

Information disclosure by the European Union – Analyzing the impact of EU reporting on domestic compliance with EU legislation

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Abstract

The application of European Union law is not without problems, and there are many potential solutions to address this situation. This article analyzes the impact of information disclosure by the European Union on the application of EU law at the street level of the member states. To what extent does European-level information disclosure stimulate domestic actors to implement EU law? The article presents new empirical evidence on the application of EU directives on product safety, air safety, and pollution prevention. Based on interviews in the Netherlands, Poland and Portugal, this study illustrates that the actors actually responsible for implementing EU legislation on the ground hold very mixed perceptions about the impact of information disclosure. EU-level information disclosure only works when the information is transparent and considered legitimate. The only type that is perceived as effective is information disclosed amongst intimae.

Keywords

Information disclosure, European Union, compliance, transparency, legitimacy

1. Introduction

The effective implementation of European Union (EU) law across member states and across policy domains is a recurring item on both the political and the scholarly agenda (see Treib 2014 for an overview). As Guardian of the Treaties, the European Commission may resort to a range of tools to help, persuade or even force the EU's member states into compliance. The EU is considered somewhat of a special international organization given its hard powers to sanction infringing member states, yet we increasingly see that the EU is resorting to softer tools to ensure that its member states comply with its policies. Before initiating the official infringement procedure, the EU uses tools such as the EU Pilot which aims to solve implementation problems beforehand (e.g. Koops 2014). This article concentrates on one of such softer tools: information disclosure strategies. The European Commission – as well as other EU bodies such as agencies – publish a variety of documents and online databases that provide information about how the member states comply with EU policies. What impact does this have on domestic compliance practices?

While information disclosure (or regulatory disclosure, or regulatory transparency) is more widely researched at the domestic level – analyzing the impact of disclosure of information by national regulators about compliance behavior of firms or companies (e.g. Weil et al 2006, Fung et al. 2007, Hülse 2008, Meijer and Homburg 2009, Van Erp 2010) – we do not have much insight into the effect of European-level information disclosure. The aim of this article is to understand how information disclosure strategies are used by the European Commission and by EU agencies, and whether and how these strategies may be useful for national regulators in the daily application of EU law. To what extent does 'regulation by revelation' (Florini 1998) actually help these recipients to implement EU legislation on the ground?

By combining insights from the logic of consequentialism and the logic of appropriateness that help us understand compliance behavior with international rules, with the regulatory disclosure insights on what makes information disclosure effective, we establish a framework to understand how and with what effect EU-level information disclosure is likely to have an impact on compliance behavior of national regulators. Using document analysis and interviews, we analyze the perception of domestic regulators in the Netherlands, Poland and Portugal on the effectiveness of EU-level information disclosure related to three EU directives in

the fields of product safety, pollution prevention and aviation safety. This article proceeds by outlining the conceptual framework, describing our theoretical expectations about when and how information disclosure is expected to work. After discussing our case selection and methodological approach, the article continues with describing what type of information disclosure strategies are used in relation to the three directives under scrutiny in this article. Analyzing how the national regulators perceive the effectiveness of these EU-level information disclosure strategies, we conclude that there is still much to be improved. National regulators are very critical about the disclosed information, particularly about the alleged subjectivity and incomprehensibility of much of the information provided. Most positive remarks are made about information disclosure in closed circles of regulators.

2. Why should information disclosure work? Outlining the theoretical expectations

Regulatory disclosure, i.e. the provision of information by private or public institutions in order to advance a regulatory goal (Weil et al. 2006), can be expected to influence to behavior of the actors concerned. In the context of this article we are interested in how, and if so why, information disclosure at the European level about compliance practices has an impact on the behavior of domestic regulators. In other words, do domestic regulators take notice of this information, and accordingly step up or change their activities to ensure compliance with EU legislation? In order to understand how and why domestic actors respond to such supranational activity, we refer to the logic of consequentialism and the logic of appropriateness. Both logics propose a different reasoning why EU regulatory disclosure could have an impact on domestic compliance behavior, whereby the more rationalist logic of consequentialism classifies behavior as based on anticipated consequences and prior preferences, and the more constructivist logic of appropriateness sees action as driven by rules of appropriate or exemplary behavior (March and Olsen, 2004).

According to the rationalist school of international relations studies, compliance is a matter of preferences (e.g. Keohane 1984, Fearon 1998, Downs and Jones 2002, Tallberg 2002). States are understood to be rational actors that make decisions to comply – or to defect – out of self-interest, based on a consideration of the costs and benefits of compliance, and of the costs and benefits of defection. It follows that compliance is a matter of willingness, and non-

compliance a matter of ill will, to bear the costs of compliance on the part of states. States are likely to implement if there is an expected utility, for example because rules reduce uncertainty or transaction costs. Where the benefits of non-compliance exceed the costs of defection, states will choose to defect. Since the benefits of compliance differ across countries, countries' responses to rules are also expected to vary. In order to increase the costs of non-compliance, international organizations can think of sanctions of a financial or of a reputational nature (they may come in the form of fines, or in the form of diplomatic or public pressure), or of subsidies or other forms of assistance that reduce the costs of compliance.

The constructivist school of international relations studies assumes and suggests that states will comply when they socialize into and internalize the norms proposed by the EU (e.g. Barnett and Finnemore 1999, Risse and Sikkink 1999). Non-compliance will stem from either non-understanding (due to ambiguity or imprecision of the international text) of the norms suggested, or from insufficient socialization into these norms. This school will demand a system that clarifies, interprets, teaches and disseminates the values and norms incarnated in the international agreements. It therefore suggests that information disclosure by the EU could provide clarity, uniform interpretation, dissemination, and as such persuade states into compliance. As Risse (2000) argues, international organizations could use reasoned arguments to persuade states that meeting their international commitments is the appropriate and right thing to do. This implies that states not only comply in order to be regarded as a "good" partner on the international scene, but because their own country will truly be better off if complying.

We learn from these opposing logics that there can be different dynamics at stake that trigger state behavior. In short, following the logic of consequentialism, we expect compliance out of fear or opportunity, and following the logic of appropriateness, we expect compliance out of duty (Thornton et al. 2009). However, this does not yet sufficiently explain what it is in the *instrument* of information disclosure as such that might stimulate domestic actors to change their behavior. For this we can complement the above description of logics of behavior based on international relations theory, with the wider body of legal-sociological literature on regulatory disclosure, or regulatory transparency. This literature to a large extent concentrates on the impact of disclosure by national regulators about private offenders (e.g. companies). Van Erp (2010) for example discusses consumer oriented and firm oriented disclosure strategies, indicating that regulators can

target different audiences with their information disclosure about non-compliance. This article applies this theoretical framework to yet a third target group: regulator oriented disclosure strategies. One could expect the mechanisms of information disclosure strategies targeted at consumers or private actors to also adhere to the relationship between supranational and national regulators. The type of relationship that national regulators have with their regulatees to a large extent resembles the type of relationship a supranational regulator (here the European Commission) has with the national regulators (here the national agencies or inspectorates that need to ensure compliance with EU law).

Regulators resort to information disclosure as a means to stimulate the target groups to improve their compliance with rules. We learn from the wider body of literature on information disclosure that there are several criteria that need to be fulfilled for information disclosure to be expected to be effective. The most important element is that the disclosed information needs to become *embedded or integrated* in the daily decision-making routines of both the information users and information disclosers (see Weil et al. 2006, Fung et al. 2007, Lee 2010). Without proper embeddedness, information will not be used at all. In order for this embeddedness to be likely to take place, it is necessary that the information provision is structured, in a useful format, as well as findable for the users. This overarching requirement expects disclosed information to adhere to two basic principles: it needs to be *transparent and public* and it needs to be *legitimate and credible*.

Information that is not findable, i.e. not publicly available, will have a hard time having the intended impact. Thus, the disclosed information needs to be transparent (e.g. Mitchell 1998) and public (e.g. Van Erp 2011). Disclosed information that does not reach those concerned or the wider public cannot be expected to have any impact. Media attention thus helps the likeliness of information disclosure being effective to increase. In this respect, the medium that is chosen to disclose the information – as well as the way in which it is presented (i.e. the user-friendliness) – becomes relevant (Fung et al. 2007, Meijer and Homburg 2009). The more the selected outlet is likely to reach those concerned and potentially interested third parties, as well as the more user-friendly the provided information is, the more likely it becomes that the information disclosure will have effect.

The communicated information should also be perceived as legitimate and credible. Following the logic that people are more likely to change their behavior when they consider the rules legitimate (e.g. Hülse, 2008), we can expect information disclosure to have more effect when this information – as well as the way in which it was collected and presented – is seen as legitimate. This implies that the information provider is seen as a moral authority (e.g. Pawson 2002), and that the information that is provided is perceived as fair (e.g. Makkai and Braithwaite 1994), relevant, comprehensible (e.g. Pawson 2002, Weil et al. 2006), specific and objective (Meijer and Homburg 2009), and thus of high quality (e.g. Meijer et al. 2014). Information that is not considered to be relevant, comprehensible, specific, objective, of high quality, trusted or fair, will not likely be perceived as legitimate or credible. In order to be able to judge whether the disclosed information is perceived as legitimate and credible, it is also crucial to know the supply side of the information. As Mitchell (1998) indicates, international regimes show a tendency to resort to self-reporting. Not all participants of such regimes will be committed reporters, thus influencing the legitimacy and credibility of the disclosed information.

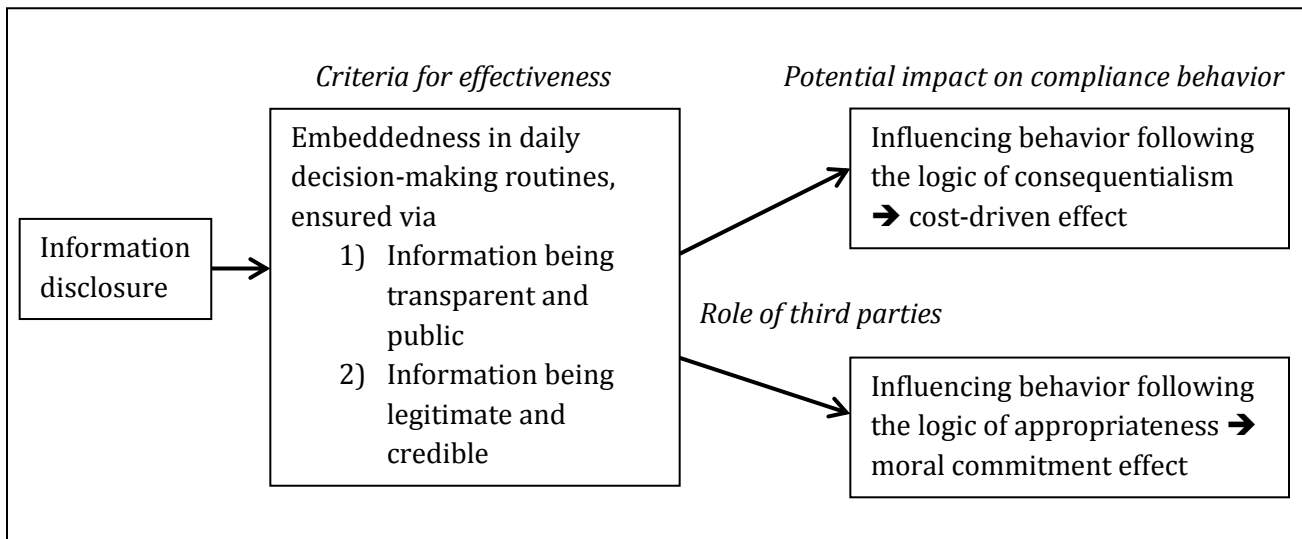
All in all, in order for information disclosure to have effect, it needs to become embedded in the daily decision-making routines of both information disclosers and information receivers. This is only likely to take place when the disclosed information is transparent and public, and legitimate and credible. When these prerequisites are in place, the disclosed information can empower third parties. By providing them with more ammunition, third parties can start to act as co-regulators, simultaneously targeting and thus influencing the behavior of the non-complier (Krain 2012, Katzenstein 2013, Meijer et al. 2014). When we combine the literature on the expected impact of disclosed information on compliance behavior with what we know from the international relations literature about different logics of behavior, we can expect information disclosure to change compliance behavior following two directions: on the one hand, information disclosure can be expected to have a cost-driven effect (by either reducing the costs of compliance or increasing the costs of non-compliance), and on the other hand, information disclosure can be expected to have a moral commitment effect.

Particularly the type of information disclosure that is directly aimed at shaming, fits the rational logic of consequentialism approach to behavior. Information with the intention to name and shame intends to cause reputational damage. As Meijer and Homburg (2009) state, disclosure

will only have an effect when the effected party assesses that this disclosure has an impact on its reputation. In order to cause reputational damage, part of the strategy is often ‘publicity’, to ‘shine a spotlight on bad behavior [in order to] help sway abusers to reform’ (Hafner-Burton 2008, 690). The underlying assumption in the literature that is concerned with information disclosure about private companies is that offenders will expect public shaming to lead to disapproval of the general public, and thus potential loss of revenue (e.g. loss of stock value). This effect is likely to play out differently when we are concerned with information disclosure by supranational authorities about national authorities. While real costs such as loss of revenue are not expected, we do assume a shaming effect to potentially take place, for example via the loss of respect and dishonor, which might lead a state to consider the costs of non-compliance to increase. As well, disclosed information could take the form of reducing the costs of compliance, by for example building national capacity in the form of increased knowledge or expertise.

Disclosed information about application of legislation can have the (be it explicit or implicit) intention of describing the expected ‘appropriate behavior’. While rationalists would explain this by highlighting that this type of information can reduce the costs of compliance, constructivists would explain this logic differently. By openly describing how certain rules and regulations are incorrectly applied, and how they should be applied, regulators can provide guidance and send out a moral message about what is seen to be appropriate or legitimate behavior (Parker 2006, Van Erp, 2011). Following this logic, EU-level information disclosure could help domestic regulators to better understand (and internalize) what is expected from them precisely in order to ensure application of the rules. The responsive regulation literature describes this logic as the building of ‘moral commitment’ to comply with the law (e.g. Ayres and Braithwaite 1992, Parker 2006).

Figure 1: The potential effect of information disclosure



3. Case selection and approach

In order to analyze how and to what extent EU-level information disclosure has an impact on the behavior of national regulators, we analyze the usefulness of information disclosure activities related to three EU directives according to national regulators in three EU member states. The three selected directives are the EU Directive on general product safety (GPS; Directive 2001/95/EC), the Directive on integrated pollution prevention and control (IPPC; Directive 2008/1/EC),ⁱ and the Directive on safety assessment of foreign aircraft (SAFA; Directive 2004/36/EC).ⁱⁱ The GPS and SAFA Directives require member states to conduct inspections and to assess the safety risks of consumer products and third-country aircrafts, respectively; the IPPC Directive obliges member states to provide environmental licenses to large industrial installations. We have seen above that third parties can have a triggering role in using disclosed information to change compliance behavior. These three directives have been selected as exemplary for sectors and activities where relevant third parties such as consumers and citizens are likely to be interested in information about non-compliance. As such, we could expect that member states have a stake in not being reported about negatively.

The member states selected for study are the Netherlands, Poland and Portugal, which are understood to face very different obstacles in the process of implementing EU legislation, and such are considered to belong to different ‘worlds of compliance’. Research by Falkner *et al.*

(2005), Falkner and Treib (2008) and Leiber (2007) indicated that different member states demonstrate different dominant implementation patterns. Countries belonging to the ‘world of law observance’ or the ‘world of domestic politics’ are thought to have few problems in the application of EU law; both are diagnosed as having effective administrative and court systems ensuring smooth application. Here the Netherlands is chosen as a sample country for the world of domestic politics. Countries that are thought of as belonging to the ‘world of transposition neglect’ are evaluated as scoring mixed in this regard; whether such countries stumble upon problems at the application stage depends on whether domestic conditions are fit for application. For this category, Portugal is chosen as a sample country. Countries clustered in the ‘world of dead letters’ are considered to be the worst performers when it comes to process patterns at the application stage, with non-compliance at this stage being referred to as rather systematic. Poland has been selected as a sample country for this world of compliance. Officials from those countries may be expected to demonstrate different perceptions of the usefulness of information disclosure strategies for improving the implementation of EU legislation on the ground.

The analysis in this article is based on document analysis and interviews. We analyzed all relevant documents of the European Commission (24 in total) related to the three selected directives that fall under the label of ‘information disclosure’ related to compliance behavior. In addition, we have conducted 26 in-depth, semi-structured interviews with national officials and Commission and EU agency representatives. Relevant national implementation actors include ministerial officials, as well as higher and lower-level agency officials, including product and air safety inspectors and IPPC permit writers. In order to understand how and to what extent these national officials actually use – and change their behavior as a result of – EU-level information disclosure, we concentrate on their perceptions of the usefulness of such instruments. Studying perceptions is relevant because perceptions co-determine the eventual effectiveness of policy instruments in practice; the perceptions of actors whom compliance instruments are supposed to affect play an important mediating role in how these instruments are used and the impact that they have (McAdam 1982). While perceptions do not automatically reflect actual behavior, perceptions do ‘serve as cognitive and normative frames for action, rendering it more likely than not that particular behavioural dynamics are associated with certain perceptual patterns’ (Egeberg and Trondal, 2011, 874).

4. Information disclosure in the fields of product safety, pollution prevention and aircraft safety

The different types of information disclosure strategies used at the European level vary considerably. Some documents resort to the use of quantitative or qualitative indicators to publicly benchmark the implementation performance of member states. Others provide information on a more abstract level, without naming or shaming individual member states explicitly. The extent to which transparency is provided also varies; the relevant information may be restricted to a select group of national officials or available to the public at large. Table 1 provides an overview of available documents (implementation reports, public online databases, research reports, and information for authorities only) for each of the directives included in this study. The following subsections discuss these mechanisms for each of the three directives individually (referring to the relevant Commission documents as numbered in the reference list). Note that since the focus of this article is on the application phase of the implementation process, the discussion concentrates on the extent to which such documents discuss the application (rather than transposition) performance of member states. Also note that our focus on application explains why we do not focus on general Commission reports, such as the Commission’s annual reports on monitoring the application of EU law; these – and other – reports hardly address application as a ‘self-standing’ issue, rather they address transposition issues or implementation issues more globally.

Table 1 – EU-level information disclosure mechanisms

	GPS	IPPC	SAFA
Implementation reports	Yes	Yes	Yes
Public online databases	Yes	Yes	No
Research reports	Yes	Yes	No
Information for authorities only	Yes	Yes	Yes

The GPS Directive

Commission reporting on the implementation of the GPS Directive has been rather irregular. In fact, only a single implementation report has been published to date (COM document 7). The report is not specific concerning the application of the GPS Directive. It states that market surveillance has been ‘successful’ – but it simultaneously refers to the adoption of a legislative package that should make key provisions of the GPS Directive more stringent for member states. Differences regarding the implementation performance of member states are not expressly stated. Overall, it seems that this report is not aimed at naming and shaming poorly complying member states, rather it aims to propagate the idea of how ‘powerful [a] tool for ensuring a high level of consumer protection’ the GPS Directive ‘has proven to be’ (ibid, p.12).

In contrast to the silence on the performance of member states in the Commission’s implementation report, are the more explicit references to this subject in the annual reports on the functioning of RAPEX (Rapid Alert System for dangerous non-food products). These reports publish statistics on notifications of dangerous consumer products submitted by the national authorities to the Commission during previous years; they expressly list the five most frequently notifying countries (COM document 24). The relevance of this ranking is nuanced by the Commission, which states that the participation rate of countries is a result of various factors, such as the size of these countries and the production and market structures that characterise them (ibid). In other words, it is difficult to compare the implementation performance of countries, based only on an assessment of the numbers of products reported through RAPEX (or on reactions by market surveillance authorities to RAPEX notifications) (ibid). Similar remarks apply to the Commission’s monthly updates on the number of RAPEX notifications and member state reactions to such notifications,ⁱⁱⁱ and to its weekly reports specifying product risks.^{iv}

Similar remarks apply to external research reports as well. Some of these reports provide precise descriptions of national performances regarding the transposition of the GPS Directive and merely offer general descriptions of how aspects of the GPS Directive are put into effect by the market surveillance authorities (Baker and McKenzie 2006). Others do focus on the practical sides of market surveillance (BSI Development Solutions 2011). These reports may, for example, say something about the resources available for market surveillance, provide numbers in relation to specific market surveillance indicators, and outline the strengths and weaknesses of market surveillance throughout the EU. None of these reports, however, explicitly aim to benchmark

member state performances. In fact, they seem incapable of doing so since raw numbers are hard to compare and they rely on self-reporting by – sometimes only a selection of – member states.

‘Not all member states collect the detailed information that is required to complete the questionnaire accurately [and] there appear to be very few correlations between the outcome data provided by the Eurobarometers and the input and output indicators provided by member states [market surveillance authorities]’ (ibid, p.5)

The limited availability and comparability of data across member states was also problematic for the first consumer scoreboards (COM document 6), which the Commission has published since 2008. These problems seem to be less urgent for subsequent scoreboards; these scoreboards do not compare the performances of member states, rather they compare consumer and retailer perceptions of product safety across these same member states, and retailer perceptions of compliance monitoring by market surveillance authorities (COM document 22). A number of Eurobarometers present country-specific figures on similar issues (COM documents 3, 12, 13, 16, 19 & 23).

The IPPC Directive

The Commission has published three communications on the implementation of the IPPC Directive. These reports, which are based on self-reporting by member states, are specific concerning the member states that have failed to meet the transposition deadline. In relation to the application of the directive, the Commission’s first implementation report refers to an earlier report that evaluated the performance of member states as ‘largely satisfactory’. It does not refer to individual member states that are not considered to perform adequately (COM document 1). The Commission does name member states in its second implementation report. Here it not only points out that there is cross-country variation in the numbers of IPPC permits issued, it also refers to individual member states that have reported low numbers of permits granted to IPPC installations (COM document 2). Moreover, it explicitly refers to a Court ruling against a particular member state that may be of relevance for other member states as well (ibid).

In its third and final report on the implementation of the IPPC Directive, the Commission names all countries against which infringement proceedings were started. It states that four of these cases have been referred to the CJEU, and it names one country that the Court has already

judged to have infringed the directive (COM document 15). This report also features examples of the application of particular provisions of the directive. In these cases, member states are seemingly referred to only when their performance is judged as positive or neutral. The report concludes on a rather general note, that self-reporting by member states has ‘revealed a need for some countries to finalise the issuing of permits in order to ensure compliance with the Directive’, and that ‘case studies undertaken by the Commission have shown that permits are not based sufficiently on [the best available techniques]’ (ibid, p.9). Culprits are not mentioned in this regard.

Case studies are found in the research reports on the implementation of the IPPC Directive that were commissioned by the European Commission (Entec 2007). These reports assess, for example, the permitting status in member states. It is with regard to this issue that these reports permit benchmarking. Exact numbers of granted and outstanding permits are provided per member state, and member states are compared and then ranked on the basis of this comparison; the five best performers are referred to explicitly.

Public access to information reported by member states to the Commission is available on the Industrial Emissions Reporting Information System (IRIS) website,^v and on the website of the European Pollutant Release and Transfer Register (E-PRTR).^{vi} IRIS makes it possible to verify the permitting status in individual member states and the precise, translated, implementation reports submitted by member states to the European Commission.^{vii} The website also has a tool that allows one to compare member state answers to Commission questionnaires and to search national reports for key terms. E-PRTR provides environmental data on pollutant releases and transfers for 25,000 industrial installations throughout the EU. The website presents precise figures for all EU member states and for all industrial activities registered in these member states.

The SAFA Directive

Compared to the GPS and IPPC Directives, the SAFA Directive appears to be subject to the most frequent reporting cycle. This may be explained by the continuous flow of inspection reports to the SAFA centralised database, which is maintained by the European Aviation Safety Agency (EASA). The flow of reports provides EASA with precise information about how many aircraft inspections authorities undertake, how many safety risks they find, and which corrective measures they impose on airline operators. Annual reports on the implementation of the directive

have not been based on subjective self-reporting by member states or on questionnaires submitted by them, but on the data that EASA has retrieved from ‘real-time’ SAFA inspection reports.

The Commission’s report ‘on the application of the SAFA Directive’ (COM document 10) specifically addresses the performance of member states regarding the transposition of the directive, rather than its application in practice. Certainly, the report presents the numbers of SAFA inspections conducted annually by the member states for a number of years. However, these numbers do not provide information about the quality of inspections or the relative performance of member states. The Commission states that the output registered by many member states is ‘unacceptable’ (ibid, p.10), but it does not point out which member states allegedly do not do enough.

Similar remarks apply to the Commission’s first report on the SAFA Programme (COM document 8). This report presents both the number of inspections conducted by individual member states and the number of findings detected by the aviation authorities, but what the reader should infer from this information remains unclear. The Commission’s second report on the SAFA Programme (COM document 9) also contains a list of average numbers of items checked per inspection by the national authorities. At first glance, this report appears to provide more insight into how member states perform, as it indicates the relative rate of activity displayed by member states when they inspect a plane. However, once again it does not indicate the quality of the inspections.

After the second Commission report (COM document 20), member state specific information has been provided exclusively in the staff working documents annexed to the Commission report (COM documents 11, 14, 18 & 21) or, since 2013, in the EASA report on the functioning of the SAFA Programme. The nature of the information and the method of reporting have remained the same.

Finally, the Commission may decide to circulate reports created by the EASA standardisation team, which carries out regular inspections of member states, to all national aviation authorities that take part in the SAFA Programme. These reports are made available to SAFA national coordinators through a restricted online database (interview EASA1).

All in all, we can conclude that the Commission and EU agencies resort to various types of reports, documents and databases that can be identified as information disclosure. This type of

reporting differs to some extent from the type of reporting that national regulators do about private companies. Rather than providing information about private companies (i.e. the companies that in the end need to comply with these EU directives, such as chemical companies or aircraft manufacturers), this type of reporting is intended to discuss the performance of member states as regulators. When we analyze these EU-level documents, we notice that most of them are publicly available (first three categories in table 1), but that the Commission and EU agencies also resorts to the option of information available for authorities only (category 4). Van Erp (2010) discussed that regulators can target their information at consumers as well as firms. We identified here that information can also be targeted from one type of regulator to the other. Analyzing the EU-level reporting, we notice that these type of documents do not make explicit who the target group is. Information is disclosed about compliance at the domestic level, but whether this information is mostly directed at national regulators or at the public at larger remains implicit. This confirms Van Erp's (2010) suggestion that regulators often do not distinguish between different audiences, and address them simultaneously. The only exception is the type of documentation that is restricted for national authorities; here the target audience is clear. As a final note, we can state that both logics of changing compliance behavior can potentially be activated with the various types of information disclosed at the EU level. As stated above, some documents explicitly name and shame different member states on their compliance behavior and could be expected to have a cost-driven effect, whereas other documents follow the path of attempting to build moral commitment by describing the expected behavior. To what extent does public disclosure stimulate national regulators to actively ensure compliance with EU legislation? How do the domestic regulators perceive the effectiveness of such EU-level information disclosure?

5. Does information disclosure work? The effectiveness of EU reporting according to domestic street-level actors

5.1 To what extent are the criteria for effectiveness present?

As described above, in order for information disclosure to potentially have an impact, it needs to become embedded in the daily decision-making routines of both the information providers as

well as the information users. A first lesson we learn from the description of EU-level information disclosure in relation to these three directives, is there does not seem to be a routine on the side of the information providers. The type of reporting used is ad hoc, and does not follow a routinized pattern. In order to capture to what extent the reporting is embedded at the national level, we need to explore if and how the disclosed information is perceived as transparent and public, as well as legitimate and credible.

EU-level information as transparent and public?

In order to analyze whether the information disclosed at the EU level is perceived as transparent and public, we checked whether national officials are familiar with the reports. Unfamiliarity with Commission reports discussing the performance of member states seems to be common for street-level actors in all countries and in all policy domains included in this study. This is particularly true for street-level actors that have little affinity with policy-making aspects in the respective policy domains; in other words, for civil servants who are exclusively in charge of inspecting products or airplanes and for officials who are responsible ‘only’ for permitting IPPC installations. The unfamiliarity with EU reports amongst lower-level officials seems to derive from several factors. Generally speaking, lower-level officials are unlikely to proactively look for EU documents and supervisory authorities do not, as a rule, inform implementing authorities of the existence of such reports. Moreover, it is by no means self-evident that reports forwarded to implementing agencies reach street-level implementation actors; in fact, it seems that familiarity with such reports is likely to be contained to top-officials within the relevant implementing agencies, and interviews suggest that these officials are rather uninterested in such reports (Interview NL25, NL16). In addition, we could find no evidence of media attention, or other third party interaction with the EU-level reporting under scrutiny. It thus appears that the information disclosure strategy used at the EU level mostly reaches the top-officials in national ministries and implementing agencies.

EU-level information as legitimate and credible?

In order for information to be perceived as legitimate and credible, it needs to be relevant, comprehensible, specific, objective, of high quality, trusted and fair. Interviews with those top-officials who are familiar with the EU-level disclosed information indicate that this does not

always adhere to these principles. Particularly the objectivity and comprehensibility of the information provided is criticized

The legitimacy of information presented in EU reports is limited, first of all, by the questionable *objectivity* of the data that they are based on. Most documents that are relevant to our case studies are based on self-reporting by member states (also see Mitchell 1998). Self-reporting exercises are accompanied by self-incrimination problems, which result from the idea that there are incentives for member states to ‘look good’, and which are thus likely to produce ‘polished’ images of member state performances. Interviews suggest that it is Dutch officials specifically who doubt the reliability of information submitted by their colleagues (Interview NL15; NL16; NL23; NL24; NL25; NL30). Officials indicate that there have been informal moments with colleagues from other member states when the veracity of formally submitted information was nuanced (Interview NL16). Dutch officials seem to consider their own country the ‘blue-eyed boy’ of the EU when it comes to compliance with the Commission’s information requests. The idea that the desirability of the asserted honest reporting practices of the Netherlands is doubted in view of the supposed practices of other member states is illustrated by the following quotation:

There were some discussions at the ministry about this. Should you report in this way? You don’t want to cheat, but couldn’t it be more general rather than so detailed? Other member states don’t report in such a detailed way either. It is ambiguous: we want to be precise, but how precise should we want to be? Spain reports 100% compliance although we know this is not true to the facts. This is frustrating. (Interview NL21)

It is difficult, if not impossible, for the Commission to verify the correctness of reported information regarding the application of EU law on the ground. This is the case because application is an especially complicated issue to verify as such, and because of the resource limitations that the Commission faces as guardian of the treaties. All the above factors taken together account for the idea that ‘nobody trusts these reports, even not the Commission’ (Interview PT12).

Note that the unreliability of information submitted to the Commission by the member states may result from more than purposeful manipulation on the part of national authorities.

Compliance with the Commission's information requests may be difficult to achieve due to practical difficulties in the reporting process. Such difficulties may, first of all, relate to the manner in which questionnaires sent by the Commission to the national authorities are set up. Interviewees indicate that they have struggled with a lack of clarity on the interpretation of key terms, with seemingly simple notions posing questions of interpretation (Interview NL27). Where national authorities interpret such terms differently, the information that they deliver to the Commission is bound to be unreliable in view of the Commission's wants and, or so one may presume, inadvertently so. Second, member states may face difficulties in the reporting process where the data collected by national authorities do not match the informational needs of the Commission, or when reality does not fit the conceptual framework used by the Commission. Such reporting difficulties raise additional concerns about the reliability of the information presented in Commission reports, and about the comparability of this information across member states. This lack of comparability is what national officials perceive as limiting the usefulness of the information represented by the Commission.

In addition to the discussed problems with objectivity and reliability of information, the interviewees also address problems related to *comprehensibility* of the information contained in EU reports. Of the three cases under scrutiny here, SAFA reports do provide objective information on member state performances. This is the case, since figures on numbers of inspections carried out, of items inspected per inspection, and of findings detected per inspection are retrieved from ramp inspection reports, which are submitted to the SAFA database that is managed by EASA. Since the information contained in SAFA reports is not mediated – that is, made to look better – there is no way for member states to cheat on either indicator mentioned above. In this sense, the image arising from ramp inspection reports does, in principle, speak to the implementation performance of member states. This SAFA example indicates that objectivity as such is not sufficient for disclosed information to be used effectively. As stated by an EASA official, the SAFA implementation reports will be difficult to grasp for relative outsiders (Interview EASA1). In fact, it may be the case that only SAFA national coordinators are capable of making sense of this information:

The figures presented by EASA in its annual reports, well, these may all be jolly, but what I have already noticed is that in some cases, people draw completely idiosyncratic

conclusions from these figures. (...) You can't conclude anything from these reports. (...) Since I have the knowledge and the expertise of how the programme works and should work, I am able to translate this information to what really matters. But of course it doesn't tell a layperson anything. (Interview NL30)

The European Pollution Release and Transfer Register (E-PRTR) provides another good example of problems related to the comprehensibility of information. The E-PRTR website is widely accessible and easy to search, and it provides a wealth of information about pollutants emitted for industrial sectors and individual member states. The notion that the presented information is not contextualized does, however, make it difficult for a layperson to draw comparative conclusions as to the implementation performance of member states, as the following quotation suggests:

The Commission thinks a lot of things are very helpful, even E-PRTR. But it's a total waste of time, because what conclusion can you attach to an E-PRTR report if what you've got is only general information about emission levels? It is meaningless in fact, for me at least. This is a Commission opening up to general society. Someone from the Netherlands can enter E-PRTR and can see that a power plant in Poland produces so and so much. But it doesn't tell you anything. If it is the biggest power plant in Europe, it must emit also more, so it is very misleading. (Interview PL12)

In other words, since information is difficult to grasp for interested members of the public, member state performance may be misinterpreted. This may anger member states, as the above quotation suggests is the case. This may lead to officials expressing themselves very negatively about EU-level reporting. As here exemplified by a Dutch official's perception of reports on the implementation of the IPPC Directive:

Implementation reports are far removed from reality. They are very theoretical and very formal. Authorities are not judged by the quality of the permits issued by them; it all remains very quantitative. This does not bring anything. These are endless reports, and they are an administrative burden for us. It is very difficult to convey this message to the European Commission. The Commission looks for measurable indicators, but such indicators contribute hardly visibly to the effectiveness of application. (Interview NL26)

This sheds a rather negative light on the ability of the Commission to provide legitimate and credible information. When confronted with this suggestion, one interviewee at the Commission to a large extent agreed to these observations. It is difficult for the Commission to acquire sufficiently precise insight into the application performances of member states, and information gathered by the Commission can hardly constitute a sound basis for adequately benchmarking national performances. A Commission official indicates that it is exactly this potential adverse effect of information disclosure that has limited the extent to which the Commission makes use of scoreboards and that explains why the Commission is ‘not famous for strong words’ in its implementation reports (Interview EC8). This official suggests that there is a fear that ‘simplistic naming and shaming’ may trigger opposition from member states because they might feel offended, damaged, or treated unjustly; opposition that is not desirable in view of the dependency of the Commission on member states in the area of law making. This observation is in line with the results of a study on the role of the European Railway Agency in improving the implementation of EU railway legislation in the member states (Versluis and Tarr 2013). Here it was also observed that the EU agency rather wants to be seen as a neutral actor, and thus abstains from using strong words or hard power.

The above indicates that the disclosed information by the Commission and EU agencies is unlikely to have been effectively embedded in the daily decision-making routines of national regulators, and thus we can question whether this information disclosure strategy is very effective in changing national regulators’ compliance behavior. We observed that the information provided is not very visible for potential third parties, nor for the actual street-level implementers in the member states. The group of actors that is familiar with the disclosed information, national top-level regulators, does not speak highly of its legitimacy and credibility due to reported problems with the objectivity and comprehensibility of the information provided. Despite the sub-optimal presence of the required criteria for effectiveness of information disclosure, we will now analyze to what extent we do witness some kind of impact of this EU-level reporting on national regulators compliance behavior, and to what extent this seems to follow the cost-driven effect, or the moral commitment effect.

5.2 To what extent do we observe impact on compliance behavior?

The most positive remark on the impact of EU-level information disclosure comes from Portuguese officials in the area of market surveillance. They illustrate the learning effect that EU reports can have, as the following interview excerpt suggests:

Such reports are useful to see how other countries carry out market surveillance, since they give ideas; we can take lessons from such studies. If one member state dedicates its efforts to a product or a category of products, this know-how will certainly be helpful for all member states. (Interview PT6)

Most interviewees indicate that impact of disclosed information on compliance behavior is visible, but only in certain specific situations. What the three directives analyzed in this article seem to suggest, is that particularly information disclosed amongst intimae is taken seriously. The SAFA Directive provides a good example of how information restricted to regulators only is experienced as useful, and how this information may generate an impact that publicly available information does not seem to produce.

Information about the performance of member states in view of the objectives set by the SAFA Directive is provided by EASA during meetings of the European SAFA Steering Group (ESSG), which gathers the SAFA national coordinators of all SAFA participating states, and representatives from the European Commission and EASA. This information covers more than the number of inspections carried out by member states and the number of items inspected per inspection. It also benchmarks member state performance regarding, for example, the achievement of the annual inspection quota established for each member state individually, and the timeliness of the submission of reports to the centralized SAFA database by the national authorities. This information covers many more variables than those presented in publicly available implementation reports, providing a more complete picture of the implementation performance of member states. In sum, compared to the publicly available documentation, interviewees are less critical about the objectivity and comprehensibility – and thus the legitimacy – of this restricted type of documentation.

Interviews suggest that legitimate and credible information shared amongst a selected group of regulators may be a powerful tool for supporting the implementation performance of

member states. The latter is certainly true for the Portuguese SAFA national coordinator, as the following quotation suggests:

How I know how other member states do? Yes, that's the role for EASA to play. The agenda of ESSG meetings always has a fixed bullet for EASA to present a general overview of the way in which member states are implementing the programme. And it works very well, because we are all extra attentive to the performance, to the benchmarks. There are several of them, and we all check these benchmarks to see if our country is behaving correctly or not. (...) Of course, some states feel the obligation to ask for the floor and to give an explanation for something. I don't know, but it's better not to have a bad performance there that makes you feel you need to give that explanation. (Interview PT17)

This quote seems to illustrate that the different effects of information disclosure play a role at the same time. While on the one hand this Portuguese SAFA national coordinator illustrates that the prospect of reputational damage following from a negative ranking is a performance driver, and thus suggesting a cost-driven effect, he also mentions that he wants his country to 'behave correctly', suggesting a moral commitment effect.

The literature suggests that information disclosure about bad performance can trigger actors into compliance. Our Dutch SAFA case, however, illustrates that performance information can also have an almost reverse effect of damaging countries that seem to perform too well. The Dutch SAFA national coordinator indicates that he is content with scoreboards, as long as they show that the Netherlands does not stand out from the crowd. The following quotation underlines this point:

If I see the areas in which the Netherlands scores significantly worse, I can tell management, 'listen, these are the points for improvement, this is where we want to improve, because otherwise we'll get problems.' So I can use the fact that EASA is aware of something, that EASA indicates that we need to improve, as a 'stick in the cupboard' in relation to management. The fact that I can use instances of underperformance to establish improvements, yes, that makes me happy. Because if we're doing too well,

management will say that we can do our work with fewer inspectors. (...) I use EASA and the Commission as patrons. (Interview NL30)

Thus it seems that information disclosure may also deter national authorities from performing ‘too well’ given domestic (resource related) repercussions that officials fear may accompany a flawless performance. In such instances, information disclosure strategies do not compel member states to perform at their very best.

6. Concluding remarks: how and when does EU-level information disclosure positively affect domestic compliance according to national regulators?

The EU frequently resorts to providing information about how its rules and regulations are applied at the domestic level in all member states. Following the growing body of literature on the impact of information disclosure, this article analyzed its effect in the European Union context. The information disclosure literature normally discusses the impact of information provided by national regulators about national companies or firms. This article demonstrated that the lessons learned in that context can also be used to better understand the impact of information disclosed by supranational actors (in this case the EU) about national regulators (here member state regulators). In order to better understand when and how information disclosure at the EU level might have an impact on domestic compliance according to national regulators, we combined the international relations logics of consequentialism and appropriateness with the more legal-sociological thinking about regulatory disclosure. This resulted in a framework that expects information disclosure to have an effect when it becomes embedded in the daily decision-making routines of both information users and providers (which is in turn only likely to happen when the disclosed information is transparent and public, as well as legitimate and credible), and the possible effect on compliance behavior can be a cost-driven effect or a moral commitment effect.

The analysis of the disclosed information related to three EU directives in the fields of product safety, pollution prevention and aviation safety in the Netherlands, Portugal and Poland, indicates that in these cases the prerequisite of disclosed information becoming embedded in daily decision-making routines does not seem to hold. The information did not reach the wider public, nor the street-level actors who have to apply the EU rules at the national level. Only top-level regulators are aware of the disclosed information in relation to these three directives. This

seems to confirm the conclusion by Mitchell (1998) that international regimes often fail to provide transparent information about its own performance. When asked about their opinion about this information, the respondents appear critical of particularly the objectivity and comprehensibility of the information provided. The only positive signals have been raised about the effectiveness of information disclosure amongst intimae. Particularly the aviation safety example, where information is disclosed amongst a team of national regulators, indicates that peer pressure is felt. Respondents indicate to feel the need to ‘behave correctly’, and do not want to appear at the bottom of the list in front of colleagues from other countries. The information provided by the European agency, rather than the self-reporting on which most publicly available documents are based, seems to be perceived as more legitimate and credible. This confirms the conclusion in the regulatory disclosure literature that information disclosed within a ‘community of mutual trust’ (Van Erp 2011) works well. This also links to our own earlier conclusion that EU networks are more likely to have a positive impact on domestic compliance situations when these networks are based on informality and trust (XXX). Or as Mitchell (1998, 112) puts it: ‘opacity also has its virtues. Too much transparency may inhibit cooperation.’

The case studies conducted for this article thus seem to indicate that the disclosed information in closed circles is perceived as more effective than the more publicly available information. Particularly this publicly available information is described as too subjective (due to its self-reporting nature) and rather incomprehensible. In addition, it is not always clear what the intention of information disclosed at the EU level is exactly. Very often there is no clear target group. If the intention of this information disclosure is not to contribute to regulatory goals – in other words to improve domestic compliance with EU legislation – it becomes questionable why the EU would issue such documents at all. The analysis done in this article indicates that this aim of contributing to regulatory goals is not clearly reached. In order for the EU-level information disclosure to work, it is advisable that the Commission works on the transparency and legitimacy of the information provided.

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