The sound of silence; 'silent losses' in the implementation, application and enforcement of community legislation

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In my contribution to the colloquium I discussed three major threats to the implementation, timely transposition and correct application of EC legislation as they show from research projects we conducted over the last decade. These threats, often resulting in non-compliance, have one common thread: lacking information on the law-in-action. The present contribution therefore welcomes the new way in which recent community legislation seems to deploy a well balanced information-strategy using agencies, implementation networks, obligations to exchange information and attempts at serious ex post evaluation projects.

But let's turn to the threats first before discussing the solutions.

The first of the three threats – to be discussed here - consists of *the lack of the right information* on the overall effectiveness of enacted EU legislation in terms of actual application, implementation and enforcement. The EU legislative institutions lack detailed information on what happens when EU legislation is interpreted, implemented, applied and enforced in the Member States. Moreover, the institutions do not always seem to be very keen to know either: the overall sentiment seems to be that after enactment, implementation the Member States' business. Information on

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what is actually happening after enactment, though, is vital for the EU legislative institutions' ability to reconsider and adjust their course. The problem is not that there isn't any information on the application of EU legislation, but rather that in a lot of cases it is not the right information to assess the effectiveness of directives or regulations, and that they are reported by more or less partisan organizations, i.e. the Member States. Transposition-notifications, scoreboards, reports on litigation under EC legislation, the odd infringement procedure, will tell you only so much about what is really happening in the post-enactment stages of legislation. The EU by and large has – what we have labeled - a '*paper implementation culture*'[2] meaning that implementation and application are mainly monitored on the basis of quite abstract Member State progress reports and notifications. Information on the Law-in-action is still quite rare.

The lack of (the right) information shows whenever a policy area is systematically evaluated. A 2004 evaluation of the Public Procurement Directives 1992-2003 for instance revealed that less than an estimated third of the public procurements complied with the administrative procedures laid down in the procurement directives.[3] This compliance deficit does not directly show from the monitoring data the Commission keeps, or from its annual reports on application. Sometimes even the central authorities of Member States are not aware of the '*silent losses*' as regards interpretation and application of EU law.[4] We simply do not know whether or not and to what extent EU legislation is being complied with,

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[2] See Voermans, Wim; Eijlander, Philip; Van Gestel, Rob; De Leeuw, Ivo; De Moor van Vught, Adriënne and Prechal, Sacha (2000) *Quality, Implementation and Enforcement; a Study into the Quality of EU Legislation and its impact on the implementation and enforcement within the Netherlands.* Ministry of Justice/Tilburg University; The Hague/Tilburg.

[3] See Europe Economics, *Evaluation of Public Procurement Directives,* Markt/2004/10/D Final Report. The researchers admit that this percentage of non-compliance can even be worse because they simply did not have all the necessary information.

[4] In our own research project in the year 2000 (Voermans et al. 2000, p. 28-29) it turned out that 'silent losses' occur quite frequently because national enforcement authorities, inspectors or administrative authorities simply cannot resolve residual legislative problems of their own, nor can they report back. One example is the provision on 'serious offence' in Directive 96/26/EC on the admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations, amended by Directive 98/76/EC *OJ* 1998 L 277/17. The directive holds that repeated – even minor - offences of drivers against the transport rules leads to the revocation of the license to practice as a road transport operator. This has the unforeseen and quite dramatic consequence that big operators, with a large staff, run a much bigger risk of losing their license than small operators. Obviously this was not the objective of the directive, but what are the administrative authorities to do? They do what they normally do: not apply the provision at all. This was but one example. We stumbled upon many problems like these in the five, randomly picked, dossiers we studied in our year 2000 project.

and judging from what seeps through the outlook is not altogether promising.

The second threat is the *domination of policy making* and short term attainment of policy goals over a dedicated focus on implementation and compliance during the EU legislative process. From the little we do know, we can deduct that the compliance rate of EU legislation is probably rather low. In 1998 Radaelli concluded that poor performance in the implementation stage is the Achilles heel of many European rules.[5] His conclusion still stands to this day. In a recent Communication of September 2007 the EU Commission[6] admits as much, but at the same time points out that it is, in fact, the Member States which have the primary responsibility for the correct and timely application of EU Treaties and legislation. The EU Commission cannot go it alone when it comes down to overseeing and controlling the implementation. This divide in responsibilities only seems to add to the problems of implementation. Chinese walls seem to be cemented between the initial legislative stages and the phase of implementation. The Commission cannot be held accountable for the implementation performance of the Member States and lacks the resources to effectively monitor and check the actual implementation performance of the Member States. Member States themselves will not be all that motivated to review and verify their implementation performance more rigorously than is strictly required. In most cases only reports of on-time-acts are required (e.g. notifications of transposition or an implementation report). To do more than that is ill advised: overzealous implementation can result in disadvantages for national economic operators. Add to this that underachievement in the actual implementation of EC legislation is very difficult to bring to court, let alone the Court of Justice, and one can discern a constitutional flaw in the fabric of the EU legal order here. The system of checks and balances pertaining to the responsibility for implementation of EU legislation leaves much to be desired. The establishment of European agencies[7] and European networks

[5] Radaelli 1998, p. 6.
[6] See *A Europe of results – applying Community Law* COM (2007) 502 final.
[7] According to the Commission's website a Community agency is a body governed by European public law; it is distinct from the Community Institutions (Council, Parliament, Commission, etc.) and has its own legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task, in the framework of the European Union's "first pillar". See http://europa.eu/agencies/index_en.htm (last visited 8 January 2008).

that act as ‘ears and eyes’ as regards implementation, is to be welcomed in this respect.

The third threat is that EU legislative processes *lack an effective feedback culture*. After EU legislation is concluded it sometimes proves difficult for authorities in Members States to report back on interpretation, application and implementation problems without incriminating themselves and triggering an infringement procedure. The need for feedback shows in the emergence of different networks of implementation authorities over the years. A well known network in this respect is the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), an informal network of the environmental authorities of the Member States.