

Executive Summary

This study focuses on Member State compliance with monitoring, evaluation and inventory mechanisms employed within both the first and the third pillar of the European Union. Following a comprehensive analysis of existing practice, it seeks to offer practical recommendations on how to improve compliance with such mechanisms within the third pillar.

At first glance, the existing evaluation mechanisms are predominantly of an administrative nature. Their general feature is that they are fragmentary, incoherent and inconsistent. In other words, the current mechanisms are both insufficient and inefficient, in the sense that they do not guarantee implementation of the common binding norms of the third pillar.

One of the foundations or preconditions of the principle of mutual recognition is that the Member States share common ground regarding fundamental principles of their legal systems, such as the rule of law, the protection of human rights, the principle of legality, the principle of ‘subsidiarity’, the principle of proportionality, and other principles common to all criminal justice systems. With this in mind, how can the Member States cooperate effectively if full mutual trust in the legal system of another Member State, or its implementation, is not present?

In order to be able to further promote the necessary mutual trust within these areas, it is imperative to examine and strengthen the functioning of monitoring, evaluation and inventory mechanisms existing within the third pillar of the European Union. For us to produce appropriate recommendations on how to improve the respective mechanisms and compliance with these mechanisms by the Member States and, eventually, to strengthen mutual trust within the European Union, a careful examination of the content and process related factors that at the same time both hinder and contribute to compliance with third pillar mechanisms is required. Such an examination necessitates a study of the extent to which the degree of compliance is contingent upon the actual organizational structure (approach, working method, constellation of actors involved) within which these monitoring mechanisms operate, as well as the way in which these additional factors may also hinder or contribute to compliance.

Because any proposals to improve actual compliance with the monitoring mechanisms within the domain of criminal matters may also be derived from an examination of the experiences with such mechanisms in the first pillar, our recommendations are based on a study on the functioning of monitoring, evaluation and inventory mechanisms in both the third pillar and the first pillar.

The study was structured according to the following research questions:

1. Which, content and process related factors hinder (better) compliance with monitoring, evaluation and inventory mechanisms within both the first and third pillars of the EU?

2. To what extent does the degree of compliance depend on the approach and working methods used, and the constellation of actors involved in these monitoring, evaluation and inventory mechanisms?
3. What adjustments to monitoring, evaluation and inventory mechanisms may improve the follow-up to the outcomes of such mechanisms by the Member States?

The relevance of these research questions can be seen from the current absence of an effective monitoring system. When ratified, the Treaty on the Functioning of the European Union will provide for a formal framework of such an implementation scheme (Article 70 TFEU). However, given the current uncertainties as to when the Treaty will be ratified, the transition period of five years after the entering into force of the Treaty of Lisbon regarding third pillar legislation, and the increasing number of situations in which legislation is not applicable to all Member States, it is important to begin now with the process of developing better monitoring systems.

Based upon existing practices, this report analyses those factors that hinder (better) compliance (and follow up) with monitoring and evaluation mechanisms in the first and third pillars of the European Union. We base our findings on an in depth analysis of existing literature on this topic (see the Annex to this report for a schematic overview of compliance factors, as well as chapters 2 for detailed descriptions), coupled with evidence based analysis of real life cases and experiences with such monitoring and evaluation mechanisms (see chapters 4 and 5). This enables us to draw from the experiences with monitoring and evaluation mechanisms in a wide variety of situations, such as in the OECD, the first pillar and the third pillar of the European Union (see, in particular, chapters 3, 4 and 5).

The main – and very obvious – lesson to be derived from these analyses is the realization that a well functioning monitoring or evaluation mechanism needs a context sensitive approach, not a one size fits all or implementation biased approach. A context sensitive approach needs to take account of the following crucial elements:

1. Monitoring and evaluation mechanisms to a large extent stand or fall with the degree to which its members learn from each other and thereby adhere to the rules, which in turn depends upon the level of commitment of its members. For every monitoring or evaluation mechanism that is to be established at the European Union level, we carefully need to examine the political will amongst Member States to achieve the required goal. Without a basic level of trust and commitment among the members, even the best designed evaluation or monitoring mechanism is subject to failure.
2. A second necessary element in order to allow for a context sensitive approach is the realization that specific Member State factors do matter and that these domestic factors are, generally speaking, rather ‘sticky’ or ‘culturally determined

mental patterns', and thus difficult to overcome. Actors that play a dominant role in ensuring follow up in these mechanisms need to be(come) sensitive to these domestic specificities and need to have the freedom, and be able, to react upon them.

3. A third element which particularly comes to the fore in the field of criminal law, is that the interdependence of Member States and exclusive nature of the legislation, stimulate compliance at all levels, both in relation to compliance with legislation, as well as with the outcomes of evaluation findings. A spirit supportive of not only the instrument, but also its European Union nature and cooperation with other Member States, will stimulate compliance. This could also be promoted by a common policy on certain areas, which is not only formally or symbolically supported by the Member States, but also appears from what they actually do.

The study identifies three possible scenarios:

1. Monitoring and evaluation mechanisms based on peer review

On a positive note, monitoring and evaluation mechanisms that largely rest on peer review among the member countries they may be beneficial in stimulating mutual learning via peer pressure. Member States seem to be relatively open to accepting peer review from other Member States, and the intensive, non-confrontational and non-legalistic nature of the interaction in most peer review systems generally leads to an ongoing and informal information-sharing experience from which all partners may benefit.

2. Monitoring and evaluation mechanisms based on independent, 'expertocratic' reporting

It is argued that, only if reporting is done in an independent, uniform, objective and standardized way, is it possible to arrive at a genuine comparability of national policies and of their respective impacts. Independent experts might be better placed to report accurately and truthfully on the Member States' performances.

3. Monitoring and evaluation mechanisms based on sanctioning

The third scenario incorporates the use of sanctions to stimulate (by imposing fines) or to force (through the launch of infringement proceedings) Member States to comply. However, while the presence of clear sanctioning mechanisms is a positive incentive for Member States to comply, we require the necessary political commitment to make the mechanism work in practice.

Without necessarily indicating a preference for a particular scenario or a specific combination of scenarios, we would emphasize that any system that intends to promote compliance with the implementation of European Union agreements, as well as

compliance with monitoring and evaluation results, needs to adhere to a multi-step approach. Without precisely specifying the number of steps needed, an analysis of compliance outcomes in the first and the third pillars of the European Union seems to at least indicate the need for a first inventory step, where information is collected in the different Member States in the most uniform and objective manner. This process of data collection should be undertaken according to the following conditions:

Data collection is most likely to result in reliable and comparative information, which is crucial for checking compliance and stimulating follow up, when:

- the monitoring or evaluation process is institutionalized (Member States are more likely to participate in, and accept the outcomes of, institutionalized mechanisms, since institutionalisation creates a dynamic of its own);
- the monitoring or evaluation process takes place on the basis of an iterative process supported by a permanent structure (if Member States are aware that their performance is judged regularly and repetitively, the probability that they will feel compelled to continue paying attention to the issue(s) discussed is greater than where ad hoc evaluations are concerned, due to the follow up element that it implies);
- the monitoring or evaluation process uses common European, precise indicators for assessment (it is self-evident that progress can only be measured comparatively if there are precisely defined and explicit indicators that limit the leeway for interpretation for those who report on national progress);
- the monitoring or evaluation process results in prescriptive and express policy recommendations that allow for effective monitoring and evaluation, and that give the process a forward-looking orientation. Only with such recommendations can the evaluation process be constructive and enhance compliance, while preventing the emergence of evaluation fatigue.

In order to ensure actual compliance with monitoring and evaluation outcomes, we would, however, support the shift towards a more flexible approach reaching beyond an initial uniform and generally applied methodology; an idea based on our general conclusion that well-functioning monitoring and evaluation mechanisms need a context sensitive approach that takes into consideration political will and commitment, as well as domestic circumstances.