"The Achilles Heel of European Regulation"
The Commission’s Neglect of Enforcement

Esther Versluis

Esther Versluis
Maastricht University
European Studies
PO Box 616
6200 MD Maastricht
The Netherlands

e.versluis@philosophy.unimaas.nl
T + 31 43 3882558; F + 31 43 3884869
Abstract

The European Commission – as the ‘guardian of the Treaties’ – is responsible for monitoring the implementation of Community law. Does the Commission satisfactorily execute this task? This paper argues that it does so only to a certain extent. The extent to which the Commission actually has an impact on policy implementation within the member states is analyzed by the case studies of two specific EU directives: the Seveso II and Safety Data Sheets Directives. These cases show that whereas the Commission does have some impact on the ‘transposition’ of EU directives into domestic law, the impact on the ‘enforcement’ of EU rules is to be neglected. The enforcement of its legislation is a black box for the Commission. The paper concludes with an exploration of possible modus operandi for ‘international organizations’ to enlarge their impact on implementation.
“The Achilles Heel of European Regulation”

The Commission’s Neglect of Enforcement

1. Introduction

Attention by the European Commission for the implementation of Community law at national level is increasing the last decade. Especially the White Paper on ‘European Governance’ enhanced the debate on the implementation of European legislation (COM(2001) 428). According to this White Paper, more attention should be paid to the effective implementation of Community law: ‘Ultimately the impact of European Union rules depends on the willingness and capacity of Member State authorities to ensure that they are transposed and enforced effectively, fully and on time. Late transposition, bad transposition and weak enforcement all contribute to the public impression of a Union which is not delivering’ (COM(2001) 428: 25). To follow up on this White Paper, the Commission adopted the Communication ‘Better Monitoring of the Application of Community Law’ (COM(2002) 725), in which it sets out various actions to improve this monitoring of the implementation. Attention for this topic is necessary because of a presumed ‘implementation gap’ and one of the reasons why the Commission shows such an increased attention for this topic is the enlargement. As the environmental Commissioner Wallström argues, the improvement of the implementation gap is ‘particularly important in view of the enlargement in order to ensure that new Member States transpose and implement correctly the “acquis communautaire” within the agreed timeframes’ (SEC(2003) 804: 2). Especially the East and Central European countries show a less stable environment for rule application and policy implementation (Bunce, 2000: 128). Not only this reputation of new member states shows a worrying scenario; the implementation activities of the older partners of the Union also make both the Commission and academic literature conclude that the EU has a compliance problem (e.g. Jordan, 1999; Knill, 1997; Medrinou 1996; Tallberg 2002).1

According to Article 10 of the Treaty Establishing the European Community (TEC), the ‘member states shall take all appropriate measures … to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community’. Despite the fact that the member states are thus primary responsible for correct implementation of the Community law, the European Commission – as the ‘guardian of the Treaties’ – has the task to ensure that the member states actually fulfill this function. As stated in Article 211 (TEC),

---

1 Börzel argues, however, that this so-called compliance problem is a ‘statistical artefact’ (Börzel, 2001).
the Commission shall ‘ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied’. The Commission is thus, together with the European Court of Justice, responsible for ensuring the proper implementation of EU law in all countries. The procedure laid down in Article 226 (TEC), the infringement procedure, explicitly gives the Commission the power to take action against member states that fail to fulfill their implementation obligations. If the Commission suspects such a failure, it can start the infringement procedure by sending a formal notice to the member state concerned. If necessary, it can also make use of the second step of a reasoned opinion and it can in extreme cases of non-compliance even bring a member state before the Court of Justice.

Especially since the late 1970s the Commission adopted a more rigorous approach with respect to its function of guardian; the number of infringement proceedings dramatically increased since then (Mendrinou, 1996: 3). Since 1978, the Commission opened more than 15,700 infringement proceedings (Börzel, 2001: 803). With this tougher stance, the Commission is trying to elude its reputation as ‘a pussycat when it comes to enforcement’ (Puchala, 1975: 513). Particularly in the environmental sector – which covers over one third of all infringement cases – the Commission opens a large amount of cases each year. In 2002, the Commission issued 137 reasoned opinions and brought 65 cases against member states before the Court of Justice in this sector alone (SEC(2003) 804: 6). These figures are quite impressive, but does the Commission nowadays satisfactorily execute its task as ‘guardian of the Treaties’? This paper argues that it does so only to a certain extent.

This paper analyzes the extent to which the Commission actually has an impact on policy implementation processes within the member states. This is done by using the examples of case studies of the implementation of two specific EU directives in four member states. These four member states are the Netherlands, Germany, the United Kingdom and Spain. The two directives both deal with the regulation of dangerous substances and are the Seveso II directive (96/82/EEC) and the Safety Data Sheets directive (91/155/EEC). The last section of the paper explores possible modus operandi for the Commission – and other international organizations – to enlarge their impact on policy implementation.

2 The empirical results are drawn from a policy study conducted for my dissertation (Versluis, 2003). The information on the implementation of these two directives in the four member states is mainly obtained via 106 in-depth interviews and 210 questionnaires. Respondents were representing the European Commission, national and regional governments, enforcement agencies, industry associations and chemical companies.
3 OJ No L 10, 14/01/1997, p. 0013-0033
4 OJ L 076, 22/03/1991, p. 0035-0041
2. What is ‘implementation’?

Before considering the impact of the European Commission on policy implementation, it is first necessary to analyze this concept of ‘implementation’. What does this concept refer to, what does it include or exclude? A deeper analysis of the concept shows that different scholars refer to different aspects when talking about implementation. Does one refer to implementation on European level or to implementation on national level? If one refers to implementation on national level, does one refer to the judicial understanding of the word or rather the political scientist’s understanding?

If the word implementation is used in a European context, it can mean two things. First of all it can refer to the powers of the Commission as laid down under Article 202 (TEC) to implement legislation at Community level. This ‘implementation activity’ is commonly referred to as ‘comitology’. According to the Council decision of 28 June 1999 (1999/468/EC), the Commission – under close watch of the European Parliament in case of co-decision – arranges implementation of EU legislation by use of three types of committees composed of member state officials: advisory, management and regulatory committees. These committees advise and control the Commission by evaluating, updating and proposing revisions of implementation measures. Implementation in the understanding of comitology refers to the filling in of details, e.g. prices for categories of products, after the adoption of the general framework by the Council (or Council and Parliament in case of co-decision). It can be claimed that it is unconventional that comitology is often referred to as policy implementation, since it could also be argued that this is still a part of the policy making process (Cini, 2003: 354).

The use of the word implementation on European level can refer to another activity as well, however. The introduction showed that according to Article 10 (TEC) the member states are responsible for implementation of the Community law and that Article 211 (TEC) appoints the Commission as the institution that has to monitor whether the member states actually live up to this expectation. There are a few exceptions to this standard rule. In some areas – e.g. competition, common fisheries policy, and humanitarian aid programs – the Commission has a direct implementation function. In these cases the Commission is directly responsible for setting the rules. In the area of competition, for example, the Commission directly decides what firms can and cannot do; it can for instance prevent mergers from taking place (Cini, 2003: 353). As
stated, this is exceptional. Generally speaking, EU policy is implemented on national level and therefore this article focuses on the role of the Commission in implementation of Community law on the national level.

Even if it is specified that implementation refers to the national level, confusion can still rise. Different types of scholars refer to different activities when addressing the implementation of EU directives in the member states. Often a distinction is made between ‘formal’ or ‘legal’ implementation on the one hand and ‘practical’ or ‘administrative’ implementation on the other hand (e.g. From and Stava, 1993; Mortelmans, 1994; Pridham and Cini, 1994). With formal or legal implementation (judicial interpretation) the transposition of European directives into national legislation is meant; the ‘law in the books’. Practical or administrative implementation (socio-political interpretation) rather refers to the establishment of administrative agencies, the setting up of necessary tools and instruments, the monitoring and the actual enforcement of legislation. This understanding of the word implementation concerns the actual effects and results of legislation; the ‘law in action’.

Instead of causing confusion by using the general concept of implementation, this paper uses the more specified terms ‘transposition’ and ‘enforcement’ in order to make clear what specific activity is referred to. Transposition is understood as the ‘conversion on paper of international commitments to domestic law’ (Haas, 1998: 18). Enforcement refers to ‘the degree to which the relevant authorities seek to ensure compliance and bring those responsible for non-compliance into line’ (Haas, 1998: 18).

---

5 This direct implementation function of the Commission is becoming more and more important, however. In its White Paper on European Governance, the Commission announced that it is thinking of setting up more regulatory agencies in clearly defined areas which ‘will improve the way rules are applied and enforced across the Union’ (COM(2001) 428: 24).

6 Since the directive is the most commonly used policy tool at EU level, this paper focuses on policy implementation from the perspective of directives. According to Article 249 (TEC), a directive is only binding in the result to be achieved and leaves to the national authorities ‘the choice of form and methods’.

7 This understanding of implementation as transposition is not applicable to the other commonly used type of EU legal instrument, the regulation, since this instrument is directly applicable in the member states.

8 This ‘misuse’ of the word implementation can in some cases be found in academic literature. Scholars claim to study the ‘implementation’ of EU directives, but a close look shows that the actual focus of attention is transposition only and not implementation in the broader understanding of the word. Siedentopf and Ziller (1988a and b), for example, claim to describe the entire process of implementation of Community legislation in the member states; both incorporation into national law and administrative application. A closer look at the national reports (1988b), however, shows that most attention is addressed to both the preparatory phase and the phase of legal transposition. A clear description of the actual enforcement is lacking. The same applies to the edited volume by Pappas (1995). The title promises a study of the implementation of Community decisions, yet the analysis of the country studies shows that the main emphasis is on transposition alone. Not only scholars make this ‘mistake’, also documents by the Commission raise confusion. Yearly tables and figures on the application of Community law published by the Secretariat General of the Commission unsatisfactorily carry the name ‘implementation rates’. Whereas the usage of the concept ‘implementation’ implies an overview of a broader spectrum, these tables only refer to the notification of national transposition measures. A close reading of the Communication ‘Better Monitoring of the Application of Community Law’ (COM(2002) 725) shows the same problem. All actions announced to ensure better monitoring focus on the transposition phase only. Even the heading ‘Better enforcement of Community law’ deals with incorrect transposition rather than with enforcement in the sense of practical implementation.
compliance into line’ (Matthews, 1993: 2). The conclusions of this paper will show that when analyzing the impact of the European Commission on policy implementation in the member states, it is necessary to be precise; the impact of the Commission on transposition differs from its impact on enforcement.

3. Case studies: transposition and enforcement in practice

3.1 Transposition

Transposition of the Seveso II Directive

The Seveso II directive concerns the control of major-accident hazards involving dangerous substances. The directive first of all aims to prevent major accidents. In case such accidents do happen, the directive also concentrates on the limitation of the consequences. It aims to protect the environment, employees as well as neighbours of companies handling dangerous substances. The bad implementation of the first Seveso directive actually was one of the triggers for the Commission to pay more attention to implementation. The disappearance of several drums of chemical waste after the major explosion of a chemical plant in Seveso (Italy) in 1976 led the European Parliament to push the Commission for a stronger focus on its monitoring task. Seveso II was adopted on 9 December 1996 and needed to be transposed by the member states on 3 February 1999. A first evaluation at the end of 1999 showed that no single member state transposed the directive on time: the Commission sent a formal notice to 12 member states.\footnote{Only Finland, Belgium and Spain did not receive a letter. Interview in the Civil Protection Unit (Chemical Accident Prevention, Preparedness and Response) of DG Environment of the European Commission, 7 December 1999.}

The ‘20th Annual Report on Monitoring the Application of Community Law (2002)’ (COM(2003) 669) showed that even in 2002, three and a half years after the deadline, not all member states transposed this directive completely. Especially Articles 11 (emergency plans) and 12 (land-use planning) of the directive caused considerable transposition problems. Article 12 is, according to the responsible civil servant at the Commission, ‘without doubt the provision that has caused the biggest problems to all member states, not only in transposition but also in practical application’.

\footnote{See Versluis 2003, chapter 9.3.1 and Annex II.}

\footnote{Interview in the Civil Protection Unit (Chemical Accident Prevention, Preparedness and Response) of DG Environment of the European Commission, 12 February 2004.}
Table 1: Transposition of the Seveso II Directive

<table>
<thead>
<tr>
<th>Member State</th>
<th>Transposition (required date: 3/2/1999)</th>
<th>Infringement procedure started?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>Main decree in force in May 2000, however, it lasted until 2003 before the Länder transposed all their requirements.</td>
<td>Yes, but stopped after transposition by the Länder.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Main decree in force in April 1999, however, it lasted until October 2000 before Northern Ireland and Gibraltar transposed their parts.</td>
<td>Yes, but stopped after transposition by Northern Ireland and Gibraltar.</td>
</tr>
</tbody>
</table>

A more in-depth evaluation of the transposition of this directive in four of the member states shows that the Commission does have a role to play. In three of the four countries the Commission started the infringement procedure. It stimulated the British government to force Gibraltar and Northern Ireland to transpose the directive. The same applied to Germany, where the Länder are directly responsible for the transposition of two elements from the directive. Whereas the federal level completed the transposition of all elements for which it was responsible in May 2000, it lasted until 2003 before all Länder eventually transposed their parts. Recently the Commission started the infringement procedure against the Netherlands because it still did not transpose Article 12. Only in Spain, which completed its transposition in July 1999, the Commission did not undertake any action.

The example of this specific directive shows that transposition can be problematic. Germany and the United Kingdom both experienced problems with respectively the Länder and Gibraltar and Northern Ireland. In both countries, governmental representatives indicated that this is a problematic issue since the central government has no official tools to ‘force’ the sub-national governments to transpose, whereas they are being held responsible in case of non-transposition. According to a representative of the German federal environment ministry it is rather ineffective that the Commission cannot send a formal notice to the Länder that cause the infringement.

---

12 In many cases, Great Britain, Northern Ireland and Gibraltar individually transpose EU legislation.
13 Strangely enough, an interviewee in the Civil Protection Unit (Chemical Accident Prevention, Preparedness and Response) of DG Environment of the European Commission mentioned on 7 December 1999 that the transposition of the Netherlands was complete.
14 This example shows that with respect to transposition, Spain does not automatically live up to the reputation of Southern member states as having a problem of non-compliance, also referred to as the ‘Mediterranean syndrome’ (La Spina and Sciortino, 1993: 219).
15 Interview in the ‘Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit’ on 11 April 2001.
The Safety Data Sheets (SDS) directive regulates the supplying of information in order to be able to work safely with dangerous substances and preparations. This information needs to be delivered to all professional users of dangerous products in the form of a safety data sheet. Such a sheet must contain 16 headings with information concerning, amongst others, ingredients (heading 2), first-aid measures (heading 4) and transport information (heading 14). The directive was adopted on 5 March 1991 and needed to be transposed by the member states on 30 May 1991. The transposition time thus was only less than three months. This is rather unusual, since usually directives allow – and member states require at least – about two years for transposition. According to a representative of the Commission, the period was so short since it was thought that such a technical directive would not cause any problems in the member states, especially seen the aim of the directive of harmonizing already existing systems to make safety data sheets.

Table 2: Transposition of the Safety Data Sheets Directive

<table>
<thead>
<tr>
<th>Member State</th>
<th>Transposition (required date: 30/5/1991)</th>
<th>Infringement procedure started?</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Netherlands</td>
<td>Transposition completed in April 1993.</td>
<td>No</td>
</tr>
<tr>
<td>Germany</td>
<td>Transposition completed in October 1993.</td>
<td>No</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Transposition completed in September 1993.</td>
<td>No</td>
</tr>
<tr>
<td>Spain</td>
<td>Transposition completed in July 1993.</td>
<td>No</td>
</tr>
</tbody>
</table>

Considering the short transposition time, it is not surprising that all member states were about two years late with the transposition. Because of the short period provided by the Commission, it did not start the infringement procedure against any of the member states. Further attention by the Commission for the transposition of the Safety Data Sheets directive was not required since, after this period of two years, all member states introduced national legislation that incorporated the directive. When analyzing the transposition in the four member states studied, the similarities between the domestic legislation used are remarkable. In all cases, the national legislation almost literally uses the wording of the directive. Generally speaking, besides the late incorporation, the transposition of the Safety Data Sheets directive was a rather smooth process that did not require any control by the European Commission.

16 See Versluis 2003, chapter 9.3.2 and Annex III.
17 Interview in the Chemicals Unit of DG Enterprise of the European Commission, 15 June 2000.
3.2 Enforcement

*Enforcement of the Seveso II Directive*\(^18\)

The main activity that inspectors have to undertake when enforcing the Seveso II directive relates to the crux of this legislation: the safety report. In order to demonstrate that they handle their dangerous substances in a safe and sound manner, chemical companies have to write an – about 400 pages long – safety report. Inspectors mainly have to assess this safety report to check whether all appropriate measures to prevent and limit the consequences of major accidents are described. As well, they have to carry out on-site inspections – at least once a year as the directive prescribes in Article 18 – to see to what extent the safety on paper is put into practice in the chemical plants.

The Seveso II directive generally speaking is enforced rather well. All four member states actively enforce this topic in the form of special projects. The United Kingdom appoints the largest inspection teams per company of four to six inspectors. Dutch teams are slightly smaller, but still rather large in comparison to the one or two inspectors involved in Germany and Spain. This gives British and Dutch inspectors the opportunity to inspect more aspects more thoroughly compared to German and Spanish inspectors. Because of the large teams in the Netherlands and especially in the UK, the total number of man-days per inspection in these countries is rather high (15 to 20 days opposed to 1 to 5 days in Germany and Spain). The frequency of inspections is about the same in the four member states, about one to two times per year. This same trend can also be seen with respect to the assessment of the safety report. The total number of man-days per assessment in both the UK and the Netherlands is higher than it is in Germany and Spain where smaller teams carry out the assessment. Dutch and British inspectors in total spend between 20 and 50 man-days per assessment, whereas in Germany and Spain the total number of man-days is not likely to be higher than 20 (Spain) or 30 (Germany). The intensity of the inspections and assessments is higher in the Netherlands and the United Kingdom, but in general all four member states pay considerable attention to the enforcement of the Seveso II directive.

*Role of the European Commission.* On European level, the Seveso II directive receives quite some attention, which influences the enforcement. About two times per year there are special three-day programs in which inspectors who enforce this directive can meet: the ‘Mutual Joint Visit Program’. The primary intent of this program is to encourage and facilitate the exchange of

\(^{18}\) See Versluis 2003, chapter 3.
information on best practices for conducting inspections. Another example that shows the importance the European Commission attaches to this topic is the setting up of the ‘Major Accident Hazards Bureau’ in Ispra in Italy. This bureau has an extensive website on which information can be obtained on all sorts of Seveso-related topics.\(^{19}\) It has the special task of supporting the Commission and the member states in the implementation of the Seveso II directive. For this task it produced many guidance documents on topics such as safety management systems, safety reports, land-use planning, inspections and information to the public.

Even though the Commission does show sufficient interest in the Seveso II directive, further attention for its enforcement is hardly noticeable. The Commission is hardly aware of what member states are actually doing to enforce this topic. Interviews with the relevant Commission officials showed the lack of inside information on the details of enforcement.\(^{20}\) The Commission was not aware of the type and number of enforcement agencies used and especially unaware of the actual practices of inspections and assessments.

\textit{Enforcement of the Safety Data Sheets Directive}\(^{21}\)

In relation to the safety data sheets directive, inspectors need to check whether companies that house dangerous substances and preparations have safety data sheets available for these products. Each sheet needs to use the right (national) language, have 16 headings and show a correct content of these headings. Besides, inspectors have to check whether and to what extent companies regularly update their sheets and whether they comply with the demand to deliver the sheets with every first supply of a product.

Conclusions on the enforcement of the SDS directive are simple and straightforward: it hardly exists. The enforcement of this directive is not high on everyone’s agenda. In none of the countries special ‘SDS-inspectors’ exist who pay full-time attention to this topic. When inspectors do pay attention to safety data sheets, it is only a small amount of their time and inspections will not last longer than a few hours. Most attention to SDS enforcement is paid in the Netherlands. Here, the environmental inspectorate organized annual projects in which the sheets are inspected since 1997 and it is likely that they continue doing so in the nearby future. Dutch inspectors make use of a checklist that guides them through the inspection of the sheets. However, the impact of the annual projects should not be exaggerated; there are only eight to ten inspectors available.

\(^{19}\) http://mahbsrv.jrc.it
\(^{20}\) Interviews in the Civil Protection Unit (Chemical Accident Prevention, Preparedness and Response) of DG Environment of the European Commission on 7 December 1999 and 15 June 2000.
\(^{21}\) See Versluis 2003, chapter 5.
whereas there are thousands of companies that potentially can have sheets. Projects in the other three countries were once only (e.g. Northern Region Project in the UK in 1997 or a project in North-Rhine Westphalia in 1995) and further enforcement is dependent on individual actions of inspectors that are rare.

**Role of the European Commission.** Conclusions on the attention of the Commission for the enforcement of this directive are equally simple and straightforward: there is none. There is one slight exception. From September 1996 to November 1997 all Member States (except Luxembourg) participated in a project to enforce the then latest amendment of the substances directive (92/32/EEC). The project was called ‘SENSE’ (‘Solid Enforcement of Substances in Europe’) and it focused on checking the compliance of chemical companies with their obligations to notify new substances, classify and label chemical substances and produce safety data sheets. All participating countries promised to carry out at least five inspections. In total, 100 companies were visited in the participating countries and 1,905 substances were checked. For 1,252 of these 1,905 substances (66%) a safety data sheets was available. After this project, the Commission did not pay further attention to the topic of safety data sheets. Apart from the results of this project, the Commission has no detailed information on the enforcement of the SDS directive. As was the case in the example of Seveso II, the responsible civil servants at the Commission do not know what happens with the enforcement of ‘their’ directive within the member states.

### 3.3 Results of the case studies

The case studies of the Seveso II and Safety Data Sheets Directives clearly show the need to be precise when using the word implementation. Implementation in its strict judicial understanding shows a completely different outcome compared to implementation in its broader socio-political interpretation.

---

### Table 3: Transposition and enforcement

<table>
<thead>
<tr>
<th></th>
<th>Transposition</th>
<th>Level of enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Seveso II</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Netherlands</td>
<td>partly (1 article left)</td>
<td>good</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>completed</td>
<td>good</td>
</tr>
<tr>
<td>Germany</td>
<td>completed</td>
<td>reasonable</td>
</tr>
<tr>
<td>Spain</td>
<td>completed</td>
<td>reasonable</td>
</tr>
<tr>
<td><strong>Safety data sheets</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Netherlands</td>
<td>completed</td>
<td>meager</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>completed</td>
<td>bad</td>
</tr>
<tr>
<td>Germany</td>
<td>completed</td>
<td>bad</td>
</tr>
<tr>
<td>Spain</td>
<td>completed</td>
<td>bad</td>
</tr>
</tbody>
</table>

The above table shows that of the eight cases in total, the record related to transposition is good. Only in the Netherlands, in case of the Seveso II directive, one article has not yet been transposed. If one would understand the concept ‘implementation’ in its judicial meaning only, the conclusion would be that these two directives are almost perfectly implemented. When taking the practical implementation – the enforcement – into account as well, the results are completely different. Especially the SDS directive shows that implementation on paper does not necessarily imply implementation in practice.

When looking at the role of the Commission in relation to these two specific cases, it seems that the Commission is more concerned with the transposition than with the enforcement of its directives. Only in relation to the transposition of Seveso II problems occur and at least in the United Kingdom and Germany the start of the infringement procedure urged transposition. In the Netherlands the impact of the Commission remains to be seen. Even though the Commission did unfold some activity in relation to Seveso II enforcement, the general picture is that it does not have a clue of what happens with its directives at the ‘street level’. In some cases it is aware of the enforcement agencies involved, but what actually goes on within the member states is a big puzzle; enforcement can genuinely be labeled as a black box for the Commission. Of course these cases only apply to two specific directives, but the results show a rather gloomy picture related to the role of the Commission in enforcement.
4. An analysis of the role of the Commission as the ‘guardian of the Treaties’

What do these two cases imply? What role does the Commission actually play in the transposition and enforcement of its directives? Do the cases of the Seveso II and Safety Data Sheets directives sketch an accurate picture of the impact of the Commission on implementation?

4.1 The Commission's impact on transposition

The case studies show that transposition can be an extremely long and sometimes complicated process, but that in the end the member states do transpose the EU directives into their national legal system. This conclusion can also be found in literature on transposition of Community law. Even though transposition often is late, it does take place in the end: ‘If one can speak of transposition problems at all, they relate to the issue of timing – member states often need longer than the time provided by the Directives (usually two years) to incorporate them into national law’ (Börzel, 2001: 816). The Seveso II case shows that the Commission does start the infringement procedure against member states that are late or incomplete with their transposition. The Commission seems to have an impact on implementation in the meaning of transposition: ‘Non-transposition hence seems to be a temporal phenomenon. This may be a result of the effective enforcement strategy of the European Commission and the Court of Justice, which in most cases ensures compliance in the end’ (Mastenbroek, 2003: 391, see also Tallberg, 2002: 620).

One of the main activities that the Commission undertakes in the exercise of its function as the ‘guardian of the Treaties’ is to publish – for twenty years already – its annual reports on monitoring the application of Community law. When analyzing these yearly reports the same conclusion can be drawn: transposition does take place in the end. These reports seem to show that the Commission actively functions as the ‘guardian of the Treaties’; the tables included in these reports show that the transposition of EU directives does not form a problem at all. The latest numbers of the Commission of 31 December 2003 show an EU average of 98,03% of transposition measures notified, with ‘leader’ Denmark at the top (99,17%) and ‘laggard’ Greece at the bottom of the list (97,13%).

The attention by the Commission for the transposition phase can also be seen when analyzing the infringement proceedings that are started under Article 226 (TEC). According to

Börzel there are five types of infringements for which the Commission can start this procedure (Börzel, 2001: 804-806):

1) Violations of Treaty provisions, regulations and decisions;
2) Non-transposition of directives (i.e. the absence of notification measures);
3) Incorrect legal implementation (i.e. incomplete or incorrect transposition);
4) Improper application of directives;
5) Non-compliance with Court of Justice judgments.

The two most important sources for detecting infringements are complaints and routine checks of notifications of national measures to transpose directives. According to a Commission official, especially complaints are important: 'the Commission makes (formal) transposition-checks, but at the moment really profound evaluations are only made when we have complaints'.24 The volume of complaints has been growing steadily over the years and the last years the Commission receives approximately 1300 complaints on an annual basis; about 40% of these complaints concern the environmental sector (COM(2003) 669: 6). Most complaints relate to incorrect transposition. Besides relying on complaints, the Commission actively executes routine checks of notifications on national transposition measures. Since these two sources for detecting infringements mostly concern the transposition phase, it may come as no surprise that most infringement proceedings relate to transposition as well. Most infringement proceedings (more than two-thirds) that are opened by the Commission relate to the absence of notification of transposition measures (Börzel, 2001: 808; Jordan, 1999: 81; Mendrinou, 1996: 8).

Action by the Commission in relation to non-transposition generally speaking can be described as effective. In this area the Commission clearly has an impact. Tallberg argues that the EU is ‘exceedingly effective in combating detected violations’ (Tallberg, 2002: 610). It provides for the situation in which non-compliance is indeed a ‘temporal phenomenon’. Especially the infringement procedure is very effective in reducing non-compliance.25 In 2001, only 7% of the complaints registered by the Commission were followed by a letter of formal notice and only 1% by a reasoned opinion. The main reason for this is that the pure start of examination by the Commission is already enough to ‘force’ member states to correctly transpose the legislation: ‘in many cases the pre-litigation examination of complaints is enough to prompt the Member States to put the situation right’ (COM(2002) 725: 13). This shows that the Commission relies heavily on techniques of quiet negotiations and bargaining; for example a letter of formal notice to the

---

24 Interview in the Civil Protection Unit (Chemical Accident Prevention, Preparedness and Response) of DG Environment of the European Commission, 3 March 2004.
25 However, infringement proceedings are no indicator of the actual or absolute level of non-compliance. They only cover a fraction of the violations of Community law in the member states (Börzel, 2001: 808).
United Kingdom regarding the drinking water directive was only sent after 10 written exchanges and 3 meetings (Jordan, 1999: 81). Because of this strategy 80% of the cases are settled before they go to court. And when a case does reach the Court of Justice, the Commission is rather successful in winning cases: ‘about 90 percent of all infringement judgments are in favor of the Commission’ (Tallberg, 2002: 618). In this respect, the use of the infringement procedure is a very efficient tool to ensure proper transposition.26

4.2 The Commission’s impact on enforcement

Both case studies showed shocking results with respect to the role of the Commission in enforcement: in neither of the cases the officials working on this topic were aware of practicalities related to the enforcement of these directives. As well, further information on the role of the Commission in the enforcement of Community law is hard to find. Neither scholars nor the Commission itself seem to pay attention to this particular topic: ‘Despite the circulation and analysis of data on formal state ratification and conversion of EU obligations into domestic, it remains unclear if these commitments are enforced after implementing legislation has been passed’ (Haas, 1998: 17). Perhaps this is a rather logical consequence of the fact that information related to transposition is much more easy to obtain. Compared to the sources available for studying the transposition of Community law, opportunities to analyze its enforcement are scarcer. This leads to the situation in which ‘the data on practical implementation are largely rather ad hoc and anecdotal, and rise out of specific studies of individual directives’ (Cini, 2003: 361).

The information that is available from the two case studies seems to reveal a few possible points of attention. The Seveso II directive is more intensively enforced than the safety data sheets directive that hardly is enforced at all. The Commission does seem to have some influence on this. First of all, the Seveso II directive – in its Article 18 – explicitly forces the member states to ‘entail at least one on-site inspection… every twelve months’. At least in the case of Spain this proved to be of influence on the enforcement practice: Spanish inspectors often mentioned the

26 Besides the infringement procedure, the Commission can use other unofficial methods to force member states to implement Community law. For example, the Commission threatened to stop – and in one case even acted upon it – EU funding in Greece if they would not comply with the rules on public procurement (Dimitrakopoulos and Richardson, 2001: 352). As well, a recent Dutch newspaper article showed the impact the Presidency of the EU can have on transposition. The approaching Presidency forms a clear stimulus for the Dutch government to iron out its backlog in transposition (Financieel Dagblad, 18/03/04).
fact that the European Commission forces them to execute inspections. A second element of influence is the organization of Mutual Joint Visits that stimulates the exchange of information on best practices. Especially countries with less experience in enforcing this type of legislation indicated to benefit from this program. Finally, the Commission stimulates enforcement of the Seveso II directive through the guidelines issued by the Major Accident Hazards Bureau. These guidelines form an important source of information for inspectors in all member states; especially Spanish inspectors indicated to profit from these guidelines. In the example of the safety data sheets directive no such mechanisms are at work. The SENSE project that was executed did enhance a short wave of attention; it stimulated some member states to carry out a one-time inspection round. The effects were not long-lasting, however. Perhaps an explicit ‘inspection article’ in the directive, exchange of best practices and EU guidance documents would have stimulated enforcement to take place.

4.3 Is the Commission an effective ‘guardian’?

When analyzing the impact of the European Commission on the implementation of EU rules, one clearly has to distinguish between the phase of transposition and the phase of enforcement. If ‘implementation’ is understood as the legal phase of transposition only, the Commission seems to do a rather good job as ‘guardian of the Treaties’. Sooner or later most Community legislation is transposed into domestic law. The two cases show good transposition results and the reports published by the Commission seem to show the same. However, Börzel (2001) and Williams (1994) both argue that one has to be careful with the information on transposition provided by the Commission. The information in the annual reports on the monitoring of the application of Community law is not always very useful. The reports change of structure almost every year and this makes it impossible to compare results year to year. When comparing the reports with other sources of information it shows ‘disturbing discrepancies and apparent errors’ (Williams, 1994: 374). Besides, the tables with transposition results published by the Commission are largely based on information provided by the member states themselves. Thus, the Commission is largely dependent on the willingness of member states to (correctly!) notify their activities, which is a problem since only Denmark, Finland and Sweden regularly notify the Commission on their national transposition measures (Jordan, 1999: 80). The annual surveys on the implementation of environmental law, for example, contain Annexes with transposing measures notified by the member states. These Annexes do not say anything at all about complete or correct transposition.

27 Of the five inspectors and four representatives of ministries interviewed in Spain, seven emphasized the impact of this particular Article.
The example of the transposition measures for the Seveso II directive shows an incomplete list of national laws and regulations. Nowhere, the Annex makes notice of the fact that this list is incomplete and that certain Articles of the directive are not yet transposed in some of the member states (SEC(2000) 1219: 60-62). The uninformed reader could easily misinterpret these figures and conclude that correct and complete transposition takes place.

Even though one carefully has to judge the available information on transposition, the Commission does have a concrete impact on this activity. Transposition generally speaking does take place and in cases of non-transposition the start of the infringement procedure is an efficient tool for the Commission to secure compliance. It is logical that the Commission will concentrate on the areas where it can receive some success, that is, formal rather than practical compliance (Jordan, 1999: 80). This is also confirmed by a Commission official: ‘In my opinion, it is much more powerful to be able to prove lacking or incorrect transposition than to waste too much energy on theoretical debates on application’. It is this phase of enforcement that causes problems. The cases show that proper transposition does not automatically lead to enforcement. The Commission does not know what happens with EU rules at the ‘street level’; this is a black box. Therefore, enforcement could be called the Achilles heel of European regulation.

5. Possible modus operandi

An accurate fulfilling of its task as ‘guardian of the Treaties’ by the Commission is necessary: ‘Uneven implementation of EC rules could distort competition across the market quite as much as having no rules at all’ (Colchester and Buchan, 1990: 132; see also Cini, 2003: 356). The Commission does not control enforcement. What are possibilities for the Commission to open the black box and shed more light on the enforcement of Community law? How to monitor this Achilles heel of European regulation? What might be possible modus operandi for the Commission to properly execute its function of guardian, especially with respect to enforcement?

The problems with monitoring enforcement are not one-dimensional and remedies are not simply located. When trying to improve the functioning of the Commission as guardian, solutions have to be found in two areas. First of all, problems lie within the Commission itself and solutions have to be sought in its internal structures. Secondly, however, solutions can also

---

28 For the United Kingdom, for example, the Annex only mentions the Regulations adopted for Great Britain, without mentioning that Northern Ireland and Gibraltar still need to complete the transposition.
29 Interview in the Civil Protection Unit (Chemical Accident Prevention, Preparedness and Response) of DG Environment of the European Commission, 12 February 2004.
be found in improving the level of compliance with Community law. With an improved compliance level, the need for active monitoring by the Commission is less accurate.

5.1 Difficulties within the Commission

Problems with monitoring can to a large extent be attributed to the Commission’s lack of attention for this activity. In several occasions, the Commission has been judged negatively with respect to its guardian function:

- ‘Moreover, the Commission has been notoriously bad at performing its implementation function. Its skills have traditionally lain in policy formulation rather than policy implementation’ (Cini, 2003: 361).
- ‘Senior Commission staff are, for the most part, better at drafting Directives than they are at implementing them, stronger at planning programmes than they are at administering them’ (From and Stava, 1993: 64).

Whether this lack of attention is intentional or not does not matter. Fact is that the Commission has always paid more attention to its policy-making activities and has thus somewhat ‘neglected’ its monitoring functions. An explanation for this has to be found in a lack of knowledge, conflicting interests and a lack of power.

Lack of knowledge

In the first place, the Commission often is not aware of the practical infringements by member states. Enforcement is extremely difficult to monitor. In order to be able to check whether and to what extent member states are actually enforcing Community law, the Commission needs its own inspectors in the different countries to check what is happening. The Commission neither has the time nor personnel to execute this task. It is entirely dependent on the member states to report what they are doing. Since there are no on-site visits or spot checks by Commission officials, it is dependent on third parties to report deficiencies: ‘in the very places that EU environmental policy is supposed to bite – in factories and on river banks and beaches – it [the Commission] has little or no physical presence’ (Jordan, 1999: 78). Environmental groups, for example, are necessary to provide information on the actual enforcement of environmental directives: ‘As there is no independent means of monitoring or inspection of what happens “on the ground”, the Commission is almost wholly dependent upon the complaints made by environmental associations against Member States’ (Pridham and Cini, 1994: 259). Especially since most EU legislation is so technical and detailed, it is hard to check whether and to what extent all complex
details are actually enforced. Monitoring all details requires a sufficient technical and scientific infrastructure (Börzel, 2001: 810).

Conflicting interests
One of the Commission’s main problems in monitoring enforcement is a conflict in interests. The Commission – in one institution – combines the different interests of agenda-setting and policy-drafting and of policy implementation. According to Dimitrakopoulos and Richardson this implies that the Commission has a considerable impact on the implementation; it can (and has to) anticipate implementation problems while formulating policy (Dimitrakopoulos and Richardson, 2001: 346). Others, however, doubt whether this combination of powers can have this positive impact on implementation. According to Cini it is very difficult for the Commission to take implementation aspects into account when formulating policy, ‘as it may be particularly difficult for the Commission to get agreement on legislation, it will not be in its interest to spell out potential problems that could make its exercise even more difficult than it would otherwise be’ (Cini, 2003: 360, see also Jordan, 1999: 71).

Some scholars even argue that these conflicting interests are extremely problematic and place the Commission in an ‘invidious position’ (Williams, 1994). Since the Commission – besides monitoring the implementation – is also the responsible actor for drafting the directives, Williams argues that there is a problem of separation of powers: ‘it is unfair for each Commissioner to be placed in a situation where the temptation may continually arise (whether as a result of pressure from Member States or otherwise) to compromise enforcement in order to gain support of a recalcitrant Member State for the adoption or issue of a legal measure’ (Williams, 1994: 353).

Peters addresses this same issue. He argues that the Commission is at the same time the principal and the agent. When it comes to its policy-making and agenda-setting functions, the Commission acts as the agent and the member states are the principals. In its function of implementation, however, the roles are reversed and the Commission is the principal and the member states the agents. This combination of powers is rather awkward and can cause threats to legitimacy (Peters, 2000: 202).

Lack of power
Steiner argues that the last phase in the infringement procedure, the referral to the European Court of Justice, does not provide for sufficient formal powers to guarantee effective

---

30 Williams argues that after the sending of a formal letter to the United Kingdom government about the transposition of Directive 85/337 on environmental impact assessment, John Major responded that ‘he would now be less likely to support the treaty, due for signature by EC leaders at the Maastricht summit in December’ (Williams, 1994: 393).
implementation (Steiner, 1995: 12). The sanctions available to the Court are insufficient to demand correct compliance. For a long time the judgments of the Court only had a moral weight; they tended to be ‘more informational than directly punitive’ (Peters, 2000: 196). This issue was raised during the negotiations on the Treaty of Maastricht and resulted in the inclusion of financial sanctions in Article 228 (TEC): ‘If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it’. Before the introduction of this article, it was not uncommon that rulings by the Court on implementation failure were simply ignored (Dimitrakopoulos and Richardson, 2001: 344).

5.2 Improving the level of compliance

An improved level of compliance with Community law would make the somewhat neglected role of guardian less problematic. The Commission has several options to actively try to increase the level of compliance. Different scholars have identified different reasons for non-compliance and these different reasons call for different solutions by the Commission. Tallberg argues that there are two alternative perspectives on compliance that both require different remedies (Tallberg, 2002: 609). The ‘enforcement perspective’ identifies states as rational actors that weigh costs and benefits of compliance and non-compliance is thus intentional. The ‘management perspective’ claims that non-compliance ‘is not the result of deliberate decisions to violate treaties, but an effect of capacity limitations and rule ambiguity’ (Tallberg, 2002: 613). These two perspectives lead to three main reasons for non-compliance:

1) Non-compliance as a result of poor legislation;
2) Non-compliance as a result of capacity limitations;
3) Intentional non-compliance.

Non-compliance due to poor legislation

Problems with the implementation of Community law are often attributed to the complex policymaking structure of the EU and the vague and poorly drafted policies that spring from it (e.g. Cini, 2003: 358; Jordan, 1999: 78-79; Mendrinou, 1996: 6; Tallberg, 2002: 613). The EU often produces legislation that is vague and hard to implement. This is rather logical since policymaking at the European level is a complex bargaining process between the different institutions and between the 15 (soon to be 25) member states that all want to safeguard their own interests. The Commission also recognized this problem in its communication ‘European Governance: Better lawmaking’ (COM(2002) 275). In this communication the Commission argues that better
implementation can amongst others be reached by better rules. More simplified and clearer regulations, more consultation between the actors involved and more attention for the benefits and costs of the legislation might stimulate a better implementation record.

One of the practical solutions that are proposed is the use of regulations (COM(2001) 428: 20; Jordan, 1999: 83). Since regulations are directly applicable and do not require transposition, their use might stimulate more uniform application and reduce the problems with implementation. However, as this paper shows, the problems with controlling implementation do not so much lie in this phase of transposition. Even though transposition can be a long and complicated process, generally speaking non-transposition only seems to be a temporal problem on which the Commission does have some impact. The use of regulations would not at all solve the problems related to enforcement and the lack of control exercised by the Commission in this respect. Another option might be to include a direct reference to enforcement in one of the articles of a regulation or a directive. The example of the Seveso II directive – especially in the case of Spain – showed the impact this can have on active enforcement. Question is, however, to what extent such a reference is still influential when it is standard included in all legislation. Another solution to deal with this problem of producing legislation that is hard to implement is to stimulate consultation with the affected parties and thus to include implementers and regulated in decision-making (From and Stava, 1993: 65, also see Siedentopf, 1988a).

A solution to overcome the often unclear and imprecise formulation of Community law – which leads to misunderstandings of the requirements by both regulators and regulated – is rule interpretation by the Commission (Tallberg, 2002: 614). The Commission already noted that delays in transposition are often the result of ‘problems of understanding often complex Community legislative texts’ (COM(2002) 725: 7). This does not only apply to transposition, but also to enforcement and compliance. Also inspectors and regulated (especially small and medium-sized enterprises) often have difficulties understanding what is exactly expected from them: ‘With clearly written and communicated policies, non-implementation that is a result of misinterpretation can end’ (Mbaye, 2001: 277). Rule interpretation provided in the form of guidelines or checklists would improve both the inspections (and reduces differences between member states) and the level (and willingness) of compliance by the regulated. Another option is EU-wide criteria for inspection tasks (Jordan, 1999: 83). The example of the Seveso II
directive showed the positive influence of Community guidance; especially in Spain it helped to overcome a lack of expertise.  

Non-compliance due to capacity limitations

Capacity limitations in the member states can be numerous. They can take the form of a less developed administrative system, a lack of financial resources or a lack of expertise in the form of trained staff or technical competence (Cini, 2003: 358; Haas, 1998: 19-20; Mendrinou, 1996: 6). In order to enable member states to overcome financial capacity limitations, the EU in some occasions provides funding. The most obvious example is of course the cohesion fund that was geared towards increasing the capacity growth of Greece, Ireland, Portugal and Spain in order to stimulate them to comply with, amongst others, environmental Community law. To help member states overcome a capacity limitation in the form of expertise, the Commission could stimulate to ‘share best practices in implementing measures’ (COM(2001) 428: 26). The meetings of inspectors in the Seveso II ‘Mutual Joint Visit’ program stimulated such an exchange of information and especially helped member states with less experience and expertise to better enforce this directive. Besides, the Commission should check the institutional capacity of member states when issuing legislation. A standard check of this capacity would clearly shed light on possible implementation problems in an early phase. Do member states actually have the enforcement agencies to execute inspections? If not, the Commission could in an early phase warn member states and where possible provide guidance to arrange to overcome such capacity limitations.

A solution that has been suggested by several scholars as well as by the Commission – that would remedy capacity problems in the member states – is the setting up of EU regulatory agencies with clear enforcement powers. A separate law enforcement bureau or regulatory agency would undo the conflicting interests of the Commission and thus reduce the temptation to compromise enforcement. Several scholars mention the possible positive attribution of EU inspectors that can perform on-the-spot visits (e.g. Williams, 1994: 398; Jordan, 1999: 83). The White Paper on European Governance announced that a possible solution for improving the implementation of Community law was to use such regulatory agencies (COM(2001) 428: 23). In its follow-up communication ‘The operating framework for the European Regulatory Agencies’ (COM(2002) 718), the Commission further elaborates on this possibility. This documents lays down the criteria for creating such agencies. It clearly distinguishes one particular type of agency

31 Not only EU guidance can have a positive impact; guidance provided by the national government or the enforcement agency is of equal importance. The main reason why there is at least some attention for the enforcement of safety data sheets in the Netherlands is the presence of a guidance document that helps the inspectors to enforce this topic.
that could enable the Commission to act as the guardian of the Treaties. Such agencies could provide assistance in the form of inspection reports (COM(2002) 718: 4). An already existing example is the European Maritime Safety Agency (since 2002) with its task to ensure the effective application of all the regulations on safety and protection of the marine environment. Since there is not enough experience with the use of such agencies yet, not enough information is available on the impact and workability of this possibility of strengthening monitoring.

*Intentional non-compliance*

Intentional non-compliance occurs in cases of deliberate violations and fraud (Cini, 2003: 358; Haas, 1998: 19-20; Mendrinou, 1996: 6). It often is the result of a lack of political will. It can also be induced by a prevailing culture of compliance: ‘In some countries, rules are there to be followed, in others it seems if they merely exist to be violated’ (Van Waarden, 1998: 2). Whereas non-compliance due to poor legislation or due to capacity problems call for a problem-solving strategy, intentional non-compliance can best be addressed by increasing the likelihood and costs of detection via a structured monitoring system and a threat of sanctions. Such sanctions ‘raise the costs of shirking and make non-compliance a less attractive option’ (Tallberg, 2002: 612). Besides sanctioning, the Commission can use the strategy of ‘name and shame’ (Tallberg, 2002: 617), which it did with the scoreboards on the transposition of internal market rules. Intentional non-compliance thus asks for a more intensive focus on its role as ‘guardian of the Treaties’ by the Commission. Only if the Commission actively shows that it is paying attention to the implementation of Community law – and that it will severely punish non-compliance – the presence of intentional non-compliance will be reduced.
References


