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# A new instrument for a better implementation of the European Union environmental law: The Environmental Implementation Review

Camille Saint-Genis



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By Camille Saint-Genis

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## **About the author**

Camille Saint-Genis holds a Master's degree in political sciences from the Institut d'Etudes Politiques from Rennes in France, a Master of Arts in Public Law from the Sorbonne University of Paris and a Master of Arts in Political and Administrative Studies obtained at the College of Europe (2016-2017). Her research deals mainly with environmental policy.

This paper is based on the author's Master's thesis at the College of Europe supervised by Professor Sabine Saurugger.

## **Contact details**

camille.saint-genis@coleurope.eu

## **Editorial Team**

Michele Chang, Ariane Aumaitre Balado, Dimitria Chrysomallis, Frederik Mesdag, Ernestas Oldyrevas, Thijs Vandenbussche, Samuel Verschraegen, and Olivier Costa  
Dijver 11, B-8000 Bruges, Belgium | Tel. +32 (0) 50 477 281 | Fax +32 (0) 50 477 280  
email [michele.chang@coleurope.eu](mailto:michele.chang@coleurope.eu) | website [www.coleurope.eu/pol](http://www.coleurope.eu/pol)

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## **Abstract**

The present work seeks to analyse the reasons behind the creation of a new instrument by the European Commission in order to improve the implementation of the European Union (EU) environmental law: the Environmental Implementation Review (EIR). To do so, it builds upon existing theoretical frameworks developed in the analysis of policy implementation, public policy instruments and public policy change. The analysis of the empirical evidence leads to conclude the significance of organisational factors – the Better Regulation reform program and the new Commission's executive. The design of the EIR itself seems to have been influenced by both the instrument mix already used in the environmental field and instruments developed in other policy fields. The role played by external actors remains difficult to assess, although it can't be denied that they contributed to reinforce the saliency of the implementation issue at the EU level.





## Introduction

The implementation of the European environmental law has been identified as a public problem at the European Union (EU) level since the early 1990s.<sup>1</sup> The EU institutions and numerous scholars have regarded environmental policy as the most problematic policy field when it comes to implementation.<sup>2</sup> As the guardian of the treaties, the European Commission (hereafter the Commission) plays a leading role in monitoring the implementation of the EU legislation.

Since the early 1970s, academic research tried to explain the gaps between policy objectives and policy outcomes.<sup>3</sup> A case study about an implementation instrument in the environmental field is thus an opportunity to apply these theoretical frameworks to a specific policy field.

In May 2016, the Commission launched a new instrument to improve the implementation of the EU environmental legislation: the Environmental Implementation Review (EIR). The aim of this instrument is to provide the Commission, Member States, and stakeholders with a comprehensive overview of the state of play of the implementation in each Member State. The underlying assumption is that there are systemic causes to non-implementation that need to be addressed at the EU level. The EIR would be based on two-year cycles composed of three different phases. The first phase would consist in the drafting by the Commission of country reports that would focus on both sectoral elements and the administrative framework for implementation and would constitute the basis for identifying systemic roots of non-implementation. This first step would open up a phase of dialogue at the Council of the EU (hereafter: the Council) and within Member States – through country

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<sup>1</sup> C. Demmke, 'Towards effective environmental regulation: innovative approaches in implementing and enforcing European environmental law and policy', Jean Monnet Program, New York University School of Law, Jean Monnet Working Paper 5/01, 2001.

<sup>2</sup> T. Delreux & S. Happaerts, *Environmental policy and politics in the European Union*, London, Palgrave, 2016.

<sup>3</sup> P. Hupe & M. Hill, *Implementing public policy. Governance in theory and in practice*, London, SAGE Publication, 2002.

dialogues gathering national and subnational authorities as well as private stakeholders. The third phase would correspond to concrete collaboration projects, such as practice exchanges between national administrations.<sup>4</sup>

This thesis will adopt an outcome-centric approach, i.e. “primarily interested in the explanatory power of causal factors”.<sup>5</sup> The first section will be dedicated to the review of the relevant literature, as well as the definition of the analytical framework. The three subsequent sections will present the results of the analysis.

## **1. State of the art of the literature and analytical framework**

To analyse the factors that led to the launching of the EIR, several fields of literature have been identified as particularly relevant. *Implementation* has been defined by Madmanian and Sabatier as the ‘the carrying out of a basic policy decision’.<sup>6</sup> In the field of EU studies, the literature has distinguished three phases in the implementation process: transposition, application, and enforcement. *Transposition* corresponds to the integration of EU legislation in national law. *Application* refers to the action of administrative authorities putting in action a piece of legislation and enforcement to the monitoring of compliance with it.<sup>7</sup> Research on public policy implementation can be useful to better understand the context of launching as well as the design of the EIR. This work will also use the research on implementation strategies i.e. the combination of public policy instruments used to improve implementation.

One important development for the analysis of the introduction of the EIR is the study of public instrumentation, i.e. of the conditions and factors of the choice of a given instrument.

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<sup>4</sup> European Commission, *Communication – Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review*, COM(2016) 316 final, Brussels, 25 May 2016.

<sup>5</sup> T. Gschwend & F. Schimmelfennig, ‘Introduction: Designing research in political science – a dialogue between theory and data’, in: T. Gschwend & F. Schimmelfennig (eds.), *Research design in political science. How to practice what they preach*, Basingstoke, Palgrave Macmillan, 2007, p. 8.

<sup>6</sup> Hupe & Hill, *op. cit.*, p. 7.

<sup>7</sup> O. Treib, ‘Implementing and complying with EU governance outputs’, *Living Reviews in European Governance*, vol. 9, no. 1, 2014.

A public policy instrument can be defined as a ‘device that is both technical and social, that organizes specific social relations between the state and those it is addressed to, according to the representations and meanings it carries.’<sup>8</sup> So far, there has been little research focusing on one specific implementation instrument at the EU level.

The introduction of a new public policy instrument raises questions as regard to the mechanisms through which change occurs in public policies. The analysis of public policy change has given birth to numerous theoretical models that try to determine the factors, the conditions and the degree of change within a policy or a government. Of interest for this work is the model developed by Peter Hall.<sup>9</sup>

This thesis will also make use of the work on policy feedback and policy transfer. Policy feedback can be defined as the adjustment of a policy path in reaction to previous policy outcomes.<sup>10</sup> Policy transfer corresponds to the diffusion of one policy or one instrument from one government to another.

### **1.1 Independent variables and hypotheses**

The preliminary phase of this research has led to the identification of several independent variables relating to institutional changes that have occurred within the Commission, the evolution of the implementation strategy of the Commission, and the influence exercised by external factors. The corresponding hypotheses are developed below.

#### ***Organisational variables***

- The more salient the Better Regulation agenda, the higher the focus on the implementation of the existing EU legislation;

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<sup>8</sup> P. Lascoumes & P. Le Galès, ‘Introduction: understanding public policy through its instruments. From nature of instruments to the sociology of public policy instrumentation’, *Governance*, vol. 20, no. 1, 2007, p. 2.

<sup>9</sup> P. Hall, ‘Policy paradigm, social learning and the state’, *Comparative Politics*, vol. 25, no. 3, 1993, pp. 275-296.

<sup>10</sup> F. Baumgartner & B. Jones, ‘Positive and negative feedback in politics’, in: F. Baumgartner & B. Jones (eds.), *Policy dynamics*, Chicago, University of Chicago Press, 2002.

- A higher focus on the outcomes of the EU policies with the Juncker Commission will lead to a higher saliency of the implementation of EU legislation.

### ***Issue-specific variables***

- The less a policy instrument mix is regarded as effective, the more incentives the Commission has to introduce new instruments;
- The more effective policy instruments are perceived to be, the more likely it is that they are transferred to other policy fields.

### ***External variables***

- A higher pressure from other EU institutions makes policy change more likely;
- The higher the pressure from civil society on a public problem, the higher the pressure on the Commission to act;
- The higher the pressure from Member States, the higher the possibility for policy change;
- The more salient international policy goals are, the more likely that the Commission will develop and focus policy instruments on them.

In terms of methodology, the empirical work has consisted of the analysis of documents published by Commission, other EU institutions and non-governmental organisations, complemented by three interviews.<sup>11</sup>

## **2. Internal variables: the influence of evolutions within the Commission**

This section will focus on two organisational evolutions: the progressive development of the Better Regulation agenda and the arrival of a new Commission's executive in 2014. The progressive unfolding and evolution of the Better Regulation program correspond to an

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<sup>11</sup> See the bibliography for more details.

attempt to reform the Commission's administrative processes in order to improve its legitimacy. The starting point of the Better Regulation process in the EU was the concerns expressed by the European Council in 1992 about the quality of EU legislation. The reform programme really gathered pace in the 2000s, with the aim to make the community method more open and fact-based, as well as to increase the use of non-legislative instruments.<sup>12</sup> In the following years, the discourse on Better Regulation evolved to focus on the reduction of administrative burden and the competitiveness of the European economic actors. The reform agenda was reinforced by the Juncker Commission.<sup>13</sup>

Thus, the Better Regulation agenda has been a common thread of the evolution of the Commission since more than fifteen years. Better Regulation has been construed by Radaelli and Meuwese as a meta-regulation approach since it is not targeted at a specific policy field but rather focuses on administrative procedures and processes as a whole.<sup>14</sup> It can thus be regarded as a new framework that has contributed to determining the actions as well as the perceptions of the actors within the Commission about their work and the role of the Commission.<sup>15</sup>

Effectiveness is presented as one of the core principles of this regulatory reform. One of the overarching goals set in the White Paper on governance is indeed a more effective enforcement of EU law.<sup>16</sup> Thus we can see that from the start on, implementation has been an important component of the Better Regulation agenda developed by the Commission.

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<sup>12</sup> European Commission, *European governance: a White Paper*, COM(2001) 428 final, Brussels, 25 March 2001.

<sup>13</sup> C. Radaelli, 'Whither better regulation for the Lisbon agenda?', *Journal of European Public Policy*, vol. 14, no. 2, 2007, pp. 190-207.

<sup>14</sup> C. Radaelli & A. Meuwese, 'Better Regulation in Europe: between public management and administrative reform', *Public Administration*, vol. 87, no. 3, 2009, pp. 639-654.

<sup>15</sup> P. Muller, 'L'analyse cognitive des politiques publiques: vers une sociologie politique de l'action publique', *Revue Française de Science Politique*, vol. 50, no. 2, 2000, pp. 189-208.

<sup>16</sup> European Commission, *European governance: a White Paper*, *loc. cit.*

## **2.1 The Better Regulation agenda: a trigger for the EIR?**

Several elements tend to point to an influence of the Better Regulation program on the decision to launch the EIR. First, the discourse about the EIR itself also seems to have been influenced by the Better Regulation rhetoric. The main arguments used to justify the launch of the EIR are indeed the cost of non-implementation of environmental law, the potential for job creation of a proper implementation and the threat posed to the credibility of the EU by the existing implementation gap.<sup>17</sup>

Second, the EIR can also be analysed as an attempt to promote stakeholders' and subnational authorities' involvement in the process of implementation, which is in line with Better Regulation core values of participation and openness. On the basis of the elements, it could be argued that the Better Regulation programme, which can be construed as a global frame for the Commission's work, has influenced what Muller would call the sectoral frame in the environmental field.<sup>18</sup> However, there is no conclusive evidence that this reform of the Commission's functioning can explain the design of the EIR.

## **2.2. The Juncker Commission: renewed attention on implementation**

The second hypothesis guiding this thesis is that the higher focus on the results of the EU policies under the Juncker Commission has led to a higher saliency of the implementation issue. Enhancing the EU legitimacy and restoring citizens' confidence are presented as key objectives in Juncker political guidelines for the Commission. The main measures proposed to achieve these objectives are the prioritisation of the Commission's action.<sup>19</sup> The subsequent decrease in the legislative activity has entailed a reinforced attention being paid to the existing legislation, as epitomised by the Commission's work programme for 2015.<sup>20</sup> This focus on

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<sup>17</sup> European Commission, *Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review*, *op. cit.*

<sup>18</sup> Muller, *loc. cit.*

<sup>19</sup> J.-C. Juncker, *A new start for Europe: my agenda for jobs, growth, fairness and democratic change*, Political guidelines for the next European Commission, Strasbourg, 15 July 2014.

<sup>20</sup> European Commission, *Communication – Commission Working Programme 2015. A new start*, COM(2014) 910 final, Brussels, 16 December 2014.

policy outcomes marks a certain shift in comparison to the previous versions of Better Regulation, more centred on administrative processes.<sup>21</sup>

Similar discourses are used in the publications about the EIR: the communication that launched it is titled “Delivering the benefits of the EU environmental law” and also presents job creation and the EU credibility as the main rationales for the introduction of the EIR.<sup>22</sup> Similarly, the press release focuses on the expected gains of this new instrument.<sup>23</sup> This discourse is used again in the most recent communication about the EIR.<sup>24</sup>

The launch of the EIR is also justified in reference to opinion polls, which can be construed as an attempt by the Commission to enhance its legitimacy *vis-à-vis* the citizens. Indeed, during the country dialogue held in Belgium for the EIR,<sup>25</sup> the Director General of the Directorate General for the Environment (DG ENV) presented citizens’ support as the most important argument in favour of the creation of the EIR. The similarity of the discourses points to a correlation between the two and tends to show the influence of the priorities of the new Commission executive.

Lascoumes and Le Galès argue that the choice of policy instruments, far from being neutral, frames the relations between government and society.<sup>26</sup> If one applies this theoretical lens to the EIR, it is possible to construe it as an attempt of the Commission to modify its relations with Member States as well as European citizens in the implementation process. To build upon the instruments’ typology developed by Lascoumes and Le Galès,<sup>27</sup> the EIR shows features of both information and an incentive-based instruments. The former category includes

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<sup>21</sup> A. Alemanno, ‘How much better is better regulation? Assessing the impact of the Better Regulation package on the European Union – A research agenda’, *European Journal of Risk Regulation*, Special issue on the Better Regulation package, 2015, pp. 344-356.

<sup>22</sup> European Commission, *Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review*, *loc. cit.*

<sup>23</sup> European Commission, *Press release – New commission implementation tool could help save up to 50 billion*, Brussels, 25 May 2016.

<sup>24</sup> European Commission, *Communication – The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results*, COM(2017) 63 final, Brussels, 3 February 2017.

<sup>25</sup> Participation to the EIR Country dialogue for Belgium, Brussels, 29 March 2017.

<sup>26</sup> Lascoumes & Le Galès, ‘Introduction: understanding public policy through its instruments.’, *loc. cit.*

<sup>27</sup> Lascoumes & Le Galès, *Gouverner par les instruments*, Paris, Presses de Sciences Po, 2005.

instruments that seek to explain and account for political actions whereas the latter clusters instruments designed to raise awareness. The aim of the EIR is on the one hand to gather information and to communicate about the state of play of the implementation of the environmental law, and on the other hand to foster a more pro-active role of Member States and stakeholders. Thus it seems to belong to a trend that has been referred to as new governance, where “public policies are less hierarchized, less organized” and a wider range of actors, public and private, are involved in public policy making.<sup>28</sup> During an interview, the civil servant responsible of the EIR within the DG ENV<sup>29</sup> explained that it corresponded to a demand from the Commission’s executive to develop closer relations with Member States. As a result, the launch of the EIR can be viewed as reflecting an evolution towards a more systematic cooperation between the Commission and Member States and an increased commitment of Member States to tackle the implementation deficit. This tendency of the Commission to seek greater involvement of national authorities has also been identified by the literature.<sup>30</sup>

### ***A window of opportunity for the DG ENV?***

It possible to argue that the arrival of a new Commission executive has also been used by the DG ENV. The person in charge of the EIR explained in an interview<sup>31</sup> that the DG ENV seized what it considered as a political opportunity to act. The context of the launch of the EIR indeed offered a window of opportunity, defined by Kingdon as the conjunction of the three streams: the politics stream, the problem stream and the policy stream.<sup>32</sup> The arrival of a new Commission corresponds to the politics stream; the Better Regulation agenda to the problem stream and the solution pushed by DG ENV i.e. the launch of the EIR to the policy stream.

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<sup>28</sup> Halpern & Le Galès, *op. cit.* p. 1.

<sup>29</sup> Interview 3.

<sup>30</sup> M. Hedemann-Robinson, *Enforcement of European Union environmental law. Legal issues and challenges*, New York, Routledge, 2015, 2<sup>nd</sup> edn.

<sup>31</sup> Interview 3.

<sup>32</sup> J. Kingdon, *Agendas, alternatives, and public policies*, London, Pearson, Updated 2<sup>nd</sup> edition, 2011.



One can argue that DG ENV acted as a policy entrepreneur in order to promote its public policy instrument for the improvement of the implementation of environmental law.

As a conclusion for this section, the institutional evolutions within the Commission seem to have influenced the discourse and the timing for the launching of the EIR.

### **3. Issue-specific variables: evolutions of the implementation strategy of the Commission**

Two hypotheses were formulated concerning variables linking the design of the EIR to evolutions within the Commission's implementation strategy. According to the first one, the less a policy instrument mix is regarded as effective, the more incentives the Commission has to introduce new instruments. The second one argues that the more effective policy instruments are considered to be, the more likely it is that they are transferred to other policy fields.

#### **3.1. Learning from the past: the limits of the Commission's implementation strategy**

To try to confirm the first of those two hypotheses, it is necessary to look at the evolution of the Commission's instrument mix used to improve implementation and at the way the EIR fits in it. The main tool foreseen by the treaties is the infringement procedure that enables the Commission to refer Member States to the European Court of Justice (ECJ). The literature has regularly underlined its limits. First of all, constantly dragging Member States in front of the ECJ would lead to a deterioration of its relations with national governments.<sup>33</sup> Moreover, the early phases of the procedure remain confidential, which prevents a collective learning.<sup>34</sup> On top of that, the procedure is regarded as resources-costly. Given its limited financial and human resources, it is impossible for the Commission to investigate all the

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<sup>33</sup> E. Schön-Quinlivan, 'European Commission', in A. Jordan & C. Adelle (eds.), *Environmental policy in the EU*, New York, Routledge, 2013, 3<sup>rd</sup> edn., pp. 95-112.

<sup>34</sup> S. Andersen, *The enforcement of EU law. The role of the European Commission*, Oxford, Oxford University Press, 2012.

potential breaches of the environmental legislation.<sup>35</sup> As early as 1996, the Commission itself recognised that the infringement procedure was not sufficient.<sup>36</sup> During an interview, a civil servant from the DG ENV<sup>37</sup> also mentioned the limits of the infringement procedure.

Tallberg argues that the enforcement strategy, based on the assumption that non-compliance results from a voluntary choice from Member States, must be complemented with a management one, based on the idea that non-compliance is caused by administrative shortcomings and the lack of clarity of legislation.<sup>38</sup> The Commission has developed complementary instruments to the infringement procedure that fall within the scope of the second approach. Some of them aim to reinforce Member States administrative capacity, for instance through the structural funds or technical assistance via the exchange of civil servants. Others, such as the publication of interpretative guidelines, are designed to reduce interpretation difficulties. During an interview, a civil servant from the DG ENV<sup>39</sup> presented the Commission's strategy as a stick and carrot approach, where the stick stands for the infringement procedure and the carrot for financial incentives and capacity building actions. He presented the EIR as a third component of the Commission strategy. The EIR displays features from a management instrument to the extent that it seeks to identify and remedy systemic causes for non-implementation such as administrative shortcomings. However, it is also meant to raise awareness on the implementation deficit and promote the participation of public and private stakeholders, as well as practices exchanges. Thus, it appears as complementary to the existing instruments.

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<sup>35</sup> Falkner et al., 'Worlds of compliance: why leading approached to European Union implementation are only "sometimes-true theories"', *European Journal of Political Research*, vol. 46, no. 3, 2007, pp. 395-416.

<sup>36</sup> European Commission, *Implementing Community environmental law*, Communication, COM(96) 50 final, Brussels, 22 October 1996.

<sup>37</sup> Interview 3.

<sup>38</sup> J. Tallberg, 'Paths to Compliance: Enforcement, Management and the European Union', *International Organization*, Vol. 56, No. 3, 2002, pp. 609-643.

<sup>39</sup> Interview 3.

Börzel points out the difficulty to assess the effectiveness of a single component of the implementation strategy,<sup>40</sup> which might explain the accumulation of instruments over the year. The analysis of the Commission's publications on the topic since 1996 indeed shows a pattern of incremental change over time, through the evolution of existing instruments and the development of new ones. For instance, the communication published in 2008<sup>41</sup> proposed to reinforce the dialogue with Member States by creating permanent networks with national representatives for the most important directives. Thus, there has been a layering of various instruments throughout the years rather than an abrupt change in the instruments used.<sup>42</sup> It seems that the 'saturation of instruments limit the scope for instrument innovation'<sup>43</sup> explains the incremental pace of instrument change within the environmental field. The institutional approach to public policy has indeed underlined that the room for change in public policies is limited by different factors, among which the existing instruments, the context and historical and institutional elements.<sup>44</sup>

### ***Policy feedback and the EIR***

The hypothesis was that the perception of the limits of the instruments used to improve the implementation of EU law would lead to a change in the policy mix. From the elements mentioned above, it seems that the Commission has considered the existing instrument mix as incomplete. The EIR thus seems to be the result of a process of policy feedback which provokes a correction in the policy course in reaction to past policy results. Baumgartner and Jones argue that public policies often tackle only one of the dimensions of the public problems

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<sup>40</sup> T. Börzel, 'Guarding the treaty: compliance strategies of the European Commission', in: T. Börzel & R. Cichowski (eds.), *The state of the European Union. 6: Law, politics and society*, New York, Oxford University Press, 2003, pp. 197-221.

<sup>41</sup> European Commission, *Communication on implementing European Community environmental law*, loc. cit.

<sup>42</sup> W. Streeck & K. Thelen, 'Introduction: institutional change in advanced political economies', in: W. Streeck & K. Thelen (eds.), *Beyond Continuity: Institutional Change in Advanced Political Economies*, Oxford, Oxford University Press, 2005, pp. 1-35.

<sup>43</sup> C. Halpern, 'Governing despite its instruments? Instrumentation in EU environmental policy', *West European Politics*, no. 33, vol. 1, 2010, p. 53.

<sup>44</sup> M. Howlett, 'From the 'old' to the 'new' policy design: design thinking beyond markets and collaborative governance', *Policy Science*, vol. 47, 2014, pp. 187-207.

they try to solve, so that the discovery or the increased attention being paid to a new dimension of it may trigger policy change.<sup>45</sup>

The Commission's communication about the EIR<sup>46</sup> presents a new framing of the implementation problem – the existence of common roots of non-implementation –<sup>47</sup> that requests a more systematic approach. One could thus argue that a new dimension of the implementation issue has gained political attention, which explain the development of a corresponding instrument.

### **3.2. Policy transfer: an instrument similar to those already used in other policy fields**

The second hypothesis examined in this section deals with the notion of policy transfer which takes place when a policy or an instrument that has been recognised as effective to solve a public problem is transferred to another government or policy field.<sup>48</sup> The Commission roadmap for the EIR explicitly mentions monitoring instruments developed in other policy fields to try and solve the implementation deficit by providing the Commission, Member states and stakeholders thorough information on the state of play of the implementation.<sup>49</sup>

We can see a trend towards the development of monitoring instruments in different policy fields. The first was the Internal Market Scoreboard, set up in 1997. On top of annual reports on the overall situation in the EU, the Commission provides country data on sectoral and governance-related topics, in order to have an overview of how each Member State is performing as regards to implementation. Similar instruments have been developed in other EU policy fields such as the SME Performance Review since 2008, the Digital Scoreboard in 2009, and the Justice Scoreboard in 2013.

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<sup>45</sup> Baumgartner & Jones, *loc. cit.*

<sup>46</sup> European Commission, *Delivering the benefits of EU environmental policy through a regular Environmental Implementation Review*, *loc. cit.*

<sup>47</sup> IMPEL, *Challenges in the practical implementation of EU environmental law and how IMPEL could help overcome them*, Final Report, 23 March 2015.

<sup>48</sup> A. Newmark, 'An integrated approach to policy transfer and diffusion', *The Review of Policy Research*, vol. 19, no. 1, 2002, pp. 152-176.

<sup>49</sup> European Commission, *Roadmap – Communication on a regular Environmental Implementation Review. Delivering the benefits of existing environmental policies and rules*, Brussels, 14 March 2016.

It can be construed as reflecting an evolution in the relations between the European Union and the Member States, with an increased performance measurement activity. Le Galès regards the development of performance measurement instruments as an indication of states' decreasing ability to govern and of the development of their role as 'performance enhancer[s]'.<sup>50</sup>

The main mechanism at play in policy transfer as identified by the literature is lesson drawing.<sup>51</sup> To assess whether there has been a policy transfer process, it is thus necessary to examine the EU institutions' assessment of the effectiveness of monitoring instruments developed in other policy fields. The Single Market Scoreboard has been presented as a success by both the Commission<sup>52</sup> and the European Parliament.<sup>53</sup>

The last element to be examined is the similarity between the EIR and those monitoring instruments. Different degrees of transfer have been identified in the literature: copying, emulation, hybridation, synthesis, and inspiration. Copying refers to the mere transfer of a policy instrument. The emulation process implies adjustments to the specificities of the policy field where the instrument is transferred. Hybridation and synthesis both refer to the blending of several policy instruments to create a new one, but hybridation characterises policy instruments created on the basis of two instruments and synthesis cases where more than two instruments were taken as a model. The lowest degree of diffusion, inspiration, is used to describe a policy instrument that has been created on the basis of an existing one but that displays specific features.<sup>54</sup>

The EIR could be seen as an example of policy synthesis. The EIR indeed includes some specific features: the publication of country reports is bi-annual rather than annual, the

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<sup>50</sup> P. Le Galès, 'Performance measurement as a policy instrument', *Policy Studies*, vol. 37, no. 6, 2016, p.514.

<sup>51</sup> Newmark, *loc. cit.*

<sup>52</sup> European Commission, *Communication on a regular Environmental Implementation Review*, *loc. cit.*

<sup>53</sup> European Parliament resolution of 9 March 2010 on the Internal Market Scoreboard (2009/2141(INI)) and European Parliament resolution of 22 May 2012 on the Internal Market Scoreboard (2011/2155(INI)).

<sup>54</sup> Newmark, *loc. cit.*

focus on the roots of non-implementation rather than on the performance of Member States and the intention to provide tailored support to Member States based on the results.<sup>55</sup> EU scholars have argued that instrument innovation is limited at the EU level and that the EU is more likely to upload and adapt instruments used at the member state or international organisations level, or from other policy fields, than to create new ones.<sup>56</sup>

This section tends to confirm the existence of mechanisms of policy feedback and policy transfer in the Commission's implementation strategy. The EIR thus could be construed as the result a process of gradual layering of instruments.

#### **4. External variables: persistent pressures to improve implementation**

This section will focus on the influence of external factors on the Commission's implementation strategy. Four main categories of external factors will be examined.

##### **4.1. The EU institutions' concerns about the implementation of environmental legislation**

The hypothesis was that a higher pressure from other EU institutions would lead to a higher likelihood for the Commission to take action. To examine this hypothesis, it is necessary to look into the different channels of communication used by the EU institutions to reach the Commission to see whether there has been an evolution in the previous years. The pressure will be assessed on the basis of both the number and the content of the publications.

The literature has identified the European Parliament as active in voicing concerns about the implementation of environmental law.<sup>57</sup> The empowering of the European Parliament has been identified as one of the causes of the increased saliency of this issue since

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<sup>55</sup> European Commission, *Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review*, *loc. cit.*

<sup>56</sup> Halpern & Le Galès, *loc. cit.*

<sup>57</sup> A. Jordan and J. Tosun, 'Policy implementation', in: A. Jordan and C. Adelle (eds.), *Environmental policy in the EU*, New York, Routledge, 2013, 3<sup>rd</sup> edn., pp. 247-266.

the 1990s.<sup>58</sup> However, some authors have also underlined its progressive de-radicalisation in parallel to the increase in its powers.<sup>59</sup>

Besides its legislative function, the European Parliament can influence EU policies through different means. Since direct influence on the Commission's agenda has been regarded in the literature as a limited means of leverage on the Commission, the analysis has focused on indirect channels of influence i.e. resolutions, non-legislative reports, hearings, questions to the Commission and meetings. The analysis focused on the 5 years before the launching of the EIR.

Few resolutions from the European Parliament deal with implementation itself.<sup>60</sup> The European Parliament has listed three resolutions pointing to a gap in the implementation of EU environmental law in the five years before the launch of the EIR.<sup>61</sup> Interestingly, the first one, published in 2013, underlined the need for a systematic approach,<sup>62</sup> which is similar to the rhetoric used by the Commission. However, the number of resolutions related to the implementation of environmental law remains limited – three in three years –, which doesn't point to an increasing pressure on the Commission. To complement this findings, research with keywords<sup>63</sup> was operated in the European Parliament's database for the five years before the launch of the EIR. It didn't show any increase of the publications dealing with the implementation issue in the European Parliament activity.

The last potential vector of influence is the European Parliament's role in examining citizens' petitions. It appears that a fair share of them concern breaches of the EU legislation:

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<sup>58</sup> *Ibid.*

<sup>59</sup> C. Burns, 'The European Parliament', in A. Jordan & C. Adelle (eds.), *Environmental policy in the EU*, New York, Routledge, 2013, 3<sup>rd</sup> edn., pp. 132-151.

<sup>60</sup> Delreux & Happaerts, *loc. cit.*

<sup>61</sup> European Parliament, *Implementation of community environmental law*, Fact Sheet, Brussels, 13 September 2014.

<sup>62</sup> European Parliament resolution of the 12 March 2013 on improving the benefits of delivery from EU environment measures: building confidence through better knowledge and responsiveness (2012/20104(INI)).

<sup>63</sup> The aim was to list any publication including the word 'implement' in its title, for the documents published between 2010 and 2016.

the analysis of the reports published by the Committee on Petitions between 2010 to 2015<sup>64</sup> indeed shows that implementation has been a persistent subject of concern, especially in the environmental field. Those reports systematically call the Commission to fulfil its monitoring and enforcing role. The fact that these petitions are systematically mentioned in the Commission's annual reports on the monitoring of the application of the EU could constitute an indicator of the European Parliament's influence.<sup>65</sup>

In conclusion, it appears that the European Parliament has made recourse to the petitions it receives from citizens to push for a better implementation of the environmental law and that it hasn't extensively used its other vectors of communication to draw attention on the deficit in implementation. It has nonetheless attempted to take credit for the launching of the EIR.<sup>66</sup>

### ***The European Court of Justice and consultative bodies***

The ECJ has played an important role in in 'shaping and fine-tuning environmental law'<sup>67</sup> in so far as it has handled more than 700 cases on environment matters between 1973 and 2010.<sup>68</sup> However, it is difficult to see how the ECJ could have exerted an influence on the Commission's choice of instruments.

The Committee of Regions is a consultative body representing subnational authorities in the EU. Its main channels of expression are non-binding opinions and resolutions. Notwithstanding the fact that the Committee of Regions has tried to raise awareness about the issue, its opinions appear focused on specific themes or pieces of legislation. Research by keywords in the databases of the Committee of Regions showed no publications dealing

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<sup>64</sup> Available at: <http://www.europarl.europa.eu/committees/en/peti/reports.html>

<sup>65</sup> Annual reports on monitoring of the application of the EU law published by the Commission between 2011 and 2015, available on the Commission's website at [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm).

<sup>66</sup> European Parliament, *Environmental Implementation Review*, At a glance, February 2017.

<sup>67</sup> *Ibid*, p. 129.

<sup>68</sup> L. Krämer, 'The European Court of Justice', in: A. Jordan & C. Adelle (eds), *Environmental policy in the EU*, New York, Routledge, 2013, 3rd edn., pp.113-131.



exclusively with the implementation of environmental law in the 5 years before the launch of the EIR. The Committee of Regions nonetheless regards the shift in the Commission approach to implementation between its 2008 and 2012 communication, from a focus on breaches to a governance approach, as being in line with its own criticism.

The Committee of Regions did not use either the Technical platform for cooperation on the environment, launched by DG ENV in 2012 to exchange about implementation issues and potential solutions, to push for better implementation. Whereas the documents from the first meeting mentioned the implementation as an issue by itself, subsequent meetings have been focused on specific policy areas.<sup>69</sup>

Drawing on Le Galès and Lascoumes' research,<sup>70</sup> one could argue that the Committee of Regions is pushing for a redefinition of the relations between the actors by promoting instruments that will enhance the participation of subnational entities. In several of its opinions, the Committee of Regions indeed pushes for increased participation of subnational authorities in the policy-making.

The European Economic and Social Committee (EESC) is also a consultative body, representing civil society at the EU level and is called to give non-binding opinions on certain pieces of legislation or initiatives. The research in the publications' database of the EESC did not show any opinion on the implementation issue published in the 5 years before the launch of the EIR, which would suggest that the EESC has not reinforced its pressure on the Commission over this period. What can be said is that the EESC has expressed concerns about the lack of implementation of the environmental law in other opinions. In one of its opinions on the 7th EAP, the EESC indeed claims that there are "fundamental obstacles" to the

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<sup>69</sup> Meetings' minutes and presentations can be found at the following link: [http://ec.europa.eu/environment/legal/platform\\_en.htm](http://ec.europa.eu/environment/legal/platform_en.htm)

<sup>70</sup> Lascoumes & Le Galès, 'Introduction: understanding public policy through its instruments', *loc. cit.*

implementation of the EU environmental law.<sup>71</sup> The EESC then advocates for a more effective monitoring mechanism. This discourse is somewhat similar to the one used to justify the EIR. Thus, there seems to be a certain correlation, but it is difficult to conclude to a relation of causality.

### ***The role of expertise in the implementation strategy***

Two more organisations need be mentioned, owing to the role they play in the implementation of the environmental law: the European Environment Agency (EEA) and the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL). They both provide expertise in the field of environmental law and especially on the implementation of the *acquis*.

The EEA was created to gather and to provide the Commission with information on the environment in the EU. The literature has argued that it has sought to exert a certain degree of influence on the environmental policies themselves.<sup>72</sup> However, there hasn't been any report on the implementation issue in the five years preceding the launch of the EIR, except for the outlook of the environment. In the 2015 outlook, the EEA underlined challenges that remain to be met, and the overall picture was a mixed one. It thus can be said that it contributed to giving the Commission an understanding of the extent of the implementation issue, but it is difficult to assess how the EEA may have influenced the launch of the EIR.

IMPEL is a non-profit organisation gathering European environmental authorities from EU that supports the implementation of the environmental *acquis* via activities such as capacity building and practice exchanges. The coordination of the EU and IMPEL activities dates from the late 1990s. The literature suggests that it has developed a more political role.<sup>73</sup> As with the EEA, most publications dealing with the implementation tackle sectoral issues or

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<sup>71</sup> European Economic and Social Committee, *Opinion on the Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'*, NAT/592, Brussels, 20 March 2013, p. 4.

<sup>72</sup> Delreux & Happaerts, *loc.cit.*

<sup>73</sup> Hedemann-Robinson, *loc. cit.*

focus on one piece of legislation. But IMPEL carried in 2015 a review of the implementation of the EU environmental law and identified the main challenges ahead as well as potential causes for the lack of implementation.<sup>74</sup> It suggests the existence of root causes common to all Member States. It is cited in the Commission's communication launching the EIR,<sup>75</sup> and IMPEL preliminary findings regarding the common causes for non-implementation, such as insufficient administrative capacities, low level of fines, a lack of data and skills, are used to back the Commission's argumentation. One could say that the report published by the IMPEL informed the Commission's discourse about the EIR and the instrument's design.

The elements of analysis presented in this subsection do not allow one to conclude a determining influence of EU institutions or bodies. If there is evidence that they voiced concerns about the state of play on this issue, it is difficult to establish any causal relation.

#### **4.2. Civil society as a watchdog for breaches of the EU legislation**

The main tool that can be used by citizens to try to influence the EU institutions is petitions. There is no clear-cut evidence of a correlation between this vector of pressure on the EU institutions and the launch of the EIR. Although the environment is systematically mentioned as one key concern in the petitions, the analysis of the reports published by the Committee on Petitions between 2011 and 2015<sup>76</sup> do not show any indication that the number of petitions has recently raised. On the contrary, the share of environmental petitions in the total number of petitions received by the Parliament is slightly decreasing during the period between 2011 and 2015 (from 14,8% to 7,8%), as well as their absolute number. Moreover, the analysis did not reveal any change in the tone used or the content over the 5 years before the launch of the EIR.

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<sup>74</sup> IMPEL, *loc. cit.*

<sup>75</sup>European Commission, *Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review*, *loc. cit.*

<sup>76</sup> See above.

Another way to capture the influence civil society may have exerted on the Commission is to look at non-governmental organisations (NGO) that voice environmental concerns at the EU level. Beyers<sup>77</sup> has identified two different strategies for interest representation: voice and access. Whereas the former refers to the indirect transmission of information via the public space, the latter can be characterised as an “exchange of policy-relevant information with public officials through formal and informal networks”.<sup>78</sup> According to Beyers, the Commission is less open to diffuse interest. The literature has recognised the role played by civil society organisations in monitoring the implementation of EU environmental law and also drawing the Commission’s attention to serious breaches.<sup>79</sup> Environmentalist associations have indeed been identified – along with the European Parliament mentioned above – as one of the factors for the increased salience of the implementation issue since the 1990s.<sup>80</sup>

It is difficult to assess the influence as well as to find information relative to informal contacts, so that the analysis has focused on these organisations’ publications (press releases, reports, open letters etc.). Due to time constraints, it only dealt with the publications of the ten most influential of those organisations<sup>81</sup> via research with keywords in their databases. The communication campaigns of those NGOs have also been looked at. No definitive conclusion can be drawn from the influence of those organisations on the sole basis of the results obtained, since they don’t take into account the informal or indirect influence civil society organisations may have exerted. The analysis nonetheless showed that there has been no significant increase in the amount of publications linked to the general issue of the implementation of environmental legislation in the 5 years before the creation of the EIR. In most cases,

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<sup>77</sup> J. Beyers, ‘Voice and Access. Political practices of European interest associations’, *European Union Politics*, vol. 5, no. 2, 2004, pp. 211-240.

<sup>78</sup> *Ibid.*, p. 213.

<sup>79</sup> Delreux & Happaerts, *loc. cit.*

<sup>80</sup> Jordan & Tosun, *loc. cit.*

<sup>81</sup> As identified by Delreux & Happaerts.

publications mentioning implementation focus on specific pieces of legislation or environmental areas. These results appear in line with the literature's assessment of the access of the organisations representing diffuse interest to the Commission.

#### **4.3. The Member States, main actors of the implementation of the EU legislation**

Since they play an essential role in implementation, it is necessary to analyse Member States' perception of the implementation gap and of the Commission's strategy. The main sources of information about Member States positions are the conclusion from the European Council and the Council.<sup>82</sup>

The study of the conclusions of the European Council between 2011 and 2015 doesn't show any occurrence of a debate on the specific topic of environmental law implementation. Implementation of environmental law is only mentioned in relation with important EU goals such as the Energy Union or international negotiations, but there is no debate on the general issue. When looking at the conclusions of the Environment Council over the same period of time, it appears that the issue of implementation has been debated on average once a year. Interestingly, in the conclusions of the 26th October 2015 summit,<sup>83</sup> Member States claim that exchanges at the ministerial level may contribute to identify grassroot problems and solutions. This element of discourse is strikingly similar to the one used by the Commission for the EIR. Interviews and the literature on the topic leads to doubt that this was representative of an evolution in Member States' positions that influenced the Commission.

Jordan indeed argues that "states remain deeply reluctant to address the underlying cause of the implementation deficit".<sup>84</sup> This reluctance has also been identified by other EU

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<sup>82</sup> The analysis concerned the conclusions from all European Council planned summits from 2010 to 2015 and all Environment Councils during the same time frame.

<sup>83</sup> Council of the European Union, *Outcome of the Council meeting*, Meeting n°3419, Environment, Luxembourg, 26 October 2015.

<sup>84</sup> A. Jordan, 'The implementation of EU environmental policy: a policy problem without a political solution?', *Environment and Planning*, vol. 17, no. 1, 1999, p. 86.

institutions: the Committee of Regions claims that there has been a lack of political will from Member States to correctly implement EU environmental legislation.<sup>85</sup>

Similarly, interviews<sup>86</sup> point to an initial reluctance of some Member States regarding the EIR for several reasons. First, environmental pioneers didn't want to implement a system that was considered as less progressive than their domestic policies. Some Member States also expressed concerns about the production of additional data. Moreover, it was feared that the EIR could lead to the suppression of infringement procedures, whereas this instrument can be useful in some context to exert pressure on governments to implement the environmental *acquis*. The director of DG ENV introductory speech at the EIR country dialogue for Belgium addressed this concern by explicitly stating that the EIR is not meant to replace infringement procedures. Eventually, one interviewee also revealed that some Member States rejected the strategy of blame avoidance of the Commission<sup>87</sup> and tried to shift partial responsibility back to the Commission by arguing that the Commission should also push for better implementation at the EU level.<sup>88</sup> Drawing on the theory on policy instruments,<sup>89</sup> one could also make the assumption that Member States did not agree with the evolution of their own role in the implementation process entailed in the EIR. The Commission's affirmation that the EIR was launched to raise awareness at the political level<sup>90</sup> suggests that the problem wasn't dealt with at the highest political level before.

#### **4.4. The EIR, an instrument to monitor the progress towards international policy goals**

The last hypothesis to be examined states that the more salient international policy goals are, the more pressure there is for the Commission to focus its effort on domestic policies

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<sup>85</sup> Committee of Regions, *Towards a 7<sup>th</sup> environment action programme: better implementation of EU environmental law*, CDR 1119/2012, Opinion, Brussels, 98<sup>th</sup> plenary session, 29-30 November 2012.

<sup>86</sup> Interview 1, 2 and 3.

<sup>87</sup> Interview 2.

<sup>88</sup> Hood, Christopher, *The blame game: spin, bureaucracy and self-preservation in government*, Princeton, Princeton University Press, 2010.

<sup>89</sup> Lascoumes & Le Galès, *Gouverner par les instruments*, *loc. cit.*

<sup>90</sup> European Commission, *Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review*, *loc. cit.*

to achieve them. The saliency of the international goals will be assessed based on the role played by the EU in their negotiations and their perception by the Commission.

Since two decades, the EU has shown an increasing willingness to be and has been considered by the literature as a leader in international negotiations on sustainable development.<sup>91</sup> This ambition has been *inter alia* backed by an attempt to match domestic policies with external ambitions.<sup>92</sup> The Commission has indeed tried to ensure the implementation of EU internal policies in order to reinforce the EU credibility.<sup>93</sup> It can thus be argued that this external strategy exerts pressure for the effective implementation of EU policies. The two most recent comprehensive agreements will be examined in this subsection.

During an interview with a national coordinator with the EIR,<sup>94</sup> the Sustainable Development Goals (SDG) were mentioned as one of the rationale for the launch of the EIR. The communication about the SDG argues that the EU “was instrumental in shaping the global 2030 Agenda”<sup>95</sup> which would reinforce the domestic saliency of this declaration and the pressure to meet the objectives set in it. It explicitly mentions the EIR as one of the instruments that will be used to monitor compliance with the SDG.

Similar comments can be made about the Paris Agreement of 2015, in the negotiations of which the Commission exhibited leadership along with the Member States.<sup>96</sup> The Commission, indeed, presents the EU as a leading actor in the negotiations.<sup>97</sup> Here again, the

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<sup>91</sup> D. Kelemen, ‘Globalizing European Union environmental policy’, *Journal of European Public Policy*, vol. 17, no. 3, 2010, pp. 335-349.

<sup>92</sup> R. Wurzel, D. Liefferink & J. Connelly, ‘Conclusion - Re-assessing European Union climate leadership’, in: R. Wurzel, J. Connelly & D. Liefferink (eds.), *The European Union in climate change politics: still taking a lead?*, Oxon, Routledge, 2017.

<sup>93</sup> J. Skjaereth, ‘The Commission’s shifting climate leadership. From emission trading to energy union’, in: Wurzel, Connelly & Liefferink, *loc. cit.*

<sup>94</sup> Interview n° 1.

<sup>95</sup> European Commission, *Communication – Next steps for a sustainable European future. European action for sustainability*, COM (2016) 739 final, Brussels, 22 November 2016, p. 3.

<sup>96</sup> R. Wurzel, D. Liefferink & J. Connelly, ‘Introduction - European Union climate leadership’, in: Wurzel, Connelly & Liefferink, *loc. cit.*

<sup>97</sup> European Commission, *Communication, The Road from Paris: assessing the implications of the Paris Agreement and accompanying the proposal for a Council decision on the signing, on behalf of the European Union, of the Paris agreement adopted under the United Nations Framework Convention on Climate Change*, COM(2016) 110 final, Brussels, 2 March 2016, p. 2.

influence of the EU in the negotiations seem to be built upon its domestic policy experience. This would imply that this international commitment exerts pressure on the EU to achieve the goals that have been set.

These empirical elements, coupled with the literature on the role of the EU in international negotiations, would tend to suggest an increased pressure to effectively implement the environmental *acquis* in recent years due to international commitments. The EIR could thus be construed as a part of the Commission strategy to secure the fulfilment of those goals and thus maintain the EU credibility.

Thus, it is difficult to exactly assess the degree of pressure exerted by external actor on the Commission in its decision to launch the EIR. What can nonetheless be argued is that most EU institutions have issued repeated calls for an improvement of the implementation of environmental legislation and have put the emphasis on different issues or potential solutions.

## **5. Conclusion**

The analysis of the independent variables points to mixed results as regards to their influence. It can be concluded that the Better Regulation program has informed the cognitive framework of the Commission's work. One would expect as a consequence that the EIR has been influenced by it, although a causation link cannot be established with certainty. The arrival of a new executive in 2014 also seems to have reinforced the focus on implementation, creating a window of opportunity for the introduction of new instrument.

The design of the EIR could reasonably be construed as having been influenced by existing instruments of the Commission's implementation strategy. On the one hand, there is some evidence of a process of policy feedback in the environmental field, whereby the progressive piling up of new instruments has constituted an answer to the persistence of a



perceived deficit in implementation. On the other hand, several elements suggest that the design of the EIR has been inspired from existing instruments.

Little empirical evidence has been found of a direct influence of external actors. This could also be linked to the empirical choices made for the research. It is however important to note that they have underlined in a way or another the deficit of implementation of the EU environmental law. Their recurrent calls for action may have generated pressure on the Commission over time. It seems that international agreements recently ratified by the EU have reinforced the saliency of the implementation issue.

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