it ever more crucial that an entity like OLAF (*Office de la lutte anti-fraude*, the Brussels-based anti-fraud watchdog of the EU) performs in accordance with ordinary working parameters (cf. Spiteri 2004). In some areas, EU intervention goes somewhat further, requiring the Member States themselves to set up specialised enforcement agencies. This has been the case in the most fraud-ridden sectors, for example in the olive oil and tobacco industry (see further Jans et al. 2005:221-222). These agencies are in fact testimony of a nearly perfect middle-way approach: though they operate as such under national control, their duties and organisation are largely spelled out by the EU.

A second point to consider here, limiting the purport of what has been remarked so far, is that a situation of *full* Member State compliance is perhaps of itself an intrinsically misguided objective. Unsettling as this may seem, there is ample evidence to suggest that a demand of faithful and integral rule observance easily turns out to be counterproductive, and actually strengthens latent inclinations for non-compliant behaviour. The well-known Dutch approach of ‘gedogen’ is a case in point. ‘Gedogen’ denotes

deliberate inaction from the side of public authorities vis-à-vis norm violations, rooted in the idea that certain situations and practises can be better regulated and contained through a non-repressive approach. The typical Netherlands example concerns the national drug policy, which differentiates in the applicable sanction and enforcement system between hard and soft drugs, as well as between the trade, sale, production and consumption phases thereof. Generally, the sale and consumption of limited amounts of soft drugs is condoned, freeing up resources to combat mass-sale and production. International and comparative health surveys have through the years underscored the success of 'gedogen': the figures display a highly favourable record of the Netherlands concerning addiction and drug abuse, the crime rate is comparatively lower, and the legalisation of specific forms of trade and consumption has allowed for a concentration of limited government means (see EMCDDA 2009).

As seen above, in EU law however, non-compliance may only be tolerated in extremely limited circumstances (see also, recently, ECJ, *Commission v Netherlands*, 2009). The strong emphasis on effectiveness of European rules at almost any cost appears to leave little room for condoning certain forms of non-compliance. In addition, a gradual shift can be observed in recent years, where the EU institutions have started to move beyond the promotion of administrative sanctions at rule violations, but are moving closer and closer towards obliging a purely punitive approach (ECJ, *Commission v Greece*, 1988; *Germany v Commission*, 1994; *Commission v Council*, 2005; *Commission v Council*, 2007). Among scholars, this relentless EU intrusion into the domain of national criminal law has raised many an eyebrow. Punitive sanctions are nowadays considered 'sexy' in Brussels offices, but the true added value for the sought-after effectiveness of European law is rather dubious (see Buruma and Somsen 2001; Faure and Heine 2005). The time might be rife for a step back, and for a more open admission of Member States' ability to judge the approach they themselves deem the 'best fit'. Hackneyed as such an appeal may seem, a subtle paradigmatic shift is called for here, partly inspired by the principle of subsidiarity, from the remorseless command-and-control perspective towards more cooperative reining and steering methods.

Lastly, even when the outlined strategies are implemented in full, taking the strict perspective wherein full adherence to the rules in force always equals a situation of optimal compliance, there remains cause for caution on other grounds, when engaging in structural reform. Especially to the countries that recently acceded to the Union, the limitations of the official EU vision on Member States' duties and responsibilities have become poignantly clear. The soft stimulus, most manifest during the accession process, towards the creation of greater *vertical* linkages between European and national actors,

as outlined above, are generally to be welcomed. Besides, the emergence of a true culture of dialogue would go a long way in quelling the democratic deficit and the uncanny sense of distance still experienced by the governed. Considerable care should be taken here to allow for a broad representation of interests, not limited to those subjective interests expressed by governments, or by the most powerful undertakings and organisations (Streeck and Schmitter 1991:133 ff.) What is more, establishing greater *horizontal* linkages within a single Member State, and also among Member States, so as to streamline the information flows relating to EU rules and practises, instigating cross-cutting dialogues, and becoming accustomed to structural dialogues with Brussels-based officials, can give rise to a disturbing condition of myopia: for legislative offices, executive and administrative bodies, as well as the judiciary, will more often than not press for their own agenda, and seek to adjust to the new reality without sacrificing too much of their bureaucratic autonomy. Thus, they will attempt to use, mould and bend the rules in their own favour, supposedly for the benefit of EU effectiveness, but in truth slightly more to the detriment of their national seniors; after all, from the moment one is forced to serve two masters, instead of the previous one, it becomes easier and more tempting to deceive both, and finally have one's own cake and eat it too. More than forty years ago, one scholar already warned of the danger that technical ministries and services will grow rampantly and become the dominant actors, along with their EU counterparts, in the direction and management of major parts of society, if not the entire economy (Scheinman 1966:769). Once they realise the novel potential here, matters will be all too anxious to present particular (political) choices of their own as inevitable, or if more convenient, as ideologically neutral at most. Simultaneously, once a dossier is presented as containing a European dimension, this may serve as a magician's wand to e.g. unlock previously unavailable funds, or set aside legitimate concerns, compelling politicians and citizens into directions that were in fact not tyrannically superimposed on the supranational plane at all (cf. Putnam 1988). In sum, the increasing interpenetration of the EU and national levels of governmental authority risks accentuating an already great orientation towards bureaucratic means of policy-making, encouraging cultures and techniques of problem-solving that escape public scrutiny, and to a growing extent, serve the interests of anonymous and unaccountable civil servants only. Thus, though it is foolish to object to multi-level governance and the stale mantra of interlinked policy and communication networks, the interdependence of domestic and European actors ought not to function as a *va banque* type motto: tried and tested national approaches are to be kept and refined, not pre-emptively abandoned; equally, sub-national actors and civil servants should not suddenly be permitted a free reign.

On the road towards optimisation of Member State compliance with EU laws and policies, it is the ultimate contention of this paper, varying on the Union's own creed, that there should remain sufficient room for 'diversity in unity' as to how rules are being applied; and that the interests of the many should be broadly represented, instead of the subjective and (dangerously parochial) ones of the few. Thus, on relatively short notice, Europe may stand on a par with the United States – which, after all, adheres to the idea of 'E Pluribus Unum' itself. The rules created on the lofty European stratum may then in each and every Member State be regarded as something that is profoundly native – as 'law of the land'.

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