Managing Compliance in a Multi-Level Polity: The Case of the European Union

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TESI DOCTORAL UPF 2019

DIRECTOR DE LA TESI

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Dedication

To Dad, Mum, Granny and all my brothers and sisters and friends (especially Pani and Antonio) who got me through it.

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Acknowledgements

I want to take this opportunity to extend a sincere thanks to Javier for all he has done to ensure we reached this point. This would not have been realised without his interest and support and all his help which went beyond what could be expected of a supervisor. If finishing would have been impossible without Javier, the thesis would never have even begun without the ceaseless support and encouragement of my family who deserve a special mention, in particular my mum, my dad, my granny and friends brothers and sisters who are all a continuing inspiration to me. Finally, I want to take this opportunity to give a special mention to the Office of the Secretary at the Department of Political Sciences in particular, and Universitat Pompeu Fabra in general, for being a spectacular help throughout all these years.

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Summary

This thesis tackles the issue of non-compliance in the European Union (EU). This is an important issue because without Member State (MS) compliance with EU policy outputs, collective policy goals may not be achieved. Non-compliance may even undermine the stability of a political system in which over half a billion citizens reside. While an EU compliance literature has made important strides in understanding why MS non-compliance occurs, there are still important gaps in our knowledge. This thesis identifies and addresses three of these gaps. Firstly, I explore the determinants of sub-state non-compliance. Secondly, I explore the functioning of the EU enforcement mechanism (infringement proceedings) by testing for case-level explanations for why some infringements reach adjudication by the European Court of Justice (ECJ). Thirdly, I investigate the Commission's use of discretion during this infringement procedure, around the timing of when it refers an infringement case to the ECJ and the duration pre-trial settlement bargaining. The results of the three papers provide innovative and relevant insights to not only the EU compliance literature but also contributes to ongoing debates in international relations, judicial politics, public administration and wider governance literatures.

Resumen

Esta tesis aborda el tema del incumplimiento en la Unión Europea (UE). Este es un tema importante porque sin el cumplimiento de los Estados miembros (EM) con los *policy outputs* de la UE, los objetivos de la política colectiva pueden no lograrse. El incumplimiento puede incluso debilitar la estabilidad de un sistema político en el que residen más de 500 millones de ciudadanos. Si bien una literatura de cumplimiento de la UE ha logrado avances importantes en la comprensión de por qué ocurre el incumplimiento, todavía existen lagunas importantes en nuestro conocimiento. Esta tesis identifica y aborda tres de estas brechas. En primer lugar, exploro los determinantes del incumplimiento subestatal. En segundo lugar, exploro el funcionamiento del mecanismo de ejecución de la UE (procedimientos de infracción) probando explicaciones a nivel de caso de por qué algunas infracciones llegan a una sentencia del Tribunal de Justicia de las Comunidades Europeas (TJCE). En tercer lugar, investigo el uso de la discreción de la Comisión durante este procedimiento de infracción, en torno al momento en que remite un caso de infracción al TJCE y la duración de la negociación del acuerdo previo al juicio. Los resultados de los tres documentos proporcionan ideas innovadoras y relevantes no solo a la literatura de cumplimiento de la UE, sino que también contribuyen a los debates en curso en las relaciones internacionales, la política judicial, la administración pública y la literatura de gobernanza.

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Introduction

Recent events have demonstrated that compliance[1] with European Union (EU) policy outputs cannot be taken for granted. For example, in the Mediterranean refugee crisis 2015-2018, Member States (MS) failed to meet their commitments for resettlement of refugees (Bauböck 2018). At the same time, Hungary and Romania and Poland have been refusing to comply with EU rules in such a manner that it can be considered a systemic rule of law crisis (Batory 2016; Closa 2019). In the last decades, non-compliance with Euro-zone budgetary commitments has occurred in multiple MS (Savage and Verdun 2016).

The above represent high-profile cases in which MS have not complied with EU rules. However, like the metaphorical iceberg, non-compliance includes many more cases that are less high-profile. The European Commission, the executive arm of the EU and the actor responsible for monitoring compliance with the enormous body of EU primary and secondary legislation, is responsible for bringing legal cases against MS for compliance failures. Last year (2018), a total of 1571 suspected cases of non-compliance were formally investigated by the Commission (European Commission 2019). A similar number of cases were launched in 2016 and 2017 (European Commission 2017, 2018a).

[1] The definition and operationalisation of compliance is expanded upon later. Compliance is understood here to be conformity with the legal obligations emenating from the European Union and non-compliance to be non-conformity with these rules.

What all these examples show is what the policy implementation literature has long demonstrated: legislative outputs are not self-implementing (Mazmanian and Sabatier 1983; Van Meter and Van Horn 1975).

Whether or not MS comply with EU rules affects the realisation of important policy goals, as well as the stability of the political system. Some of the most important policy objectives relate to effectively regulating the Single Market. This is a significant source of economic activity in the EU, the benefits of which are estimated at upwards of 8.5 % of EU Gross Domestic Product (GDP) (European Commission 2018b). Frictionless cross-border trade (the motor of this economic benefit) requires compliance with EU rules. In addition, without compliance, the high levels of consumer and health protection for food and other products are put at risk and the same is true for citizenship rights (such as the right to live, travel and work across its territory) of over half a billion citizens. There are additional policy problems that the EU is better placed than to MS to address, such as "wicked problems" that are transboundary in nature and require multi-lateral response (Levi-Faur 2011). The capacity to address these is severely weakened if MS do not comply with the rules.

Secondly, non-compliance may even undermine the stability of the EU political system. Disputes between the European Commission and MS over non-compliance or amongst MS themselves are potentially damaging to a political system (and in particular a

legislative process) which depends on consensus and cooperation to be effective (Heisenberg 2005; Hix and Hoyland 2011).

In addition to the consequences for policy goals and political stability, studying EU non-compliance can make significant contributions to important academic debates. It can contribute to understanding why states fail to comply with international law and why policy goals fail in implementation.

The structure of implementation in the EU makes it a useful case to analyse. Unlike states, the EU lacks a bureaucracy which can administer and apply policy outputs. Instead, implementation takes place through the different national and sub-national administrations in its 28 MS. EU rules are therefore filtered through many different political and administrative institutions, with different structure and actor configurations, and across multiple levels. Consequently it provides fertile ground to test competing predictions regarding the working of different institutional configurations and utilise statistical techniques to simultaneously test for several causes of non-compliance (Toshkov 2010).

Studying non-compliance in the EU is also excellent opportunity to explore the processes and outcomes of centralised enforcement mechanisms in international organisations. The EU is more advanced as a form of regional integration than any other international organization. Besides its mode of decision-making (qualified majority voting), budgetary arrangements (revenue

collection and distribution), and citizen involvement (direct elections to the European Parliament), the EU has a strongly developed legal order complete with institutionalised enforcement mechanisms. The EU has several mechanisms[2] of which the central one is infringement proceedings. There are not many other examples of enforcement mechanisms like it[3]. Studying how the EU enforcement mechanism works can provide insights for the design of enforcement mechanisms in other international organisations.

European Union Compliance Literature: Three gaps

The study of non-compliance in the EU began with an "eclectic" range of studies in the late 1980s (Mastenbroek 2005). It was with the development of the Single Market programme that interest in compliance really took off (Treib 2014). Policy makers and academics together were interested to see if there was a wide-spread "compliance deficit" undermining the formation and functioning of the market (European Commission 1997; Gibson and Caldeira 1995; Lampinen and Uusikylä 1998). Since then studying

[2] This toolkit composes, among others, the legal order with the principles of supremacy and direct effect and the preliminary reference system which effectively binds national courts to rule in accordance with EU law, even when it means against their national governments and more informal mechanisms SOLVIT and EU-PILOT.

[3] Some analysis has been done into WTO dispute settlement system (e.g. Busch, Reinhardt, and Shaffer 2008; Zangl 2008) but as Tallberg and Smith (2014) argue there are noticeable differences between the WTO and EU models, not least because the EU model allows the Commission to perform role of prosecutor rather than it simply being a dispute between two states.

compliance in the EU has expanded to become its own cottage-industry (Angelova, Dannwolf, and König 2012; Treib 2014).

Rather than develop new theory to explain EU non-compliance, both early and more recent studies have tested expectations drawn from the International Relations theory (Chayes and Chayes 2012; Downs, Rocke, and Barsoom 2007; Fearon 2014) and policy implementation literature (Bardach 1998; Van Meter and Van Horn 1975; Pressman and Wildavsky 1984). The results indicate that while opposition to the policy preferences can (and does) cause non-compliance in some cases (Thomson, Torenvlied, and Arregui 2007), the vast majority of non-compliance evidence is attributed to MS capacity issues (Angelova, Dannwolf, and König 2012).

In order to further unpack the issue of MS capacity, authors have applied lessons from domestic implementation literature (Matland 1995; Mazmanian and Sabatier 1983; Schofield 2001); public adiministration literature (Bouckaert, Peters, and Verhoest 2010; Peters and Pierre 1998; De Vries and Nemec 2013); and broader literature on governance and managing inter-organisational relations (Cousins 2002; Ruhanen et al. 2010). These test the impact of variables such as policy-characteristics or political and administrative settings as well as political opposition (Héritier 1996; Krislov, Ehlermann, and Weiler 2013; Siedentopf and Ziller 1988).

One key advance has been to further conceptualise state capacity so that there are broadly two accepted understandings. Firstly, there is

a resource-centred approach, in which capacity is determined by the sum of military, financial and human resources (Simmons 1998; Tallberg 2002). Of course, military resources are not likely to be employed within the EU, but manpower can impact on a state's capacity to implement. According to the alternative, institutionalist approach, capacity is determined by institutional structure, in particular how much autonomy is afforded to actors by the presence or absence of veto players (Putnam 1988; Tsebelis and Garrett 2000; Tsebelis, Tsebelis, and George 1995).

As increasing the financial, military and human resources of a state is a difficult variable to be able to change, the literature has tended to further explore the issue of institutional resources. In particular, studies have examined how and when veto players block the implementation of international rules. The results are mixed with the number of veto players seemingly not being significant across all studies and all dependent variables or policy sectors (Jensen 2007; Kaeding 2006; Linos 2007; Mbaye 2001).

These inconclusive results have meant that authors have needed to explore the effects of veto players in more sophisticated analyses. While early studies used the number of veto players to test for a negative impact on transposition, there is a growing consensus that one cannot fully explain implementation success or failure without reference to the preferences of actors within these institutional frameworks. This brings me on to the first puzzle /gap in the

literature that I seek to explain: the role of sub-state actors in EU compliance.

One important potential veto player, which is largely ignored in the literature, are sub-state actors. Estimates place between 50-80% of EU policy is implemented through lower level governments (Charron, Dijkstra, and Lapuente 2015). Despite the prominent role of sub-national actors, we know very little about how well they implement EU legislation nor reasons for implementation failures specific to this level.

The academic literature, while comprising a large body of work on cross-national (Bergman 2000; Börzel et al. 2010; Giuliani 2003) and cross-sectoral (Haverland and Romeijn 2007; Zubek and Staronova 2011) compliance, does not systematically investigate sub-state non-compliance patterns (Mastenbroek 2005; Treib 2006, 2014b). The accumulated evidence in the literature is limited to the finding of a negative impact of federalism/regionalism on compliance (Haverland and Romeijn 2007). However, the mechanisms behind sub-national non-compliance are not examined in detail and there is no systematically collected data which records sub-national acts of non-compliance. Therefore, there is a clear gap which needs filled, firstly to map sub-state non-compliance and secondly to propose and test explanations for sub-state non-compliance.

A work filling this gap will help address a number of issues. A criticism of the current state of the art is that research ‘insufficiently captures the implications of MS being part of a multilevel system’ (Schmidt 2008, 299). EU policy-making and politics has created a system of multi-level governance linking the sub-state layer with the supra-national layer (Hooghe and Marks 2001). Yet, as Trondal and Bauer (2015) highlight, much of recent research fails to take into account the role, relevance and capacities of and interactions between all actors involved in the execution of a certain policy program. Against this background, it is vital to gain better empirical and theoretical understanding of the multi-level nature. In addition, using regions as the unit of analysis, rather than the MS allows for testing with more sensitive measures, helps to avoid what Rokkan (1970) referred to as the, ‘whole-nation bias’.

The second gap that this thesis will address relates to the functioning of the principal enforcement mechanism: infringement proceedings. Upon suspecting a MS is non-compliant, the European Commission can launch legal proceedings called infringement proceedings. The procedure begins with both parties try to resolve the infringement case through a negotiation settlement. However, if no resolution can be achieved in, the Commission can refer an infringement case to the European Court of Justice (ECJ), which will issue a ruling on the case. The final result of the procedure is a judgement stating whether or not the MS in question has fulfilled its obligations. This can lead to the ECJ imposing financial penalties on the incompliant MS. An interesting empirical finding is in the 30

years between 1979-2009 about one out of every three cases[4] in which the European Commission reached the adjudication stage (Tallberg and Smith 2014).

Despite this interesting observation being well-known, we lack a full explanation for why some cases go to court and others are resolved beforehand. Previous studies which have approached this question have used the MS as the unit of analysis (Börzel, Hofmann, and Panke 2012; Jensen 2007). Drawing on International Relations and compliance literature, they have tested arguments from the "enforcement" perspective according to which MS calculations regarding the net cost of compliance against noncompliance determine when an infringement case is settled (Downs, Rocke, and Barsoom 2007; Fearon 2002) and the "management" approach which positions non-compliance as "involuntary" and so state capacities in terms of resources and institutional capacity will determine when an infringement is settled before and ECJ ruling (Chayes and Chayes 2012)

One important gap, then, in the current literature is that there is little empirical analysis that explains which individual infringement cases go to court and why. State-level variables cannot adequately explain which cases go to court and which cases do not. Across all MS, some cases go to court, while others are settled before court. Even MS with high capacities to resolve a case, while also

[4] This figure refers to one in every three cases in which the Commission issued a Reasoned Opinion.

theoretically low capacity to manage the enforcement function of the Commission go to court have cases which go to court. Therefore, there is a need to complement the previous studies with case-level studies which can help resolve open questions including which type of cases and which type of disputes which go to court.

The third gap relates to the behaviour of the central enforcement agent in the EU: the Commission. This actor is referred to as being the "Guardian of the Treaty" since, according to Art 17 of TEU[5], it bears the responsibility of ensuring that Community law is correctly applied. In the infringement procedure, the Commission enjoys broad discretion both in whether to initiate a case, whether to escalate a case as well as the timing of such decisions. Article 258[6] (TFEU) states that the Commission shall bring a case "*If the Commission considers*" (my emphasis) non-compliance to have occurred, and that following a Reasoned Opinion it "*may* bring the matter before the Court of Justice" (my emphasis).

In advance of the Commission referring an infringement case to the ECJ, a period of time is afforded in which both the MS and the Commission try to reach a negotiated settlement. According to official documents, this is nominally two months from which the Commission officially sets out the legal case against the MS and

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[5] Article 17 of the Consolidated of the Treaty of the European Union grants the Commission the power to monitor EU law: "It shall oversee the application of Union Law under the control of the Court of Justice of the European Union" - Consolidated Version of the Treaty of the European Union *Official Journal 115 , 09/05/2008 P. 0025 - 0026* Community

[6] Article 258 of the Treaty on the Functioning of the European Union (TFEU) *OJ C 115, 9.5.2008, p. 160–160*

explains the action it must take to be in conformity with EU rules (Andersen 2012). Anecdotal evidence from court proceedings would demonstrate that there is wide variation across cases, however there is (to date) no systematic knowledge with regards to how this varies, nor indeed inquiry into the determinants of such variation.

An obvious gap is to explore to what extent the Commission systematically grants more time for pre-trial settlement bargaining to some states or in some policy areas and if so, what are the determinants behind its actions. Beyond just the EU compliance literature an answer would be of interest to debates about the degree to which the Commission has discretion to pursue its own political goals, or is constrained by MS. For example (Bickerton, Hodson, and Puetter 2015) have argued that the discretionary room enjoyed by the Commission is limited whereas (Bauer and Becker 2014) argue that the Commission enjoys broad discretionary space to pursue its political goals. While most studies look at discretion to pursue its political goals in the legislative process, it is worth studying the same issue in the infringement process given its close links with legislative outcomes (Blauberger 2012; Blauberger and Weiss 2013).

While the thesis will address these three specific gaps, it will also consider two general critiques of the current literature and adapt its research to them. Firstly, the thesis will aim to supplement, where feasible, any statistical analysis with descriptive and qualitative

data. Although early studies of EU non-compliance were predominantly qualitative, more recent work is quantitative (Falkner and Treib 2005; Haverland 2000; Héritier and Windhoff-Héritier 2001). There are strong arguments supporting this turn towards statistical techniques, in particular because of benefit of improved generalisability of findings. However, a critique of some of the studies is that while they find statistical support for their claims, they do not attempt to support this with qualitative work which could show the mechanisms working in a given case (Treib 2014). Therefore I will try to do this where possible.

Secondly, I will try to use indicators which attempt to capture the different dimensions of compliance. The overwhelming amount of studies use the timeliness of transposition as their principal focus and indicator of compliance when it is on-time and non-compliance when this is late (Berglund, Gange, and Van Waarden 2006; Haverland and Romeijn 2007; König and Mäder 2014; Lampinen and Uusikylä 1998) However, using only transposition as the dependent variable can leave work subject to the critique that it does not address the fuller compliance picture as some EU legislation does not need to be transposed, while transposition does not include implementation and application of laws (Knill and Tosun 2009).

In summarising the above section several comments stand out. Firstly, EU compliance is not always forthcoming. This raises interesting questions as to why non-compliance occurs and what

facilitates early settlement. Given the central role of the Commission in the resolution of EU non-compliance, there are interesting questions as regards the determinants of its behavior in the process. Knowing the answers to these questions has a potential impact for the lives of many people, while the stability of the integration project somewhat depends on it. Academically, the EU represents a particularly interesting case which stands out for research on compliance. In the following section I will outline the research puzzle more concretely and explain the three sub-questions which narrow the focus of the project to a manageable contribution.

Research Questions

In the preceding section I have outlined the relevance of EU compliance research and the contours of the literature. This has allowed me to identify several strengths and weaknesses of past research. In particular I have identified three specific gaps which require further research and the exploration of which would make a significant contribution to the academic field.

Firstly, I signalled how institutional veto players are both theoretically and empirically relevant to explaining EU non-compliance. I identified sub-state actors as very important potential veto players. The literature has done little empirical work to understand to what extent there is non-compliance at this level and if so, what are its determinants. Therefore, the first aim is to contribute an answer to this gap. I do so by asking and answering the following questions:

1. Firstly, the descriptive question: to what extent are there sub-state variations in EU non-compliance levels?
2. Secondly, what are the main causes of sub-state non-compliance?

Next, I have identified that while there is significant academic output which analyses why non-compliance occurs in the EU, much less has been done on the processes behind turning non-compliance into compliance. Central in this process are infringement

proceedings. An interesting empirical puzzle emerges from the study of these proceedings which is that 1/3 of cases that the Commission opens against the MS result in a referral to the ECJ. All states have some cases which go to court and others which are settled out of court. The current empirical work does not test for the reasons behind this. Therefore, the second aim is to fill this gap. I do so by asking and answering the following question:

1. What are the main case-level determinants of whether an infringement reaches an ECJ judgement?

Thirdly, I have identified the Commission as having broad discretion in how it carries out its enforcement functions. Not only does it select which cases to pursue, but it also has control over the timing of these decisions. Consequently, the duration which it gives to pre-trial settlement bargaining can vary. So far there is no empirical work which maps the variation in the time afforded to pre-trial bargaining, nor empirical testing that seeks to explain these patterns. Therefore, the third aim is to contribute an answer to this gap. I do so by asking and answering the following questions:

1. Firstly, the descriptive question: to what extent are there cross-state and cross-policy variations in the duration of pre-trial bargaining?
2. Secondly, what are the main determinants of cross-state and cross-policy variations in the duration of pre-trial bargaining?

The answers to these questions are intended to make a contribution to the compliance literature outlined above (Angelova, Dannwolf, and König 2012; Mastenbroek and Kaeding 2006; Treib 2014). The thesis is situated within this literature. Its principal audience is this broad body of work which seeks to empirically understand the EU and test theoretical predictions drawn from international relations (Chayes and Chayes 2012; Downs, Rocke, and Barsoom 2007; Fearon 2014; Tallberg 2002) and public administration and policy implementation literature (Matland 1995; Peters and Pierre 1998; Peters 1997; Swenden 2006).

The results can provide empirical evidence towards both understanding how the EU works but also testing the mechanisms behind compliance and non-compliance which has appeal to those interested in developing broader theories by finding evidence to support (or not) a mechanism. This is important for the development and sustainability of all the above inter-linked literatures. The answers to these questions can also have broader appeal to policy makers. Given that multiple different explanations will be systematically tested, the findings could contribute to making recommendations with respect to improving both the design of regulatory policies at the EU level and MS administration.

Research Design, Approach & Methodology

Operationalising and Measuring (Non)Compliance

The three sets of narrow research questions are situated in and hope to contribute towards answering the broader puzzles which revolve around compliance in the EU. Compliance is a concept which captures a relation between an actor's behaviour and the commitments that a rule implies. There is a broad consensus around several elements of what compliance and non-compliance is. Firstly, compliance is understood as "conformity" between an actor's behaviour and the implications of a rule. We can see this in the two most widely-used definitions in the literature Young (2013, 3) defines compliance as the "actual behavior of a given subject conforms to prescribed behaviour", and (Raustiala 2000) defines compliance as a state "of conformity or identity between an actor's behavior and a specified rule". Consequently, a simple, strict interpretation of non-compliance is that of behaviour which is not in conformity with the implications of the rule.

In practical terms, the boundaries of conformity and non-conformity require interpreting and so by implication there is some discretionary element to compliance. Under certain circumstances, e.g. cost-management, those which are tasked with identifying non-compliance and enforcing compliance may not consider all deviations from the rule as non-compliance, but instead pursue a kind of "optimal compliance" (Anderson 1997).

Compliance differs from two other concepts which are sometimes present in studies: implementation and effectiveness. Implementation is a complex concept but is generally understood as a process of purposive action by actor(s) in translating policy into action (Anderson 1997; Goggin 1990; Mazmanian and Sabatier 1983). While implementation is frequently an essential pass towards compliance, if an international rule matches the current practice in a given state, implementation is not required. This is one of the reasons why MS in the EU try to "upload" their preferences in the EU legislative process to secure policy outputs closest to domestic law (Börzel 2002).

Effectiveness is another related but distinct concept. Effectiveness is either defined in relation to succesfully inducing the change in behaviour that the policy implied or it may be a more expansive definition which refers to the achievement or resolution to the policy problem that the policy addressed (Anderson 1997). Thus, there can be compliance without effectiveness.

When operationalising and measuring compliance and non-compliance in EU studies we must establish a number of boundaries. Firstly, we need to establish what are the rules with which MS must comply. The decision in this thesis is to establish all primary legislation, secondary legislation and the decisions of the ECJ as being the rules with which compliance is measured. A clear definition of EU compliance is provided by Zhelyazkova and Schimmelfennig (2013, 702), who state that: "In the EU context,

compliance is defined as the extent to which national actors conform to the EU requirements by incorporating and applying EU laws into national context".

While this may sound a straightforward and clear decision, it responds to a potential critiqueof previous studies, identified in the literature review. Most of these studies have taken a more restricted operationalization of compliance. Among EU legislative outputs, directives are not immediately enforceable and require transposition into the domestic legal order. Most studies have looked at whether this action is done within the deadline established in the law, non-compliance occurring when this is done late.

These studies have greatly advanced our understanding of the functioning of EU policies. However, transposition is only one part of the story. We also need to know whether such legislation is successfully applied and enforced remains largely outside the focus of transposition studies. Treib (Treib 2014, 29) highlights that "we have as yet comparatively little evidence on the extent to which there is non-compliance beyond transposition and on the factors that are conducive to effective application and enforcement". Therefore, it is important to include both transposition and implementation in an analysis.

A second challenge is to identify and measure non-compliance. In order to do so, this paper follows a number of studies in using the Commission data on infringement proceedings. The use of

infringement proceedings is also advantageous as it helps to overcome the problem that compliance is a subjective rather than an objective concept. In any case-study work which tries to identify non-compliance itself there are many barriers including: measurement biases, insufficient information, etc. A decision that a state has not complied with the law is left to the researcher and given what I outlined above regarding optimal compliance, may not be the same judgement that another researcher would make.

Using the Commission's own data provides a more consistent standard. That said, the use of infringement proceedings does not capture the full level of non-compliance which we expect to be higher, in part because the Commission cannot identify all the cases of non-compliance due to a lack of resource. However, it does capture the most important (in the eyes of the Commission). There is no evidence that it systematically reacts differently to MS so therefore to make comparisons across MS it is appropriate data.

The Sample

The sampling selection across the three papers responds to a logic of obtaining as many cases as is practically obtainable, while controlling for potential biases which might affect the results. Firstly, in exploring my three sub-puzzles I include non-compliance cases across the full range of policy areas. Initially it was common in the literature to study non-compliance in only one or two policy areas (Berglund, Gange, and Van Waarden 2006; Haverland and Romeijn 2007; Kaeding 2006). There is, however, a growing

consensus in the literature that taking only one policy area may affect the results (Drake and Smith 2016; Haverland, Steunenberg, and Van Waarden 2011). Therefore, to address these issues I include all policy areas in all three papers.

The first paper addresses sub-state non-compliance in the EU. Due to the heavy workload involved in measuring the dependent variable, i.e. hand coding many hundreds of documents, it was not feasible to include all regions across all MS. Therefore, I use a sample. I include the infringement cases for the regions in the following MS: Austria, Belgium, Czech Republic, Germany, France, Finland, Spain, Italy and the UK. These MS were selected because they provide variation along key dimensions of decentralization (federal, decentralised, and unitary states); variations in capacities of the regions both between and within states (e.g. resources and political culture are different in north and south of Italy or East and West of Germany); and finally between MS from West and East and Old and New.

In paper two, I address the puzzle as to which cases are more likely to result in a Commission referral to the ECJ. Due to the heavy workload of compiling data on the dependent variable, which again meant hand-coding thousands of documents, I selected a sample of MS and analysed their infringement cases. The sample includes infringements in the following MS: Austria, Belgium, Czech Republic, Germany, France, Finland, Spain, Italy and the UK. These states demonstrate variation along the important independent

variables which the literature predicts affects the number of adjudicated on by the ECJ including power; capacity and institutional veto players.

Including more MS in the first two papers would improve the robustness of the results, especially if I increased the representation of new MS. However, practical considerations meant that this was the largest achievable sample for this thesis. Firstly, there were considerations regarding the time that it takes to sort and code the data. Data on the numbers of sub-national infringements had to be coded by hand after reading case files. Similarly, examining legislative texts for the number of articles with derogations is extremely time consuming. Therefore, I am limited to being able to handle a certain number of cases.

The choice of these MS was informed by the previous empirical research which indicated relevant control variables. In addition to these theoretical concerns, practicality meant that the sample could not be increased to include other MS. The basis for identifying sub-national non-compliance, and identifying the legal act that was the source of non-compliance, was almost entirely done through analysis of the Reasoned Opinion files, which were provided to me by the Commission. After having asked for such a large quantity of documents, the Commission had indicated that it was unwilling to repeat the process for data from any other MS. Bearing in mind these two practical considerations, and having identified MS which vary along relevant controls, the decision was taken to use this

sample. With the support of the Commission, future research could address this limitation by expanding the sample.

Finally, the third paper addresses the puzzle of how long the Commission affords pre-trial negotiations before referring the case to the ECJ. In this paper the data-collection process was less labour-intensive and so allowed me to include more cases. The sample is able to account for all MS infringements across the time period 2002-2012.

For all three papers the sample covers infringements over between 2002-2012. This provides enough period to ensure a large enough number of cases to analyse. Collecting data over a longer period would have been difficult due to resources. In addition, the infringement cases had to be closed to receive the Reasoned Opinion file as the Commission would not provide this for cases which were still open. This led to the decision to have Reasoned Opinions sent in the year 2012 as the cut-off point. Having cases after this cut-off point would have led to an over-representation of infringements solved before an ECJ ruling, due to the years that it takes for a case to reach there. This would have affected all papers, but especially the second and third papers. Choosing 2002 as the starting point was largely due to practical considerations. The online database of infringements, which I used to identify the unique infringement number, begins in 2002.

The Approach

This research will rely on a problem-driven instead of method-driven approach (Levi, Green, and Shapiro 1995). Empirical science is problem driven when the elaboration of theories is designed to explain phenomena that arise in the world. Method-driven research occurs when a theory is elaborated without reference to what phenomena are to be explained, and the theorist subsequently searches for phenomena to which the theory in question can be applied.

Middle-range theory, which explains large-scale processes by referring to general concepts and processes, will inform my hypotheses (Merton 1949). This is consistent with the approach in the literature on EU compliance, which rather than developing its own theories applies the lessons from other political systems to the EU. While the analysis follows a political science approach, the paper draws on theories and concepts from different literatures within a broader political science field including judicial politics, public administration, as well as international relations. The results are of interest to these fields, but potentially of interest to other disciplines, for example both legal scholars and practitioners.

The empirical analysis is principally quantitative but with a qualitative dimension in the description of cases. The choice of using statistical techniques is motivated by several considerations. Firstly, measuring compliance performance is never perfect, so

using the Commission data can address what is essentially a measurement problem. Secondly, theoretically there are many causes which could explain non-compliance. Following Toshkov (2010, 9) I agree that “reasons exist for each and every implementation failure” but owing to the many potential causes we need a statistical approach, especially a mult-variate one which (in comparison with bivariate techniques) can control for multiple explanations.

Although the analysis is principally statistical, the paper uses case studies as supplementary analysis when possible. The use of case studies here is in line with best practices in research for closely examining the hypothesized role of causal mechanisms in the context of individual cases (Bennett 2004). In using rich description of cases, the thesis aims at employing a kind of methodological triangulation, when the occasion permits. This is line with the important strand of thinking in research in the political science that “the best (research) often combined features of each” (Alford et al. 1995, 5).

Outline of Thesis

In this first, introductory chapter, having established the societal and academic relevance of studying compliance issues in the EU, I have drawn a conceptual explanation of the key concept in the thesis: compliance. Then I set out three gaps in the current literature in which my study is located. After explaining the research design, the methods and techniques to be used, I justified why I have chosen a predominantly statistical approach.

In the following chapters (1,2 and 3) I present the three empirical analyses which respond to my three empirical puzzles and which composes this thesis. Each of the three empirical studies will be built on a similar schema. First, I will present the specific research question, justifying the analysis. Then, a literature review will show how scholars have left a gap. I will establish the conceptual framework and as a third step, I will empirically analyze (both in descriptive and statistical analysis) the influence of these independent variables on the dependent variables. Finally I will present the results and set out the relevance of the findings to the broader literature.

The final chapter composes the conclusions. I will also reiterate its contribution to the state of art and draw some implications and identify scope for future work.

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1 IMPLEMENTATION OF EUROPEAN UNION LAW AT THE SUB-NATIONAL LEVEL: VARIATION AND DETERMINANTS OF INFRINGEMENTS

1.1 Introduction

The political system of the European Union (EU) is characterised by a highly decentralised structure of legislative implementation. While the process of negotiation and decision takes place in Brussels, the government and administrations of its 28 Member States (MS) are tasked with giving these legislative acts effect. Regional and local levels of government are heavily involved in this process, with between 50-80% of EU legislation being enacted here (Charron, Dijkstra, and Lapuente 2015; Christiansen and Lintner 2005)

Despite the prominent role of sub-national actors, we know very little about how well they implement EU legislation nor reasons for implementation failures specific to this level. The academic literature, while comprising a large body of work on cross-national (Bergman 2000; Börzel et al. 2010b; Giuliani 2003) and cross-sectoral (Haverland and Romeijn 2007; Zubek and Staronova 2011) compliance, does not systematically investigate sub-state (non)compliance patterns (Mastenbroek 2005; Treib 2006, 2014b). The evidence in the literature is limited to the finding of a negative impact of federalism/regionalism on compliance (Haverland and Romeijn 2007). The mechanisms behind sub-national non-

compliance are not examined in detail and there is no systematically collected data which records sub-national acts of non-compliance. The aim of this paper, then, is to fill this gap by posing and answering two research questions, one descriptive and the other analytical. Firstly, the descriptive question: to what extent are there sub-state variations in EU non-compliance levels? Secondly, what are the main causes of sub-state non-compliance?

Sub-state non-compliance[7] is measured as the initiation of formal infringement proceedings by the European Commission (Letters of Reasoned Opinion)[8]. We present the cases of sub-state non-compliance with EU law from regions in Austria, Belgium, Czech Republic, Germany, France, Finland, Spain, Italy, and the UK. Sub-state infringements are aggregated at the second level of government, the regional level of government of those MS. In total there are 110 regions in the sample[9].

The paper tests the explanatory power of governance networks in explaining sub-state non-compliance. Governance networks are relevant insofar they establish the level of coordination and transaction costs involved in implementing EU rules. This research also explores whether characteristics of the actors involved in

[1] Compliance in this study is defined as compliance with the legal obligations emanating from EU law.

[2] This is in line with many other studies in the literature including (Börzel et al. 2010b; Knill and Tosun 2009; Mbaye 2001)

[3] While we use the territorial boundaries of the regional governments, we capture all sub-state actions within that region. Therefore we include the infringements that occurred from actions at the local administrative level.

governance networks matter. It tests whether: (1) diverging preferences of the actors in the network affect non-compliance levels; (2) administrative capacities of the actors in the network affect non-compliance levels; (3) political support for implementing EU rules affects non-compliance levels.

The descriptive analysis shows that there is an important level of variation in non-compliance with EU legislation across EU regions. The analysis also provides evidence to support the claim that the governance structure is a key determinant of sub-state non-compliance with EU rules. Furthermore, there is support for the prediction that diverging organizational goals increase the number of sub-state infringements. The cases analysed more in detail reveal that transaction costs in reaching inter-organisational agreements contributed to non-compliance in the case of Flanders. In Aragon, the initial reason behind non-compliance was the high economic cost of compliance *vis a vis* the resources available to actors charged with implementing the rules, but additionally the difficulty in reaching inter-organisational agreements. The two cases reveal that both the administrative capacity and the political will to resolve conflicts surrounding the division of costs of complying with EU legislation between sub-national governments and central governments contribute to prevalence of regional non-compliance.

The paper makes several contributions to the literature. To begin with, this is the first time that data on sub-national compliance has been systematically coded and reported. Therefore we are able to

provide a rich source of new descriptive data. With this data we explore in a systematic way for the first time some mechanisms for non-compliance at the sub-state level. Thirdly, using regions as the unit of analysis, rather than the Member State allows for testing with more sensitive measures, helps to avoid what Rokkan (1970) referred to as the, ‘whole-nation bias’.

The paper is structured as follows. In the following section we outline the role that sub-state governments play in implementation of EU legislation. Then, we develop a number of theoretically grounded propositions and hypotheses that could explain acts of regional non-compliance. Third, we introduce the research design and operationalise the main variables and we present the descriptive data. The next section presents the results from the statistical analysis and we analyse two cases studies in more detail. Finally, a conclusion follows the discussion.

1.2 The Sub-State Level and EU Implementation: What is its Role?

EU policy-making and politics has created a system of multi-level governance linking the sub-state layer with the supra-national layer (Hooghe and Marks 2001). The sub-state level enjoys some degree of autonomy from national government. One crucial role that the sub-state layer plays in this multi-level system is policy implementation (Falkner and Treib 2005b). Between 50-80% of EU policy is implemented through lower level governments (Charron, Dijkstra, and Lapuente 2015; Christiansen and Lintner 2005). There

are three main sources of these obligations. First, for sub-state governments with legislative powers many of the areas in which they have competence such as environment, local transport, urban planning, are areas in which the EU has broad legislative powers, so sub-state legislation is impacted by EU membership. Thus, they must transpose EU directives into regional law where required. Second, they must ensure that current legislation does not contradict EU rules. Beyond legislative transposition, EU laws must be given effect through monitoring and enforcement. Third, sub-state governments must also comply with EU Treaty law, including protection for the four freedoms (free movement of goods, capital, services, and labour), which constrains their actions in their role of service providers, but also as employers.

Evidence suggests that sub-state compliance with EU laws does not always occur. For example, in the European Court of Justice (ECJ) case C-358/03[10], the Austrian Lander of Carinthia, not the entire state of Austria, was deemed to have infringed EU law. In case C-533/11[11], the complaint regarding the failure to transpose the directive 91/271/EC, was not relevant in all of Belgium, but only within the Walloon region. In fact, MS governments have sometimes been keen to demonstrate SSA culpability. For example, Germany (C-198-97)[12] and Italy (C-365/97)[13] have both previously tried to escape punishment by arguing that compliance was missing

[10] Case C-358/03 *Commission vs Austria* ECLI:EU:C:2004:824
[11] Case C-533/11 *Commission vs Belgium* ECLI:EU:C:2013:659
[12] Case C-198/97 *Commission vs Germany* ECLI:EU:C:1999:283
[13] Case C-365/97 *Commission vs Italy* ECLI:EU:C:1999:544

in only a few regions, while in case C-610/10[14] the Spanish government even tried to appeal for a reduction in the penalty applied by the ECJ because this failure related to only the Basque Country. What might explain these failures? In the following sections we outline our theoretical and conceptual framework.

1.3 Theoretical & Conceptual Framework

a) Structural Variables

When EU policies are being implemented by regional and local actors, it is frequently as part of a broader multi-organizational implementation effort. Sub-national actors in charge of implementation (which include both political and bureaucratic actors) operate in a complex web of jurisdictions in which one organization rarely has singular control over the manner in which EU policies are designed, funded and delivered. The academic literature has already shown in case studies how EU policies often cut across jurisdictions of central government and sub-state competences. Examples of such problems are climate change (Galarraga, Gonzalez-Eguino, and Markandya 2011); energy policy (Malinauskaite et al. 2017) or water policy (Newig and Koontz 2014).

Given that sub-state implementation is often one component part of a broader implementation structure, this structure provides an

[14] Case C-610/10 *Commission vs Spain* ECLI:EU:C:2012:781

important unit of analysis in predicting the prevalence of sub-state non-compliance. The institutional structure organises regional and local level actors into governance networks. Governance networks here are defined as "interorganizational networks comprised of multiple actors, often spanning sectors and scale, working together to influence the creation, implementation, and monitoring of public policies' (Koliba et al. 2018). They are equivalent to 'regimes' (Stoker 1989), 'policy networks' (Klijn 1996) or 'implementation networks' (O'Toole 1988). In managing coordination and resource exchange, governance networks face some degree of transaction costs. There are at least three types of transaction costs: (1) coordination costs; (2) information costs; and, (3) strategic cost. Coordination costs include those invested in negotiating, monitoring, and enforcing agreements between actors. Information costs are those associated with searching for and organizing information. Strategic costs result from asymmetries in information, power, or other resources. Common strategic costs include free-riding, rent-seeking, shirking, and corruption.

The more governance networks reduce transaction costs, the more likely they facilitate correct implementation. Therefore, we expect that sub-national actors embedded in networks which exacerbate transaction costs fail to implement EU rules more often than those embedded in regions embedded in governance networks which face lower transaction costs. Within governance networks there are three components which are correlated with transaction costs: (1) the number of actors involved in the network; (2) the strength or

formalization of ties between the actors; (3) the extent to which influence is concentrated in a central actor. Thus, transaction costs are lower when there are fewer actors involved in the network. Implementation which requires the joint-activity of many actors faces more transaction costs than those networks with fewer component organizations. Second, the ties which bind the organizations together in the network can be classified from strong / weak or formal / informal dimension. The more formal and stronger the ties, the lower the transaction cost. Furthermore, repeated interactions increase information and make interactions more predictable. Repeated interaction helps develop a 'problem-solving' decision style which Scharpf sees as a way out of joint-decision traps and committed allies facilitate implementation (Bardach 1998; P. A. Sabatier 1986; F. Scharpf 1988). Third, the concentration of influence in a central actor facilitates the implementation of policies by providing a 'body whose role is to act as the lead interpreter of the regimes' rules or principles, … or to otherwise steer or co-ordinate the activities of the multiple participants' (Black 2008, 140). Multiple literatures including public administration (Kickert, Klijn, and Koppenjan 2012), and multi-level governance in the EU (Egeberg 2006; Sbragia 2000) point to the relevance of this mechanism.

b) Actor-level Variables

In addition to network governance there are other variables at the actor level that might influence infringements of EU legislation at the sub-state level.

First, the literature shows how actors and organisations in implementation through behaving in self-interested ways, actually negatively affect their ability to coordinate, despite potential benefits from coordination (Bardach 1998; Midgley and Olson 1969). If all the actors involved in implementation share the same preferences over what has to be done the possibility for coordination problems are lessened. Consequently the *more the preferences of the coordinating actors diverge, the higher the transaction costs and consequently, the more sub-state infringements.*

Second, administrative capacity refers to the intrinsic attribute of the government machinery to realise its key tasks. These include implementing public policy, delivering services and providing policy advice to decision makers irrespective of their nature and degree or provision (Polidano 2000). There are multiple elements that contribute to shaping higher or lower capacity. These include financing and resources, the organisational structure of the bureacracy, the procedural routines and the intellectual talents of the staff (Keller and Skowronek. 2006). In the case of low administrative capacity, this is identified as low individual knowledge and skills in workers and the existence of incentives for corruption on top of lack of basic implementation resources (J. D. Huber and McCarty 2004). Thus, a lack of resources, corruption, pervasive rent-seeking or self-serving decision-makers are likely to impede a successful implementation of EU policies. In fact,

previous research supports the argument that administrative capacities matter for EU compliance. Capacities of MS in terms of resources (Knill and Tosun 2009); administrative efficiency (Kaeding 2006) and corruption (Linos 2007) have all been found to be related with higher levels of non-compliance. Across regions within states there are equally or greater variations in administrative capacities between regions than seen between MS (Charron, Dijkstra, and Lapuente 2015; Milio 2007). This makes cross-regional level a perfect setting with which to test these arguments. Thus, *the higher the administrative capacity of sub-state actors, the fewer the number of sub-state infringements.*

Third, given that compliance with EU rules entails committing scarce resources that could be put to alternative uses, the ranking priorities of the sub-national actors should also affect non-compliance levels. The literature suggests that legislators prioritise policies which help them get re-elected and that bureaucrats tend to give priority to easy, programmed routine cases at the expense of more complex, non-programmed, and time-consuming cases. As the level of support from those regulated groups as well as administrators is higher when the legal system enjoys high levels of legitimacy, the way implementers feel towards compliance with EU legislative acts will be affected by their degree of support towards the institution (Kohler-Koch 2000). Thus, *as the public support for the EU as a rule making body decreases the likelihood of EU policies not being prioritised (and therefore subnational non-compliance) increases.*

1.4 Research Design

Our dependent variable is number of infringements across EU sub-state authorities in our sample. The sample of countries we analyse is Austria, Belgium, Czech Republic, Germany, France, Finland, Spain, Italy and the UK. These MS were selected because they provide variation along key dimensions of decentralization (federal, decentralised, and unitary states); variations in capacities of the regions both between and within states (e.g. resources and political culture are different in north and south of Italy or East and West of Germany); and finally between MS from West and East and Old and New.

The Regional Authority Index (RAI) tracks regional authority on an annual basis from 1950 to 2010 in 81 countries including all European ones (Hooghe et al. 2016). Our unit of analysis is the individual region / regional tier. The Local Authority Index (LAI) follows the same methodology but looks at the local government authority (Ladner, Keuffer, and Baldersheim 2016). Both indexes provide data on the level of self-rule[15] enjoyed by all sub-state governmental tiers in the European MS in our sample.

As indicated previously, different governance networks present higher or lower transaction costs which may facilitate (or no)

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[15] Self rule consists of a) the scope of policy for which a regional government is responsible (policy scope); b) the extent to which the region controls its financial envelope (tax authority); c) the extent to which a region is endowed with representative institutions (representation).

implementation failures. These are: (1) The number of actors involved in the network; (2) The strength or formalization of ties between the actors; (3) The extent to which influence is concentrated in a central actor. Table 1 (pg.13) locates the MS under study along the number of actors and the structure of ties between the actors. The description indicates three categorisations of transaction costs: low transaction costs, moderate transaction costs and high transaction costs. The governance networks vary across MS more than within them. UK is the only one which exhibits significant variation within the state (Wales is much more interconnected with the central government than Scotland or Northern Ireland). Czech Republic represents the network with the fewest transaction costs while Scotland, Northern Ireland, Finland (Aland) and Belgium present the highest transaction costs according to our variables. These systems share similarities with regards to the low level of inter-locking in administration implementation and legislative policy making as well as broad competences dispersed across multiple tiers of government.

In relation to our actor level independent variables, we look at the preference heterogeneity involved in the vertical relationships between the sub-state actors and the central government actors. To capture goal congruence for this empirical research we use the percentage of votes (in national elections) for non-statewide parties in each region. We use this because research suggests that an important conflict dimension in inter-governmental collaboration is when 'clear national (or land) interests can be protected through

Table 1 Table showing the three components used to categorise governance networks and transaction costs

	Degree of Interlocking legislative and administrative processes (Swenden 2006)		Number of Actors involved in the Governance Network		The extent of competence dispersal across the network	Level of Transaction Costs in the Governance Network
MEMBER STATE	Legislative Inter-locking	Administrative Inter-locking	No. of Tiers	No. of Regions	Concentration – dispersal	
Austria	Moderate	Moderate	3	9	Moderate	Moderate
Belgium	Low-Moderate	low	4	3	High	High
Germany	Moderate-high	high	4	16	High	Moderate
Spain	Moderate	moderate	4	17	High	Moderate
UK: Wales	.	high	3	3	Low	Low
UK: Scotland	Low-Moderate	low	3	3	Low-moderate	Moderate
UK: NI	Low-Moderate	low	3	3	Low-moderate	Moderate
Italy	Moderate	low	4	20	Moderate	Moderate-high
Czech Republic	.	high	3	14	Low	Low
France	.	high	4	22	Moderate	Low
Finland: Aaland	Low-Moderate	Moderate	3	1	Moderate	Moderate

the policy process' (Peters 1997, 33). Strong regional identities in plurinational decentralised states are expected to shape the world views of the legislative and administrative actors within an organization. If a region is imbued with a strong regional identity its organisational goals along certain policy choices will be less congruent with other regions and the central government than in the absence of this identity. A higher percentage of non-statewide parties is indicative of stronger organizational goals and a higher complexity of policy preferences of the actors involved in the policy process.

Capacity of regions is captured by looking at the administrative efficiency. For administrative efficiency, we use the data collected from the Quality of Governance Institute (Charron Dijkstra & Lapuente 2015). Their Regional Quality of Governance Index measures perceptions and experiences with public sector across sub-state units through survey data. Their composite index includes into components of perceptions of corruption, perceptions of institutional impartiality, and perceptions of efficiency at the regional level. The index ranges from 0 – 100 with 100 being the highest quality of governance.

Support for the EU as a rule making body is measured by the aggregate percentage of votes for euro-sceptic parties at the regional level in the European elections over our period of study. A higher percentage of votes for *euro-sceptic parties* implies a lower level of support for EU as a rule making body in the region (Taggart and Szczerbiak 2004). EU elections were chosen because it is these elections where voters are conscious of the EU and are more likely to have it in mind when voting rather than national ones in which EU themes rarely dominate. Data on vote shares comes from national records while evaluations on euro-sceptic parties come from Chapel Hill Data-Set on party manifestos (Bakker et al. 2015).

1.5 Analysis

a) Descriptive Analysis

Table 2 (pg.16-17) shows, for the first time in a systematic way, the number of infringements in which sub-national actors in Austria, Belgium, Czech Republic, Germany, Finland, France, Italy, Spain and United Kingdom were involved in for the period 2002-2013. The observation is the region and year. In total there are 1232 observations, spread across the 110 regions. The frequency of infringements per region during this time period range from 0 observations (for example in the majority of Czech regions and some French regions like Champagne-Ardenne) to 60 cases (Gibraltar[16]). The mean level of infringements is 9 and the median 4.

The geographical distribution of infringement cases can be seen in figures 1-3 in the appendix (pg.34). The regions in Belgium have the most infringements (Brussels 56; Wallonia 54 and Flanders 42) as well as regions with Gibraltar (UK) and Aaland (Finland) while Austria too has regions with a high number of observations (e.g. Styria 30). Sub-state regions in federal (Austria, Germany, Belgium) and regionalised states (Italy, Spain, UK) generally

[16] Although infringements involving Gibraltar were recorded, as there was an absence of data covering our independent variables for Gibraltar it was excluded from our statistical analysis.

Table 2 Number of infringements with EU law 2002-2013 by Region

Region	No. of infringe-ments	Region	No. of infringe-ments	Region	No. of infringe-ments
Brussels	56	Andalucia	14	Hradec Králové	0
Flanders	42	Aragon	4	Pardubice	0
Walloon	54	Asturias	2	Olomouc	0
Abruzzo	8	Balearic islands	4	Moravian-Silesian	0
Aosta Valley	3	Basque Country	5	South Moravian	0
Apulia	14	Canary Islands	4	Zlín	0
Basilicata	3	Cantabria	3	Alsace	0
Calabria	6	Castile de la Mancha	5	Acquitaine	4
Campania	7	Castile y Leon	5	Auvergne	2
Emilia-Romagna	12	Comunidad Valenciana	10	Brittany	1
Friuli-Venezia	13	Catalonia	5	Burgundy	1
Lazio	12	Extremadura	2	Centre	0
Liguria	7	Galicia	6	Champagne-Ardenne	0
Lombardy	14	La Rioja	1	Corsica	1
Marche	5	Madrid	7	French-Comte	0
Molise	6	Murcia	1	Guadeloupe	2
Piedmont	4	Navarra	1	Guiana	2
Sardinia	11	Burgenland	22	Ile de France	1
Sicilia	10	Carinthia	27	La Reunione	1
Trentino-Alto / south Tyrol	14	Lower Austria	23	Languedoc-Roussillon	2
Tuscany	9	Upper Austria	27	Limousin	2
Umbria	8	Salzburg	26	Lorraine	0
Veneto	8	Styria	30	Lower Normandy	1
North-Rhine	15	Tyrol	25	Martinique	1

Westphalia					
Bavaria	5	Vorarlburg	24	Midi-Pyrénées	2
Baden-Württenberg	8	Vienna	23	Nord-Pas-de-Calais	0
Lower Saxony	13	Aaland	42	Pays de la Loire	4
Hesse	7	Gibraltar	60	Picardy	0
Rhineland Palatinate	7	NI	40	Poitou-Charentes	4
Berlin	4	Scotland	14	Provence-Alpes-Côte d'Azur	3
Saxony	4	Wales	2	Rhône-Alpes	3
Hamburg	5	Prague	0	Upper Normandy	2
Schleswig-Holstein	4	Central Bohemia	0		
Brandenburg	8	South Bohemia	0		
Saxony-Anhalt	6	Vysočina	0		
Thuringa	4	Plzeň	0		
Meckenburg-Vorpommer	5	Karlovy Vary	0		
Saarland	7	Ústí nad Labem	1		
Bremen	3	Liberec	0		

speaking have more cases of non-compliance than those regions in decentralised unitary states (France or Czech Republic).

Looking at the number of infringement cases involving the regions relative to the state level[17] in figure 4 (pg. 19), the evidence suggests that governance network is a relevant factor in explaining

[17] As the EU Commission sends letters to the Member State, and not the sub-state, frequently, multiple regions are mentioned in the same infringement case.

sub-state non-compliance. The Czech Republic exhibits the fewest percentage of infringements involving an identified sub-national actor (0,6%) . This is followed by France (2,7%). These two MS have the governance networks which present the fewest transaction costs for implementing EU rules at the sub-state level. The next group of MS include Germany (21%), Austria (21 %), Spain (17%) and Italy (15 %). Belgium is the next MS with a higher percentage of infringements coming from a sub-national level (26%). Then, the UK and Finland show the highest percentage of cases which involve an identified sub-national actors (34% and 37.5%). This follows what we had expected having analysed the governance networks.

Next, Table 3 (pg.20) presents the number of non-compliance cases by policy area. There is considerable variation between policy areas. The majority of cases come from Environment (48.6 %) while the next highest is the Single Market (17.8 %) and Employment and Social Affairs (10.62 %). This is not surprising insofar as the EU holds considerable competences in these areas and also are the main areas in which sub-national actors hold considerable competences.

Another way to divide infringement proceedings is by the type of infringement. Here we can distinguish between transposition issues (late transposition or incorrect transposition) and issues of application (regulations, decisions, treaties and directive application). In total, 509 (53%) were for cases of late transposition, while 438 (47%) were for issues of application. From the map, we

can see that those MS in federal states (Austria, Germany, Belgium) as well as regions which enjoy a special status and high degree of independence and autonomy (Gibraltar in UK and Aland in Finland) are those which have infringements for late transposition.

Decentralised states which in principle do have transposition powers like Italy and Spain do not tend to have transposition infringements. On the other hand regions in the UK do have infringements for late transposition.

Figure 4: Graph showing the percentage infringements involving a sub-state actor by Member State

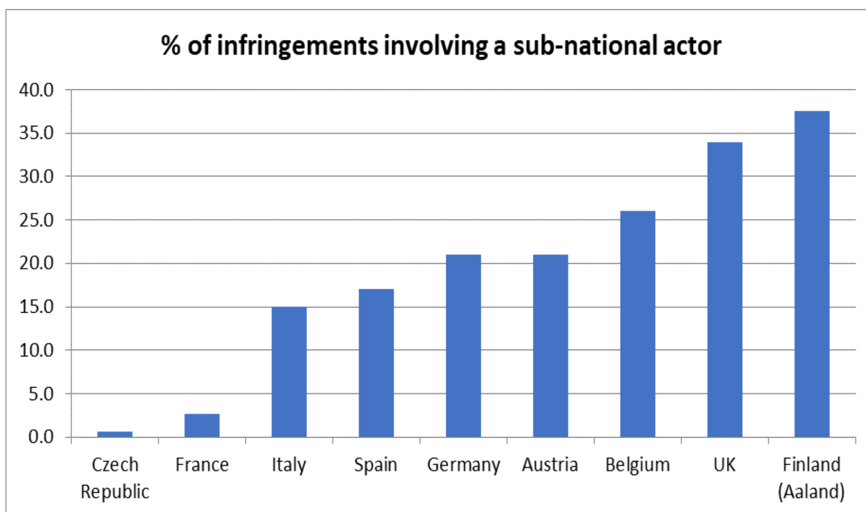

Table 3 Table showing the number of sub-state infringements by policy area

Policy Area	**Number of infringement cases**	**% of total cases**
Employment and Social	104	10.8
Tax and Customs	24	2.5
Energy	79	8.2
Single Market	171	17.8
Environment	467	48.6
Health and Consumers	8	0.8
JHA	71	7.4
Mobility and Transport	31	3.2
Maritime Affairs and Fisheries	6	0.6

b) Statistical Analysis

In order to explain the variation shown in the previous section, we performed a multivariate OLS regression to explaining cross-regional patterns of non-compliance with EU law. The results can be seen in Table 4 (pg.23). The dependent variable is the number of infringements by region and year. To illustrate the application of the analysis, we include the analysis of two cases in detail.

The regression model includes the actor-level variables for administrative capacity, organization preference divergence and support for EU policies. We also introduced MS as dummy variables[18]. This is relevant insofar the analysed regions share the

[18] The original plan was to introduce the structural transaction costs that different regions (of the MS analysed) have in order to deal with the transpositions and

same arrangements (in the implementation of EU legislation) at the national level. Thus, for the role of MS, fixed effects are relevant to explain variation in the level of regional non-compliance. We also introduced year as dummy variables. By introducing the year and the country fixed effects we will mitigate the problem of omitted variable bias[19].

Our actor centered variables in this model partially supports our predictions. Firstly, we asked whether diverging preferences of actors embedded in the network were correlated with higher numbers of infringements. One variable captures the diverging preferences of actors who are involved in the compliance network (relation between sub-state actors and the central government): the percentage of voteshare of nonstatewide parties in national elections. Thus, as the percentage of non-statewide parties increases, so does the number of infringements. A percentage increase in the non-state wide parties, corresponds to 0.00618 more infringements. This result is statistically significant.

We also test whether sub-state capacities is related to sub-state infringements. Our first measure of administrative capacity was an

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implementation of EU legislation. However, these transactions costs of regions (measured according to the index provided by Swenden 2006) had a perfect correlation with member states. This leads us to think about the existence of a member state effect, meaning that there is a sort of national structure effect in the non-compliance of EU legislation across EU regions. This is why we included member states as dummy variables in the analysis.

[19] Notice that neither the sampling process nor the treatment assignment process was clustered in this data set hence, as shown by Abadie et al. (2017) one should not adjust the standard errors for clustering.

index of regional quality of governance. The results demonstrate that as the quality of governance increases the number of infringements decreases. A one unit increase in quality of governance index results in -0.00167 fewer infringements. However, the results are not statistically significant.

According to Table 4, the support for EU rules also mattered for sub-state infringements: the higher the support for Eurosceptical parties at the regional level the lower the number of infringements. This result is statistically significant. However, it is in the opposite direction from which we expected.

The analysis also introduced control for country effects as well as for year effects: country dummies and year dummies. Country dummies capture the influence of the country effects as an aggregate trend. Year dummies capture the influence of time in the analysis. Fixed effects show clearly an important level of variation in the explanatory variables. In the model we have taken Austria and the year 2002 as the base category. Thus, controlling for all other factors (included in the regression) the predicted number of infringements for Belgium is 1.8 more than the predicted number for Austria since the estimated coefficient for Belgium is the largest, this means that Belgium is the MS with a highest non-compliance performance due to structural factors. In the same way and controlling for other factors, the predicted number of infringements for Finland is 0.437 more in relation to Austria.

Table 4 : OLS regression of number of regional infringements

	Model
Administrative Capacity	-0.00167 (0.00277)
Preference Divergence	0.00618 (0.00271)**
Support for EU policies	-0.02015 (0.00569)***
Country Fixed Effects:	
Belgium	1.82506 (0.38409)***
Czech Rep.	-2.03287 (0.15659)***
Finland	0.43717 (0.66658)
France	-1.84832 (0.13091)***
Germany	-1.83526 (0.16149)***
Italy	-1.61641 (0.18153)***
Spain	-2.10123 (0.17303)***
UK	-1.34887 (0.22729)***
Year Fixed Effects:	
yr2003	0.37230 (0.13615)**
yr2004	0.52835 (0.13330)***
yr2005	0.95495 (0.14291)***
yr2006	0.61252 (0.11975)***
yr2007	-0.01649 (0.12448)
yr2008	0.68630 (0.14571)***
yr2009	0.19741 (0.12089)
yr2010	0.44519 (0.12981)***
yr2011	0.15726 (0.12416)
yr2012	0.14775 (0.10981)
yr2013	0.00541 (0.11645)
_cons	2.18029 (0.27467)***
R- squared	0.5337
Observations	1232

Robust standard errors in parentheses * p<0.1; ** p<0.05; *** p<0.01

In the opposite direction, controlling for all other factors (included in the regression) the predicted number of infringements for Spain is -2.101 in relation to Austria and the predicted number of infringements for Czech Republic is -2.032 also in relation to Austria. Notice also that the estimated coefficients for the years

2003-2006, 2008 and 2010 are all highly significant and hence the presence of year fixed effects is justified in order to mitigate the problem of omitted variable bias.

To supplement the statistical analysis, we analyse two cases. The purpose of these cases is to address the critique of large-N, quantitative analysis that they show correlation but cannot demonstrate causality (Campbell 1988). The following case studies supply corroborating evidence to support the statistical findings. The first case study looks at the failure of the Belgian region of Flanders to transpose on time Council Directive 2011/16/EU of 15 February 2011 dealt with the administrative cooperation in the field of taxation. The second case is the non-compliance of several landfill sites in the Spanish Autonomous Community of Aragon with the Council Directive 1999/31/EC that regulates waste management of landfills in the European Union. These two cases were chosen because they represent both an infringement for legal transposition as well as application, so both major types of infringements. Secondly, they include different national political systems. Thirdly, the choice was informed by practical concerns regarding the access to key informants.

Transposition of Council Directive 2001/16/EU in the Belgian region of Flanders

The governance network in Belgium is very complex with high transaction costs. While administrative capacity with regards

financial and human resources as well as corruption in Flanders is quite high (scoring 73.09 / 100 in the regional quality of governance index), it is clear that administrative capacity in Belgium is affected by the high degree of political and administrative fragmentation. Belgian federalism is peculiar in its level of complexity. Firstly, it composes three territorially defined regional entities with their own constitutionally assigned powers: the Flemish Region (Flanders), the Walloon Region (Wallonia) and the Brussels Capital Region (Brussels). In addition, Belgium is divided into three linguistic Communities: the Flemish Community (thus bringing together the Dutch-speakers who live in Flanders and in Brussels), the French Community (assembling the French-speakers who live in Wallonia and in Brussels) and a tiny German-speaking Community in the east of the country. Added to this mix are intermediate level provinces and local government municipalities also with their own competences.

Belgium is a ‘dual federal’ model, in which competences between government tiers are separate and paralleled by autonomous administrations: federal laws are implemented by federal departments or agencies and regional laws are implemented by regional departments or agencies and there is scarce evidence of concurrent federal legislation, joint action programmes or framework legislation.

Council Directive 2011/16/EU of 15 February 2011 dealt with the administrative cooperation in the field of taxation - repealing

Directive 77/799/EEC. Belgium like all other MS voted in favour of the proposal in the Council. The directive was supposed to be transposed by MS by the date 31/12/2012 but was not transposed in Flanders until date 21/6/2013, leading to the infringement proceedings being brought against Belgium. In the infringement preceding it was revealed that the three regions (Flanders, Wallonia and Brussels) as well as the federal level government had failed to transpose the directive on time.

The governance network for implementing this policy integrated a high number of actors. Competences for its transposition fell at the Federal level, the Regional level and even Linguistic Communities. The Flemish government did not oppose the content of the directive and sought to transpose on time to avoid ‘negative publicity’. The process of transposition in Flanders, however, takes a long time. First the regional government must prepare a draft, then receive input from various stakeholders, followed by the first reading of government, then further advice for council state and committees, then any editing that is required is completed. Following this there is the second reading of the bill before it is passed into law. The duration of the transposition process in Flanders was compounded in this case by high transaction costs involved in transposing this directive. From interviews carried out with experts in Flanders it was clear that coordination and collaboration problems contributed to the transposition delay in Flanders. Interviewees commented that because of the division of competences there were many actors involved. However, these actors did not work together. Repetition is

when there is partial or total overlap of efforts aimed at attaining a goal (Huxham 1993). The unnecessary repetition of tasks in multi-organisational implementation is less efficient than only one organization doing the task. The negative impact of repetition was confirmed to us in interviews: each region repeated the drafting and preparation of a draft transposition when this could have been more efficiently achieved by pooling resources.

In addition to transaction problems stemming from multiple actors being involved, there were conflicts related to the political will of actors to support the means by which implementation was to take place. Due to concerns among actors regarding how the practical implementation of the directive would be carried out in practice in Belgium a cooperation agreement between the regions would be needed following transposition. The points of conflict were regarding the central bureau which would store the information required by the directive and process requests for information both from other MS asking Belgium for information and Belgium asking other MS for information. The practical implementation of the directive was sensitive. Who takes the role of bureau? Who pays for it? Who has access to it? Who sends the practical information? The problems were mostly on the practical level. They were sensitive on a political level.

In summary, the above case supports the importance of the governance network in explaining sub-stat non-compliance. First, the high number of actors involved in the implementation makes the

process slow. Second, their diverging preferences made agreement difficult and ultimately led to the delay. The main conflict dimension was over the allocation of competences between government tiers. The implementation of EU law interacted with the domestic setting in a way which demanded a restructuring of competences between the tiers.

Implementation of the Landfill Directive in the Spanish Region of Aragon

'The Commission will have to sit patiently and wait for the municipality to extract the 800,000 Euros of cost from its residents' – Interviewee

The administrative capacity is ranked somewhere in the middle of EU regions according to the regional quality of governance index (scoring 53.69 on the index). Additionally, administrative capacity is affected by the jurisdictional complexity. Spain is composed of three-tier system of sub-national governments. It composes 17 Autonomous communities (ACs) having a large autonomy. At regional level, decentralization is asymmetric, with two distinct regimes: the common regime (15 ACs) and the 'foral' regime (Basque Country and Navarra) which is characterised by an almost complete spending and revenue autonomy. In addition to regions, Spain composes provinces and municipalities. Regions possess substantial autonomy. Legislative and administrative competences are moderately interlocking (Swenden 2006).

The Landfill Directive, more formally Council Directive 1999/31/EC of 26 April 1999 is a EU directive that regulates waste management of landfills in the EU. The transposition of this directive was undertaken by the central government (Real Decreto 1481/2001, 27th December). This decree that transposed the EU directive established 16th of July 2009 as the latest date for the landfills to be adapted to the prescriptions of the directive. The Ministry of Environment subsequently developed a program for closing landfills that did not complies with the EU acquis, for the period 2005-2017. The Aragonese government was in charge of authorizing or not the landfills within its territory, according to whether they met the criteria of the directive. The municipalities are responsible for the management of the landfills.

Approximately 22 landfills operating in Aragon at the passing of the directive complied with the rules. There were more than 500 municipal landfills which did not comply with the directive and would have to be closed. Following closure of these the landfills, they would have to be sealed. Old landfill had to be sealed by a specific date. This date passed without the correct sealing of landfills previously existing (and no longer in use) in several municipalities. The Commission opened an infringement case against Spain due to the failure to correctly seal landfills which were decommissioned according to the directive. Among the cases included four municipalities in Aragon.

There was no evidence of opposition to the goals of the policy. While the requirements of the directive were not complex, there was considerable misfit as regards what was taking place in the region before and after the directive (it is very far from was practised before – extremely far). The Government of Aragon established 8 'agrupaciones' that would serve the whole territory in which waste would be deposited in conformity with the directive.

Administrative capacity in terms of resources available to the sub-national actors involved in implantation played a key role in why the policy was not implemented. The reason for the delay in sealing the closed landfills comes from the huge costs that the process involved for the municipal governments (*'For us it's an enormous effort' interviewee*). To look at one example, the landfill at Alcolea which is a municipality with a population of 1200 inhabitants, the cost of sealing the landfill is estimated to be between 600,000-800,000 euros. The project of sealing the would be the largest work carried out in the municipality in over a decade and as a local government representative argued 'this type of activity (…) is always at the end of the investment priorities' (*interviewee*).

The infringement was still open at the time of writing, however an agreement was reached in 2018 between the different levels of government (local, regional and central) to share the costs and bring the infringement to a close. This case again supports the argument that the governance network is a key unit of analysis in explaining sub-state non-compliance. However it also demonstrates the

complex relationship that exists between the actor-level variables and the network variables. What was clear from this case is that administrative capacity at the local level prevented the initial implementation as the cost was so high. However, once that occurred, the governance structure was unable to resolve the issue satisfactorily within a reasonable period of time. The inability of superior government tiers to assume the competence and the unwillingness of the superior tiers to initially assume the cost prolonged the non-compliance. While there was no evidence of an opposition to the main thrust of the policy from any of the actors, the high costs involved and the inability to organise the burden sharing between the multiple actors in the governance network was the reason for non-compliance.

1.6 Conclusion

This article has examined sub-state compliance with European Union legislation. We present the cases of sub-state non-compliance with EU law from regions in Austria, Belgium, Czech Republic, Germany, France, Finland, Spain, Italy, and the UK. Sub-state infringements are aggregated at the second level of government, the regional level of government of those MS. This has been understudied in the literature to date.

The descriptive analysis showed that regions in Belgium had the most infringements while the data revealed that sub-state regions in federal and regionalised states (Autria, Germany or Spain) have more cases of non-compliance than those regions in decentralised

unitary states (France or Czech Republic). In a first step, we expected that governance networks within MS which presented higher transaction costs would lead to higher numbers of infringements. The results of our descriptive analysis support this. The second objective of the paper was to explore whether, after controlling for the effects of the network, characteristics of the sub-state actors mattered for explaining sub-state infringements. The results showed that implementing policies across government tiers is rarely straightforward. Empirical evidence suggests that non-compliance at the sub-national level is a combination of structural and agency factors. Structural factors, according to our research, are related to governance structure within sub-national units and between those and the federal or central governments while agency factors are more associated to the diverging preferences of the actors that are part of the network. Therefore, in those cases in which actors involved in the implementation process share the same preferences over how the implementation of EU law has to be done, the possibility for coordination problems are lessened, and consequently, there are less problems of EU infringement. Thus, this mechanism is actually activated when operate both structural and agency factors. This has been corroborated in the empirical analysis as well as in the cases analysed in more detail. Those cases (Flanders and Aragón) revealed that much of the source of the disputes centered around the allocation of costs and resources within the governance structure. Both prevented to resolve inter-institutional bargaining quickly. The lack of hierarchy exacerbated this joint-decision trap and bargaining slowed down the

implementation. The competitive nature of institutional relations in both of these MS only exacerbated the delay.

To sum up, the difficulties encountered by the implementation in these cases bring to light a number of critical junctions that remain to be better explored in order to better understand variation of implementation of EU policies at sub-state level. In order to improve our knowledge about the reasons for sub-state non-compliance, research should look further into the factors which facilitate or impede the problem-solving capacity of network governance (Scharpf 1994; Stoker 1989). Furthermore, on a practical level and at the policy design stage, the research presented in this paper also points to some insights that should be taken into consideration when MS are negotiating policies at the EU level. Besides other factors, the manner in which the EU regulatory framework demands a redesigning of territorial or functional jurisdictions within MS should be deeply considered.

1.7. Appendix

Figure 1: Map showing the geographical distribution of infringements by Region

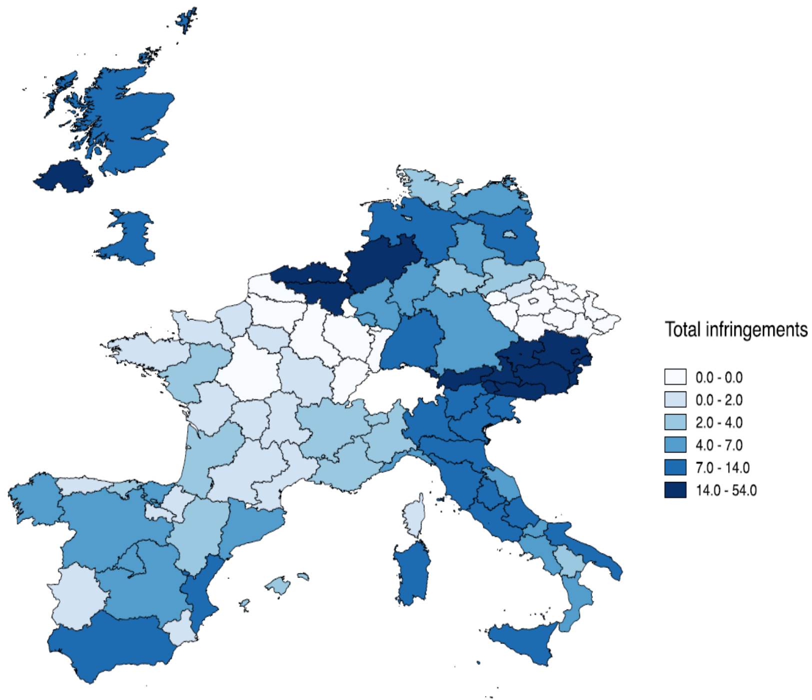


Figure 2: Map showing geographical distribution of infringements for transposition by Region

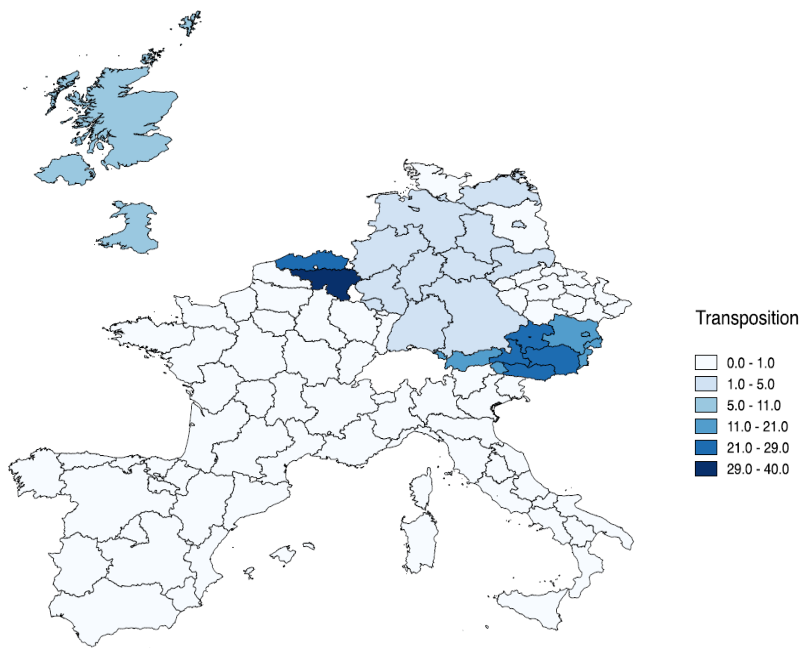
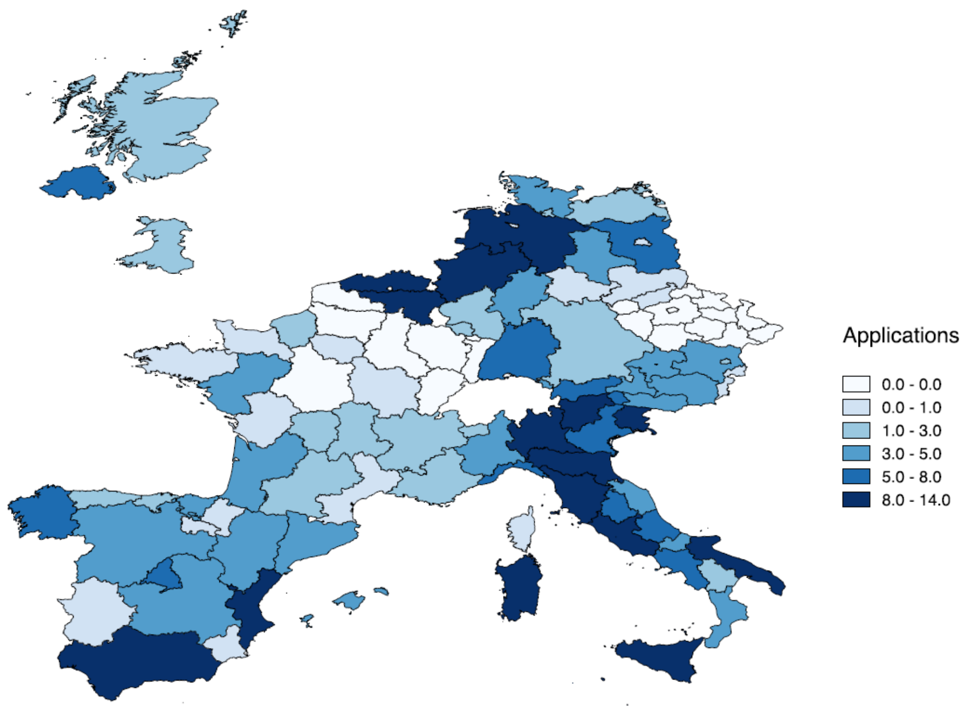


Figure 3: Map showing geographical distribution of infringements for application



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2. I'LL SEE YOU IN COURT! WHY SOME INFRINGEMENT CASES RESULT IN EUROPEAN COURT OF JUSTICE ADJUDICATION

2.1 Introduction

The European Union (EU) possesses a highly institutionalized enforcement mechanism [20]. When Member States (MS) fail to comply with EU law, the European Commission may take legal action against a MS by launching infringement proceedings. The process begins with both parties engaging in dialogue and discussions to try to reach settlement. However, if no settlement can be achieved, the Commission can refer an infringement case to the European Court of Justice (ECJ), which will issue a ruling on the case and later the potentially apply financial sanctions.

An interesting insight from the EU compliance literature is that between 1979-2009 about one out of every three cases[21] in which the European Commission file a Reasoned Opinion reached the adjudication stage (Tallberg and Smith 2014). This raises the

[20] Other mechansisms include decentralised enforcement mechanism of Preliminary references, through which national courts and more informal mechanisms such as SOLVIT and EU-PILOT. The focus in this paper is on infringement proceedings as it is the cetnral and most prominent tool. It has existed from the beginning (the informal tools are recent introductions); it has full coverage of all Member States (the new mechanisms did not always have full coverage of all Member States). Finally as the Commission and Member State are involved (as opposed to private actors in more informal mechanisms) it reveals more about the workings of the EU and the interaction between the most important actors.

[21] This figure refers to one in every three cases in which the Commission issued a Reasoned Opinion.

obvious question: why are some cases settled before ECJ adjudication, while some cases are settled only after?

Knowing the determinants for why some infringement cases are settled in discussions between the MS and Commission while other cases are referred for ECJ adjudication is important for a number of reasons. Firstly, a referral to court extends the time before the law in question is applied in a MS. This potentially denies business and citizens of protections and benefits of EU law, while also leading to possible distortions in the Single Market (see Siegel 2011). Secondly, a court referral undoubtedly raises the profile of the infringement proceedings. The public confrontation with the Commission and the Court can be exploited by actors to destabilize the EU political system (Borzel 2016; Davis 2015). If there is conflict between the Commission and the MS, this tension can provoke public discontent with the EU, undermining its legitimacy.

Despite the clear importance, we still know relatively little as to why some cases are settled through dialogue only and other cases are referred to the ECJ ruling. While there is a rich literature on the reasons why MS initially violate EU law (see: Angelova, Dannwolf, and König 2012; Mastenbroek 2005), we know less about what happens once non-compliance has been identified by the Commission (Börzel et al. 2010; Hofmann 2018; Jensen 2007). Some empirical analysis has focused on differences in the number of ECJ referrals between MS. These have tested expectations drawn from the management (Chayes and Chayes 2012) and enforcement

(Downs, Rocke, and Barsoom 2007) approaches to non-compliance, and found evidence that MS capacities to resolve the case and the capacity to resist the Commission's enforcement function contributes to observed variations (Börzel et al. 2010; Hofmann 2018; Jensen 2007).

There is almost no analysis that tests determinants for which individual infringement cases go to court and why. This is despite the fact that across all MS, some cases go to court, while others are settled before court. Even MS with high capacities to resolve a case, while also low capacity to resist the enforcement function of the Commission (such as Denmark) have cases which go to court and cases which do not. Therefore, there is a need to complement the previous studies with additional, case-level studies which can help resolve open questions including which type of cases and which type of disputes which go to court. The objective of this paper is to fill this gap and explore case-level determinants the case level for why infringement proceedings reach adjudication by the ECJ.

I test to what extent ECJ referrals are a function of unresolved interpretative disputes, i.e. when the Commission and MS hold different interpretations of the law. To date I can find no empirical analysis which tests to what extent interpretive disputes between the Commission and the MS explains why some cases are referred to the ECJ. EU rules are incomplete contracts, which require interpretation. When the Commission understand the rules differently, then infringement proceedings can be a process of

contestation and negotiation (Chayes and Chayes 2012; Snyder 1993). When the Commission and the MS cannot agree, a referral to the ECJ can help resolve these disputes by providing a definitive interpretation of the law (Lenaerts et al. 2014).

I expect that EU laws are more likely to require interpretation as the complexity and ambiguity around the scope of the law increases. Scope refers to the boundaries of EU law, i.e. in which cases does it apply or not apply (Cuyvers 2017). Consequently, the scope of EU rules is a salient matter in which the institutional interests of MS and the Commission may diverge. Growing complexity and ambiguity of a law increases the likelihood of alternative interpretations (Lebow 1996; Tallberg and Smith 2014; Young and Osherenko 1995). Therefore I predict that when the infringement case involves a legislative act with high levels of complexity and ambiguity, an ECJ referral is more likely than when it involves an act with low complexity and ambiguity, all else equal.

I test this claim on an empirical analysis that comprises a descriptive and statistical enquiry. Firstly, I conduct a descriptive analysis of all ECJ rulings between 2002 and 2012 (a total of 1093 cases). This descriptive analysis is a first step to evaluate the plausibility of the hypothesis. Secondly, as the dependent variable is binary (1 if the case reached the adjudication stage and 0 if not) a logistic regression analysis was carried out (Sperandei 2014). The statistical analysis includes infringement cases from nine MS (Austria, Belgium, Czech Republic, Germany, France, Finland,

Spain, Italy, and the UK) and across the period 2002-2012 was carried out. The infringement case (measured as Letter of Reasoned Opinion) was the unit of observation. The results of both analyses demonstrate support for the hypothesis that increasing complexity and ambiguity around the scope of the EU directive increases the likelihood that an infringement case results in ECJ adjudication.

The paper makes several contributions to the literature. To begin with, this is the first time that the case is used as the unit of analysis for explaining why some infringements result in ECJ adjudication. This improves upon previous studies which had policy area as the lowest level of disaggregation. Secondly, the paper contributes theoretically by providing evidence for a previously under-studied argument in the context of escalating infringements: that the infringement proceedings serve as a rule-clarifying function. Thirdly, it provides rich descriptive data of the subject of disputes in infringement cases which reach the ECJ. This allows me to demonstrate new information regarding the number of times that MS are successful vis a vis the Commission in infringement rulings by the ECJ. These findings provide important insights for understanding the behaviour of the Commission, the ECJ in the infringement procedure as well as its outcomes.

The paper is structured as follows. In the following section I outline the infringement procedure. Then I explain the main theoretical arguments in the literature to explain why some cases are more likely to reach adjudication stage. I present my argument in the

context of the gaps in the literature. The next section establishes the research design. This is followed by a descriptive analysis and then the statistical analysis including the description of the case. The paper ends with the conclusions.

2.2 Infringement Proceedings

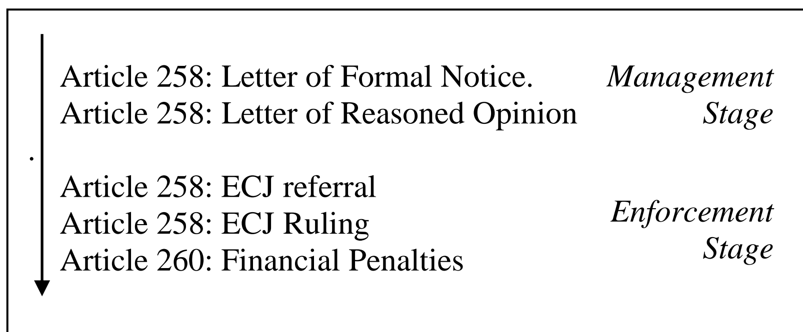
The legal basis for infringement proceedings is found either in article 258 or Article 260 of the Treaty on the Functioning of the European Union (TFEU)[22]. The proceedings have a number of steps. First, upon suspicion of an infringement, the Commission contacts the MS. Through informal discussions, the Commission identifies to the MS the suspected infringement, setting out its arguments and listening to the explanations of the MS. If the informal contact does not resolve the issue, the Commission sends a letter of formal notice to the MS. Although referred to as "formal notice" this stage is still considered an informal one. If compliance is still not achieved, the Commission sends a letter of Reasoned Opinion in which it reiterates its arguments why it believes the country has not complied and formally repeats the actions to be taken. It is at this stage that it is registered as a formal process of infringement. The process to this stage in the proceedings is regarded as the management stage (Tallberg 2002).

If the MS still refuses to comply, the case can be referred to the ECJ which passes sentence on the case. Then, if the MS still does not do

[22] Ex Article 226 & 228.

enough to comply with the original infringement compliant, the Commission can begin a second infringement procedure based on article 260 TFEU (formerly article 228). In this procedure, the Commission applies for financial sanctions for the offending MS[23]. This is regarded as the enforcement stage in which the costs of non-compliance escalate.

Figure 5: Stages of Infringement Proceedings and Compliance



Finally, infringement proceedings can be initiated for non-compliance with both primary and secondary EU legislation. Sources of infringements can be grouped into three categories: 1) non-communication of transposition measures; 2) incorrect transposition; 3) incorrect application (implementation). The former two relate to the role the MS have in transferring EU directives into the national legal corpus. These directives agreed upon at the EU level provide some discretion for MS to transpose them in accordance with national traditions. Application applies to all EU

[23] Before the Treaty of Lisbon, all steps described above needed to be undertaken with respect to the art. 260 IP as well, but after the changes introduced with the treaty, the Commission can apply directly to the Court side-stepping letters of formal notice and reasoned opinions.

legislation, primary (treaties) and secondary (directives, regulations) as well as other decisions.

Early settlement of infringement proceedings is the most common method of dispute resolution in the EU. Among infringement cases initiated by the Commission between 1978 and 2009, only 36.6% reached the second stage of the procedure, and only 11.5% were referred to the ECJ for a decision (Table 5, pg.49). The data show that while there are some cross-state differences, all MS display the same preference for backing down or finding amicable solutions in early stages of the infringement procedure. Yet, while the most common solution is to resolve the case without an ECJ ruling, around 1/3 of cases which reach the Reasoned Opinion – the stage in which the Commission sets out the legal argument which can be used in a court case – will end up being referred to the ECJ. This is not insignificant amount. So, why do some cases result in an ECJ ruling?

3.2 Theoretical Framework

Previous studies which have approached the question of why some cases are ruled on by the ECJ and others settled earlier have used the MS as the unit of analysis. Drawing on International Relations compliance literature, they have tested arguments from the "enforcement" perspective according to which MS calculations regarding the net cost of compliance vs noncompliance determine when an infringement case is settled (Downs, Rocke, and Barsoom 2007; Fearon 2002) and the "management" approach which

positions non-compliance as "involuntary" and so state capacities in terms of resources and institutional capacity will determine when an infringement is settled before and ECJ ruling (Chayes and Chayes 2012).

The logic of the enforcement approach positions non-compliance as voluntary and occurring when the net costs of compliance exceed non-compliance. The logic of referring an infringement case to the ECJ from this perspective is that a referral raises the material and reputational costs of non-compliance (Downs, Rocke, and Barsoom 2007). Testing this argument, empirical studies have focused on testing to what extent the relative power of MS can mitigate the rising enforcement costs (Börzel and Knoll 2012; Garrett, Kelemen, and Schulz 2007; Jensen 2007). Although, (Börzel et al. 2010) finds support for the mitigating effect of power, this is disputed by other authors (Tallberg Smith 2014).

In contrast to the enforcement approach, the managerial school assumes that noncompliance is involuntary. In particular, non-compliance is argued to occur due to a lack of capacity, understood as administrative resources and domestic institutional constraints (Chayes and Chayes 2012). The logic of why ECJ adjudication will help overcome these capacity issues is left implicit in the empirical studies in the EU compliance field. However, if we understand capacity from a neo-institutionalist approach, a referral can help overcome domestic opposition from veto players (Davis 2012, 2015).

It is perhaps less clear how a referral may build capacity in terms of a state resources, beyond perhaps re-allocating funding to different priorities (Simmons 1998). Nevertheless, the empirical results suggest that state capacities both in terms of resource capacity and institutional capacity matter.

The empirical tests above concentrate on cross-state variations, so by their very nature cannot account for why some cases even involving the same MS go to court while others do not. By implication the frameworks of the current empirical literature present a rather one-dimensional interpretation of the role of the ECJ in infringement proceedings. The enforcement approach understands that the role of the ECJ in this process is to raise the reputational costs against a MS by declaring it officially non-compliant and starting a process which can lead to financial sanctions placed against a MS. The arguments drawn from the management approach which have been tested share a not too dissimilar understanding. Basically, from this perspective a referral raises the costs of non-compliance which can help overcome the domestic opposition to compliance. While this is undoubtedly a significant part of the picture, it is not the whole picture. The ECJ is not only at the apex of infringement proceedings to raise the costs of MS non-compliance. Instead it is also there to interpret the EU law. EU laws are incomplete contracts and frequently require interpretation. The ECJ has been delegated the sole competence to interpret EU law (Lenaerts et al. 2014).

Table 5 Cases per EU member state by stage in the infringement procedure, 1978–2009

	Reasoned Opinion	ECJ REFERRALS	
	Total	Total	% RO/REF
Austria	391	124	31.7
Belgium	941	350	37.2
Bulgaria	13	0	0
Czech Rep.	81	21	25.9
Cyprus	55	6	10.9
Denmark	179	33	18.4
Estonia	56	9	16.1
Germany	785	248	31.6
Greece	1106	369	33.4
Hungary	40	6	15
Finland	199	45	22.6
France	1067	384	36
Ireland	630	209	33.2
Italy	1514	595	39.3
Latvia	43	0	0
Lithuania	30	2	6.7
Luxembourg	690	271	39.3
Malta	67	14	20.9
Netherlands	467	140	30
Poland	106	30	28.3
Portugal	846	168	19.9
Romania	20	1	5
Slovakia	43	5	11.6
Slovenia	34	2	5.9
Spain	632	213	33.7
Sweden	185	50	27
UK	536	134	25
EU 27	11,293	3,554	22.4

Source: Tallberg Smith 2014

This is relevant insofar as legal practice is all about interpretation. Consequently a MS may disagree with the Commission that its (in)actions constitute an act of non-compliance (Dworkin 1982). Börzel (2003) has identified a number of potential sources of interpretive disputes that the MS and Commission might have. Firstly, they may argue over the scope of the law, that the law is not applicable in a given situation or that state actions fall under an exception or exemption that is granted by the law. Alternatively, they may argue that their actions amount to compliance with the law. Either way, in these instances the infringement proceedings become "a process of contestation and negotiation between divergent interests, interpretations, and problem perceptions, which have to be reconciled" (Börzel 2003, 162).

Whether or not an infringement case results in an ECJ ruling will therefore depend in part on the Commission and MS being able to reach a common interpretation. This is less likely when the law is ambiguous and complex and the MS and Commission hold diverging interests. Broad, complex and ambiguous rules increases the likelihood that disputes require third party adjudication because they leave more room for interpretation (Lebow 1996; Tallberg and Smith 2014; Young and Osherenko 1995). Secondly, if the two parties hold diverging interpretations then this is more likely. This is a widely held view in the management school of international relations and general and EU-related public administration literature (Bursens 2002; Falkner et al. 2005).

The paper operationalises this argument by focusing on ambiguities and complexities surrounding the scope of EU law. By scope, I refer to the boundaries of EU law: in which cases does it apply or not apply (Cuyvers 2017). Disputes over the scope of EU law is a relevant dimension to test for the effects of ambiguity and complexity as gets at the very heart of policy-making in the multi-level EU (Hix and Hoyland 2011). National autonomy vs harmonization is well established to be an important conflict dimension in the EU integration process (Hooghe and Marks 1999; Scharpf 1994) as well as between the Commission and the Council in policy-making (Christiansen 2002; Schmidt 2000). The Commission is commonly characterized as being in favour of integration, as integration increases the power of supranational institutions, whereas the Council is the more likely of the two to favour national autonomy (Tsebelis and Garrett 2000).

In order to operationalize and measure the ambiguity and complexity of EU directives with regards their scope, I turn to two variables, "delegation" and "recitals". Both indicators have been previously used in studies which analyse the discretion afforded to MS in legislation (Epstein and O'Halloran 1999; Franchino 2005; Thomson and Torenvlied 2011).

The variable "delegation" captures the degree of implementing discretion a MS is afforded in the legislation. EU directives may include derogations, exceptions and exemptions in their provisions, which – if enacted – limit the scope of EU law (De Búrca and Scott

2000; Franchino 2007). Derogations and exemptions provide MS the opportunity for discretionary decision-making by allowing for all or part of the legal measure to be applied differently, or not at all, to individuals, groups or organizations. As the number of provisions which include derogations or exceptions increase, the scope of EU law becomes more complex and ambiguous. An increase in the room MS have for manoeuvrability increases the likelihood that it may hold different interpretations from the Commission in relation to the limits of this discretion (Andersen 2013). However, a feature of the application of derogations and exemptions in EU legislative acts is that they are strictly circumscribed and to employ them MS must fulfil various requirements established by the law and monitored by the Commission and the ECJ.

Diverging interpretations between MS and the Commission over the correct interpretation about the application of this delegation is common. The Commission is known to take a strict interpretation of the application of these derogations and exemptions. From the institutional interest of the Commission, a lack of common rule implied by different applications of derogations across Europe has potentially negative consequences for the functioning of the single market and may undermine the idea of commonality which underpins the common market and the EU in general (Stolpe 2010). That is why as far back as 1978 the Commission was already of opinion that this type of differentiation ought not to be exaggerated and should cease "as soon as circumstances permit" (De Búrca and

Scott 2000, 145). Recent Commission publications continue to emphasise a strict interpretation of derogations (European Commission 2013, 2014).

In contrast, MS have frequently taken a broader interpretation of these derogations (Born et al. 2014; Huber 2012). This is not surprising as the inclusion of derogations in the legislative text has usually come in response to the preferences of the MS as expressed in the Council (Brandsma and Blom-Hansen 2017). Derogations and exemptions have frequently been introduced to legislation as a mechanism to overcome the transaction costs of policy administration and reaching a consensus in decision-making (Thomson and Torenvlied 2011). They were introduced to satisfy the preferences of the MS in the Council and therefore in disputes over maintaining or losing the derogations are likely to be politically salient for the MS. In applying these derogations they are likely responding to the interests of national actors rather than focusing on the effects on the overall single market.

In summary, delegation increases the number of legal doubts requiring the specification of the scope conditions of MS discretion. Secondly, the interpretations over the specificity and validity of the use of these derogations between the MS and the Commission are frequently likely to diverge. Therefore, the first hypothesis is that *the more provisions of a given directive that delegate authority in implementation to member states, the more likely infringement disputes relating to it will be adjudicated upon by the ECJ.*

The legal provisions of an EU directive are usually preceded with recitals. Recitals are a text that sets out reasons for the provisions of an act. These clauses are understood as interpretive guides which although they have not got legal effect are used to clarify the intention of provisions. Recitals justify the need for a given law and are used to clarify the scope of ambiguous legal provisions during court proceedings (Klimas and Vaiciukaite 2008). These are frequently so specific that they have become almost a 'third kind of law-making' (Bellis 2003). As they are used to clarify ambiguities, I recitals provide more information which can be used in discussions between the Commission and the MS to clarify the scope of the EU law. This reduces the need to refer a case to the ECJ for interpretation. Therefore, the second hypothesis is that *the higher the number of recitals in a given directive, the less likely that infringement disputes relating to it will be adjudicated upon by the ECJ.*

2.3 Research Design

The dependent variable, *ECJ adjudication*, is a dichotomous variable coded 1 if an infringement case is adjudicated on by the ECJ and 0 if not. The unit of analysis is the infringement case. The sample of infringement cases for the statistical analysis includes closed infringement cases, captured as letters of Reasoned Opinion sent by the European Commission to the MS: Austria, Belgium,

Czech Republic, Germany, Finland, France, Italy, Spain, and UK during the period 2002-2013.

These states were chosen to have variation along independent variables which the literature predicts affects the number of cases which are adjudicated on by the ECJ including: power; capacity and institutional veto players (Börzel, Hofmann, and Panke 2012; Jensen 2007). Reasoned Opinions were used as indicators of infringement because this is the stage which the Commission legally defines the final parameters of the case and what a MS needs to do to resolve the infringement (Lenaerts et al. 2014).

The total number of infringements cases in the sample totals 2341 cases. Data on infringements was drawn from the European Commission's own database on infringements. However, this underwent further treatment before the statistical analysis. Firstly, infringements relating to non-communication of transposition measures (late transposition) were identified and excluded. This is because for those infringements there is little scope for different interpretations between the MS and the Commission. The precedent is long established that a MS has failed in its obligations if it has not notified transposition measures in advance of a date set by the Commission (see, for example Case C-71/99 Commission v Germany and Case C-110/00 Commission v Austria). On the other hand, non-conformity and incorrect application cases are more likely to be cases in which there is ambiguity or complexity over the

obligations required of a MS. The final sample of cases for the statistical analysis sums 709.

The main independent variables, *delegation* and *recitals* were coded using the legislative act that MS infringed. Data for this was obtained by hand coding information in annexes of the Annual Commission Report on Infringement and where this was missing from the Reasoned Opinions received for the analysis in chapter one. Information regarding the substantive content of the legislative act (recitals and provisions) comes from the online EU database CELEX. These two data sources are cross referenced by hand to obtain my independent variables.

The first independent variable, *delegation,* draws on previous studies by Thomson and Torenvlied (2011). In line with their operationalisations, I count the number of major provisions in a legislative act which delegate authority to the MS in implementation, while also controlling for the total number of major provisions. The final measure is the number of provisions in a legislative act which delegate authority divided by the total number of provisions in an act. The directives in the sample contain between 0 and 83 provisions delegating authority to member states.

The provisions in an act delegating authority are identified by studying the wording of each article and their sub-paragraphs. Articles that delegate include rights to transpose provisions with some discretion, derogations or granting exemptions to provisions

or take measures that may alter the policy (Franchino 2007). These provisions allow for all or part of the legal measure to be applied differently, or not at all, to individuals, groups or organisations. An example of such a provision, is Article 17 (entitled "Derogations") of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation or working time (as amended by Directive 2000/34). Article 17(1) provides for derogation "when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves".

The second independent variable, *recitals,* is established by the number of recitals contained in the acts. The count of recitals in an act is determined by identifying all numbered or unnumbered paragraphs in a directive, starting with the expression 'whereas'. In order to control for the number of provisions in a directive, the number of recitals is divided by the total number of provisions in the legal act. The number of recitals contained in the directives in our sample varies between 0 and 131 recitals.

In addition to the principal independent variables, I include several controls based on theoretical expectations and results from previous empirical research. There are control variables at the level of the case and the MS. Firstly, case-level variables include a dummy for which Directorate General (DG) issued the infringement, a dummy for more technical policies as well as an indicator of the quantity of

information available to the MS and the Commission to assist in interpreting the legislation.

A dummy for which DG issued the infringement is included to capture potential differences policy level differences. These have been identified by previous research as relevant in explaining non-compliance.

Next, I distinguish between legislative acts adopted by the Commission and those which are adopted by the main legislators, either alone by the Council or the Parliament and the Council together. Legislative acts adopted by the Commission are on issues which have been delegated to it and are technical in nature, such as standards.

In less politically sensitive and more technical policies, the infringement is more likely to be dealt with by bureaucrats and legal experts rather than politicians. The former are increasingly part of dense cross-national networks of public officials that have institutionalized forums for exchange of information and ‘best practices’ with the Commission issuing interpretative guidelines through these fora (Andonova and Tuta 2014). Additionally, policy implementation nowadays often involve a host of European and national agencies as well (Versluis and Tarr 2013). Consequently, we might expect that members of these networks share a perspective and way of understanding of the world acquired through their immersion in law and interaction between themselves. This

should generate compliance through a logic of appropriateness (March and Olsen 2011). The measurement of *Commission acts* legislative act is straightforward. Those cases which were adopted by the Commission are coded as 1 and all other cases are coded as 0. In total of 31 of cases are Commission acts

Next, information regarding how the law is interpreted by the ECJ should help to resolve interpretative disputes without a new court decision. This is already explained in the hypothesis regarding recitals. In addition to the recitals, I control for the number of *ECJ rulings* which the ECJ has made which reference the legal act involved in the infringement. This is captured through a search of the jurisprudence citing the legal act which is the source of the infringement. The search is carried out through the ECJ website (CURIA). The variable is a simple count variable which ranges from 0 citations to 5781 citations.

Finally, I control for the potential effect state-level variables identified in previous research. Firstly, it has been regularly found that MS with lower capacities to resolve an infringement case are more likely to face ECJ referrals (Treib 2014). To control for this, I include indicators of government autonomy and resources. Government autonomy is a function of the number and interests of *veto players* in the political system of a MS. I therefore use the veto player index by (Henisz 2000) to capture a government's ability to change policies when required by the European Commission or the ECJ. To measure *government resources*, I include an indicator of

the government per-capita expenditure. Data was obtained from Eurostat.

In addition to capacities, the Commission may be deterred from referring a case to the ECJ, either by the potential for the MS to inflict costs on the legislative ambitions (Borzel 2010) or because it anticipates that it will raise domestic opposition making non-compliance less likely or inflicting audience costs (Closa 2019). To control for these effects I include an indicator EU-specific political power, the *Shapley Shubik Index (SSI),* which measures the proportion of times a MS is pivotal (and can, thus, turn a losing into a winning coalition) under qualified majority voting in the Council of Ministers (Rodden 2002; Shapley and Shubik 1954). Domestic opposition is more likely to flare up when there is low support for the EU as rule-making body. Therefore I include an indicator of *EU opposition*. This is measured using the question of the Eurobarometer that asks, "do you think that membership of the EU is..a good thing…a bad thing…neither good nor bad". I use the percentage of respondents who answer "a bad thing" as an indicator of EU opposition.

2.4 Analysis

a) Descriptive Analysis

According to my argument, one of the reasons why infringement cases are adjudicated on by the ECJ is because of the need to

validate and interpret the EU rule. Therefore, and as a first step in the analysis, I analysed all ECJ court cases for all MS between 2002-2012 by all MS. The case documents of the ECJ are publicly available and contain a rich source of information in which the subject of the matter and the legal arguments of the MS are published. In total there are 1093 ECJ rulings. The distribution across MS and policy area can be seen in Table 6 and Table 7 (pg 63-.64).

I used the court documents to identify whether there was evidence of disagreement on the interpretation and whether the ECJ was being asked to interpret the legislative act. If the MS and the Commission never disagreed over the interpretation of the rule, this would provide evidence towards disproving my hypotheses.

In 524 / 1093 cases (46.8 %) the MS did not seek to challenge the Commission's interpretation. Almost all were for non-communication. In the remaining (569/1093) cases the MS publically disputed the Commission's arguments. There were three types of challenges. Disputes over the scope of EU law feature most prominently. For example, whether the EU rules apply to a specific product, service or sector (derogations, exemptions) feature prominently. A second prominent dispute is the claim that the MS is exempt from the law as their actions are justified and proportionate to meet other goals. A third common dispute, different from the scope of EU law, involves the Commission and MS accepting the scope of EU law but argue that the empirical facts

support that the MS complies, frequently citing competing sources of empirical information.

Financial and tax related policies were frequently the source of disputed interpretations. Many cases concerned derogations and exemptions in the application of differing excise duties and / or VAT on products produced in the domestic market than those applied to imports.

These include cases C-463/02 (Sweden), C- 144/02 (Germany), C-381/01 (Italy) which all relate to a failure to levy what the Commission viewed as the correct VAT on domestically produced dried animal feed. In the ECJ adjudication, the Court sided with the interpretation of the MS and dismissed the Commission's case.

Other cases involve the correct application of exemptions around levies to the national alcohol product (Ouzo) and non-national products - which the MS won (e.g. case C-475/01 – Greece).

A substantial number of cases involved disputes in the area of Evironmental policy For example, multiple cases centered on the correct application of derogations in the collection of directives around the "Habitats". An example is case C-344/03 Commission vs Finland concerning the hunting of aquatic birds and the scope of directive 79/409/EEC. From the perspective of the Commission, the

Table 6 Descriptive statistics for ECJ judgements between 2003-2012

Member State	**Frequency of Adjudications**
Austria	66
Belgium	88
Cyprus	4
Czech Rep.	15
Denmark	10
Estonia	3
Finland	34
France	98
Germany	76
Greece	97
Hungary	2
Ireland	42
Italy	136
Lithuania	2
Luxembourg	90
Malta	6
Netherlands	39
Poland	19
Portugal	67
Romania	1
Slovakia	4
Slovenia	3
Spain	108
Sweden	29
United Kingdom	54
Total	**1,093**

Table 7 Distribution of infringements by policy sector and infringement type

	ALL	101	102	103	104
Environment	**324**	**74**	**44**	**51**	**141**
(a) Bio-diversity	207	51	29	27	87
(b) Waste & Waste Water	117	23	15	24	54
Employment, Social Policy,Health & Medical Care	**174**	**72**	**18**	**72**	**2**
(a) Health Services	28	13		15	
(b) Employment regulations	66	11	4	42	2
(c) Social	80	48	14	15	
Network Sectors	**119**	**54**	**14**	**37**	**5**
(a) Postal & Telecommunications	57	29	4	19	
(b) Transport (air, road, rail)	36	16	5	11	3
(c) Utilities (energy, gas,	26	9	5	7	2
Agriculture, Food & Fisheries	**111**	**22**	**4**	**58**	**25**
(a) Agriculture & Forestry	42	14	2	18	8
(b) Food, drink, Tobacco	31	3		28	
(c) Fisheries	38	5	2	12	17
Single Market(s), Industry & Commerce	**296**	**94**	**10**	**103**	**78**
(a) Single Market of Goods & Services	81	19	2	56	3
(b) Financial & Capital Markets	72	41	4	24	
(c) Digital Single Market	35	23	2	6	3
(d) Industry & Construction	10	3		6	1
(e) Research & Innovation	7	1		5	1
(f) Public Procurement	91	7	2	6	70
Justice & Home Affairs	**36**	**22**	**0**	**13**	**0**
(a) Residency & Assylum	36	22		13	
Other	28		1	7	13

Notes: 101 = Non-Communication, 102 - Incorrect Transposition, 103 - National laws incompliant with EU commitments, 104 - Administrative Application

conditions required for the application of the derogation provided for in Article 9(1)(c) of that directive were not fulfilled. Finland, for its part argued that the conditions necessary for the implementation of the derogation provided for in Article 9(1)(c) of the Directive were fulfilled, the Commission decided to bring the action. The case turned on the evidence that there were alternative methods to the spring hunting of several aquatic birds in a given territory of the state. The national authorities argued that their evidence showed there was not alternative, while the Commissions evidence pointed in the other direction. The Court sided with the Commission's evidence and upheld their complaint that the MS did not meet the criteria to apply the derogation in 4 / 5 species of birds which were subject to the case (eiders, golden-eyes, red-breasted mergansers and male goosanders). In the fifth species, the Commission case was dismissed as contrary to the interpretation of the Commission, the MS did show it met the criteria to avail of the derogation in this case.

The description above reveals several important and innovative insights that are relevant to the study. Firstly, the cases show that (at least publicly) in the Court the MS frequently challenge the Commission's interpretation over the use of derogations and exceptions. Secondly, these are not idle arguments, used simply to frame their non-compliance within the bounds of acceptable behavior. As evidenced from the prior examples, MS can (and do) have their interpretation upheld through adjudication by the Court.

This leads me to a further insight that challenges one of the common assumptions of the literature. The literature frequently refers to the Commission being successful in 90 % of the infringement cases that result in adjudication (Börzel et al. 2010; Tallberg and McCall Smith 2014). My results show that this is true for the population of cases (91%) and in cases only referring to transposition this is even higher (98 %). However, if we unpack this a little, the picture is much more complex. As illustrated in the cases above, what is considered "winning" for a MS in a case may not necessarily imply having the case dismissed in its entirety. Cases can also be partially dismissed. These partial dismissals can be of great significance to MS.

If we look at the proportion of times the ECJ granted "partial dismissal" of the Commission case we observe that it occurred in 31 % of the cases (194/609), significantly higher than 10 %. Of course, understanding which of these "partial dismissals" were significant would require detailed knowledge of each case – something which is beyond the scope of this paper. However, we can get a reasonable picture if we look at the attribution of costs following a decision by the court. Following a judgement, the ECJ can attribute costs to the Commission, the MS or both. In principle the costs are attributed to the losing party (Lenaerts et al. 2014). Therefore, by implication shared costs would seem to indicate that the partial dismissal was of legal significance. In 162 / 609 (26.6%) cases in which the MS disputed the Commission's complaint, the costs were at least partially attributed to both actors.

In sum, an analysis of the subject matter of ECJ rulings presents us with a number of important insights. Firstly, MS do dispute the Commission's interpretations of the law and derogations and exemptions are frequent sources of disagreement. Secondly, the evidence points to a distinction between cases for non-communication and other cases. MS do not dispute the substance of the case in non-communication infringements. Therefore, by implication the statistical analysis should not include those cases for non-communication. Thirdly, the evidence suggests that MS can expect to be more successful in their disputes against the Commission than previously expressed in the literature.

b) Statistical Analysis

To test my hypotheses, I performed two logistic analyses (Sperandei 2014). The regression models include the independent variables *delegation* and *recitals*. These capture the degree of ambiguity and complexity in the legal acts. The first model (Table 8 pg.69) includes policy level and state-level controls as well as controls for years. To further control for omitted variables, I conducted a second model (Table 9 pg.70), which introduced MS and year as dummy variables. By introducing the year and the country fixed effects it reduces the problem of omitted variable bias.

Firstly, I asked whether the increasing complexity and ambiguity of the legal text with regards the scope of EU law increased the

likelihood of an infringement case reaching ECJ adjudication. Increasing *delegation* captures increasing ambiguity and complexity around the scope of a law. The results of the regression analysis show that

as the number of articles which permit discretion as a percentage of total articles increases, so does the likelihood of an infringement case being referred to the ECJ. An increase in the variable "delegation" increases the likelihood that an infringement case will result in an ECJ ruling (Coefficient increase: 1.520553 – Model 1; 1.293234 – Model 2). This result is statistically significant.

A second indicator, recitals, also taps into the ambiguity and complexity of the legal act. I hypothesised that an increasing number of *recitals*, by virtue of reducing ambiguity and complexity, should decrease the likelihood of an infringement case resulting in ECJ adjudication. The results demonstrate that as the number of recitals as a proportion of the number of articles decreases the likelihood of an infringement case being referred to the ECJ decreases. A one unit increase in recitals results decreases the likelihood of an infringement case resulting in an ECJ adjudication (Model 1 – Coefficient decrease - 0.28385; Model 2 – Coefficient decrease -0.2989623). The results are statistically significant.

Table 8 Logistic Regression Showing the likelihood of ECJ adjudication and main control variables.

DV: ECJ adjudication	N	709
	R2	0.069
Independent Variables	**Coefficient**	**Robust Std. Err.**
Complexity & Ambiguity		
Delegation	1.520553**	0.783284
Recitals	-0.28385**	0.121461
Case-Level		
Commission	-1.317811**	0.408022
ECJ rulings	-0.00075	0.000915
State-Level		
Veto players	0.423467	1.456861
Govt. Exp.	-0.00696	0.030719
SSI	0.037473	0.046253
EU opposition	0.005807	0.007327
Direct. General		
BUDG	0.984348	0.856561
CNCT	-0.00899	0.481148
COMP	0.703411	1.387163
EMPL	0.66296*	0.383805
ENER	-0.56001	0.396441
GROW	-0.69255	0.42239
SANTE	-0.41457	0.418395
HOME	-0.63352	0.394966
GROW	-0.08235	0.250279
MARE	-0.80751	1.153137
TAXUD	-0.23961	0.304103
Year		
yr2003	0.031261	0.349637
yr2004	-0.01095	0.346166
yr2005	0.125354	0.35208
yr2006	0.008042	0.354562
yr2007	-0.34051	0.397161
yr2008	-0.1226	0.364219

yr2009	-0.30587	0.382833
yr2010	-0.22658	0.402361
yr2011	-1.31744	0.614539
yr2012	-0.80859	0.535104
constant	-0.38853	1.259048

* p<0.1; ** p<0.05; *** p<0.01

Table 9 Logistic Regression Showing the likelihood of ECJ adjudication and dummy country variables

DV: ECJ adjudication	N	709
	R2	0.08
Independent Variables	**Coefficient**	**Robust Std. Err.**
Complexity & Ambiguity		
Delegation	1.293234*	0.783284
Recitals	-0.2989623**	0.121461
Case-Level		
Commission	-0.8100464**	0.408022
ECJ rulings	-0.00063	0.000915
States		
Belgium	0.154109	0.345723
Czech. Rep.	-0.54384	0.473331
Germany	-0.8308875**	0.373432
Spain	0.274054	0.301497
France	0.199101	0.324294
Italy	0.149772	0.247216
Finland	0.072593	0.446173
UK	-0.39201	0.400415
Direct. General		
BUDG	1.000348	0.913336
CNCT	0.139076	0.481279
COMP	0.645466	1.323903
EMPL	0.622073*	0.386373

ENER	-0.47828	0.399163
GROW	0.150363	0.259128
SANTE	-0.33391	0.413655
HOME	-0.53659	0.405831
MARE	-0.94207	1.156553
TAXUD	-0.01938	0.343402
Year		
yr2003	0.178044	0.335767
yr2004	0.066484	0.334291
yr2005	0.228007	0.346179
yr2006	0.055872	0.342908
yr2007	-0.24801	0.387518
yr2008	-0.09315	0.352787
yr2009	-0.18388	0.373634
yr2010	-0.18193	0.36549
yr2011	-1.368729**	0.576121
yr2012	-0.86976	0.499855
constant	0.061159	0.340086

* p<0.1; ** p<0.05; *** p<0.01

The analysis also controlled for case-level and state-level factors. According to table 8 & table 9, the more technical the issue, the less likely that the infringement will be referred to the ECJ. Commission directives were less likely to be referred to the ECJ for adjudication (Model 1; -1.317811; Model 2 -0.8100464). This result is statistically significant. The number of previous Court references (*ECJ Citations)* while in the expected direction, was not statistically significant.

The coefficients for domestic opposition to the EU, the share of pivotal votes in the Council of the European Union, resources and veto players were not statistically significant and some point in the

opposite direction than expected These results similar to those which are found in other research studying which infringements escalate to ECJ adjudication (Hofman 2018). For the Shapley Shubik index, elsewhere this has been suggested that as it is essentially a measure of MS's ability to influence and shape the making of European legislation, perhaps those states which are more likely to "win" at the council are less likely to have disputes over the interpretation as their preferences are more likely to be included in the end result (Hofman 2018). While the controls for DG, which take DG Environment as the base category, show that there are variations between DG, only one of the effects is significant (Employment and Social Affairs). Infringements sent initially by this DG are more likely to result in referrals than environmental cases. The MS dummy variables are mostly not significant. The exception to this is Germany which after controlling for all other factors (included in the regression) the likelihood of a referral court is less likely than the base category – Austria – and is statistically significant.

1.6 Discussion & Conclusions

This article has examined case-level factors for why an infringement case is referred to the ECJ for adjudication. This has been understudied in the literature to date. The paper tested the claim that the escalation of the infringement process is due to diverging interpretations between the Commission and MS. Applied to EU infringements, I tested whether infringement cases centred on

legislative acts which are more complex and ambiguous with regards the scope of EU law were more likely to result in ECJ adjudication.

To test the claim, I presented descriptive analysis of ECJ rulings. Secondly, while controlling for other explanations, I presented a statistical analysis of the cases of non-compliance with EU law in Austria, Belgium, Czech Republic, Germany, France, Finland, Spain, Italy, and the UK for the period 2002-2012.

As a first step, I set out the relevance of the variables "delegation" and "recitals" to the overall complexity and ambiguity with regards the scope of an EU legal act. Firstly, the variable, "delegation" positioned the directives in the sample along a position of lower to higher complexity and ambiguity in relation to the scope of EU law. A higher relative number of provisions which afforded MS derogations, exemptions and exceptions was indicative of higher levels of complexity and ambiguity over the scope. It was expected that increasing values of the variable "delegation" in the legal act which was subject to the infringement would be associated with increasing likelihood of an infringement case resulting in ECJ adjudication. Secondly, recitals were established as a clarifying tool in EU directives. Increasing "recitals" relative to provisions of a directive is indicative of increasing the amount of information which can be used to interpret the scope of an EU legal act. Consequently, I expected that increasing values of the variable "recitals" would be associated with a decreased likelihood of an

infringement case resulting in ECJ adjudication. Having controlled for other state-level explanations related to capacity and power, the results of the statistical analysis support this claim. The results show that infringement cases are more likely to involve the ECJ adjudication, with increasing "delegation" and less likely to involve the ECJ adjudication with increasing "recitals".

The results attest to a more nuanced role of the ECJ in infringement proceedings. The understanding of the ECJ's role that emerged from previous research is that its only role is that of a sanctioning body, one which forced the states to get their house in order due to the reputational and potential financial costs that the court ruling would confer upon them. However, the evidence provided here confirms that role of the ECJ in infringement proceedings is more than this. As well as being a sanctioning body, the evidence here shows that the court is regularly interpreting the law in the infringement proceedings. Both the evidence from the detailed readings of the cases and the statistical analysis support the claim that interpreting the law is an important feature of the ECJ's role in infringement proceedings.

This raises interesting normative and practical questions regarding the role of the Commission and the ECJ in the infringement proceedings. Firstly, the results show that the ECJ frequently interpretes the scope of EU laws in infringement proceedings. Although the states have undoubtedly been complicit in delegating this competence (or allowing the ECJ to assume this), there are still

questions regarding the legitimacy of the ECJ as a non-majoritarian institution playing what seems to be according to these results such an active quasi-legislative role by interpreting the scope of laws.

The results also make an important contribution to an open and interesting debate in the literature about the motives and actions of the Commission in infringement proceedings, particularly the nascent literature which links the infringement proceedings with the legislative process (Blauberger 2012; Blauberger and Weiss 2013). According to this perspective, the Commission uses the infringement proceedings to put pressure on the Member States to accept or open up new legislative proposals. One of the claims in this literature is that the Commission engages in a "harmonisation game" using infringement proceedings to target obstacles to harmonisations that MS refuse to remove in the Council (Genschel and Jachtenfuchs 2011). The Commission hopes to trigger case law that removes them through judicial harmonisation (European Commission 2001). The accumulation of case law may in turn facilitate consensus-building on legislative harmonisation.

An example of this process emerges from the description of cases carried out for this analysis: Council Directive 2006/112/EC "On the Common System of Value Added Tax". The Commission's stated objective in the legislative process was for harmonization. However, MS sought to maintain discretion through maintaining pre-existing derogations, in part because VAT reductions over the past four decades have emerged as an important state incentive to

industry. Negotiations in the Council surrounding the VAT directive were conflictive. The result was a directive both extremely long and with many exemptions delegations, discretions.

In the intervening years, the Commission has launched numerous infringement proceedings over the use of these derogations and exemptions (Lang et al 2013). The Commission has taken a strict interpretation in the infringement proceedings and MS have taken a broader interpretation. While the ECJ has sometimes ruled in favour of the MS, the general trend has been that over multiple ECJ adjudications, the scope and specification of these derogations have been narrowed. This has in turn led to new legislation with increasing levels of harmonization and more limited scope for exemptions and derogations.

For example, there were high-profile cases against Luxembourg and France concerning reduced and super-reduced VAT rates on e-books. These disputes fed into the policy process and led the Commission very recently to adopt a proposal to end the difference in treatment (Lang et al 2013). The case outlined above fits with the cases analysed elsewhere (Blauberger and Weiss 2013).

Another key finding of this analysis suggests that the ECJ may dismiss the Commission's arguments more frequently than one in every ten cases. I have shown is that the ECJ rejects the claims of the Commission more frequently than previously thought. The results indicate that the Court rejects the claims of the commission

as much as 30 % of the time. These results are more in line with what the literature of economics of litigation would expect that given the expectation of defeat rational actors would settle out of court rather than assume the costs of court (Cooter and Rubinfeld 1989.; Klerman 2012; Lederman and Ledermant 1999).

Future research should examine which cases are upheld, dismissed or partially dismissed. The literature exploring the extent to which the ECJ is a "constrained court" provides a starting point for such exploration (for overview see: Stone Sweet 2010). Future research would call for both (a) exploring the dependent variable "partial dismissal" on a larger sample size; and (b) testing for the determinants of when the court supports the MS argument.

Generally, the results indicate a need for more study into the factors which facilitate or impede resolution of interpretative disputes. For example, the insights of this research suggest that interpretive disputes on more technical issues are more likely to be resolved before adjudication. Future research could check for the interaction between the scope for interpretation and technical directives. One possibility could be that the effect of delegation is lower in more technical policies.

Finally, the results is that rule clarity is an important explanation for MS non-compliance. It would therefore be advantageous for the Commission to further strengthen its connections to MS administrations through its networks and use additional soft law to

clarify rules. Future research can explore whether this helps to resolve infringements more quickly.

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3. WHAT ARE YOU WAITING FOR? DETERMINANTS OF THE DURATION OF PRE-TRIAL SETTLEMENT BARGAINING IN EU INFRINGEMENTS

3.1 Introduction

Member States (MS) have delegated extensive discretion to the European Commission in its role as enforcement agent (Pollack 1997). We can see this in the scope for action that it has when prosecuting MS non-compliance through infringement proceedings. The Commission can decide whether (or not) to launch an infringement; whether (or not) to settle a case or refer it for judgement by the European Court of Justice (ECJ); as well as the timing of all such decisions (Lenaerts et al. 2014).

There is a lack of systematic analysis of how the Commission uses this discretion in its role as enforcement agent (Closa 2019). There are studies which explore its use of discretion in other areas (Franchino 2000; Majone 1996), and which look at the behaviour of other actors in the enforcement procedure (Alter 1996; Carruba et al 2008), but with a few exceptions (e.g. Mendrinou 1996) it is only recently has there been a strong focus on the determinants of Commission behaviour in its role as enforcement agent (Kelemen 2017; Closa 2019). These studies have begun to unpack and test explanations for its actions but there remain open questions. These studies have mostly examined specific cases or provided rich descriptive information (Andersen 2012). There are fewer large-N

quantitative studies. Therefore, one way to contribute to these debates is to provide additional systematic analysis on new quantitative data.

I do this by testing for the determinants of the length of time that the Commission commits to pre-trial settlement bargaining (PTB) before referring a case to the ECJ. What determines the time that the Commission is willing to commit to dialogue, before turning to the courts? How soon does it decide that dialogue is not going to be enough to resolve the case? Does the Commission reach this decision more quickly or less quickly depending on the case or the MS? These are some motivating questions behind this research. The answers can tell us something useful about the Commission's use of discretion in its role as enforcement agent. The principal descriptive question I ask is: to what extent are there cross-state and cross policy variations in the duration of PTB? Secondly, the analytical questions is: what are the main determinants of cross-state and cross-policy variations in the duration of PTB?

The paper probes several relevant explanations for cross-MS and cross-policy area variations in PTB. These are consistent with arguments developed elsewhere that when acting as the enforcement agent, the Commission prefers to settle infringements through dialogue and will pursue other avenues (such as court referral) in function of the anticipated consequences of its actions (Closa 2019). These considerations may mean that it treats MS

differently according to their compliance capacity and / or their capacity to inflict costs on the Commission.

In addition to the anticipated effects of its decision, I test whether the Commission's policy priorities informs its decision. The Commission and the court are limited by resources and so must prioritise cases. Priorities should reflect policy priorities. Both theoretical considerations and empirical evidence suggests that regulating the Single Market and ensuring cross-border trade and market openness is a core priority of the Commission. This means that the Commission may refer infringements more quickly in core single market areas and where markets are less open.

The paper tests these arguments through a statistical analysis of infringement cases between 2002-2012. The dependent variable, duration of PTB, measures the duration in days between the Commission beginning the first formal management stage with legal effect (Letter of Reasoned Opinion) until the date at which the case was referred to the ECJ. The sample includes all infringement cases which were referred to the ECJ between 2002-2012 for all MS and all policy areas. This totals 1742 cases.

The results of a descriptive analysis reveal that the duration of PTB varies extensively. While cases take on average 265 days from the sending of a Reasoned Opinion against the MS to the ECJ referral, this ranges from a minimum of 21 days to a maximum of 2751 days. The study reveals systematic variations across MS and policy

area. The statistical analysis reveals support for the claim that the Commission prioritizes infringements relating to the single market and that it prioritises opening up less open (but not necessarily larger) markets. Next, the Commission is clearly constrained by its resources in how much time it affords to process these cases. Finally, there is no strong evidence to suggest that the Commission is constrained by the power or capacity of MS in this process.

The paper makes a number of contributions to the literature. Firstly, empirically there is currently no systematically collected data on the variations in the time that the Commission committed to pre-trial negotiations before it referred to the Court. Secondly, the paper empirically tests for the first time several theoretically grounded hypotheses regarding the determinants of the Commission's behavior in this important aspect of compliance. Thirdly, by providing information regarding the functioning of the EU system, it adds useful insights for the literature regarding the design of dispute-settlement institutions condition their effectiveness including questions over the duration of PTB.

The paper proceeds as follows. Firstly, I outline PTB in the context of the EU. In the next section, I set out my theoretical framework and derive possible explanations for the duration of time given to the PTB in infringement proceedings. Then, I introduce the research design, operationalise the main variables, and present the descriptive data. The results of the statistical analysis are followed by a discussion of the findings and a conclusion.

3.2 The Dependent Variable: Duration of Pre-Trial Bargaining

Infringement proceedings consist of two distinct phases: a management phase and an enforcement phase (Tallberg 2002). The management phase begins when the Commission notifies the MS of the suspected non-compliance. Following notification, the state and the Commission engage in structured dialogue aimed at resolving the case. If deemed necessary, the Commission can refer the infringement case to the ECJ. This marks an escalation of the proceedings into a phase which is characterized by the threat or use of more coercive techniques such as sanctioning (Tallberg 2002).

The focus in this paper is the duration of PTB. This is captured here as being the time between the date of the official filing of the legal infringement case against a MS until the time that the case is referred to the ECJ for judgement. This is in line with the literature which looks at pre-trial settlement bargaining in civil cases (Spier 1992). The Commission enjoys broad discretion over the duration of PTB duration. Article 258 TFEU states that the Commission shall bring a case "*If the Commission considers*" (my emphasis) non-compliance to have occurred, and that it "*may* bring the matter before the Court of Justice" (my emphasis).

As well as discretion over whether to bring the case, the Commission enjoys discretion over when to bring the case. There is no time period established in the Treaties, but the European Commission establishes a deadline in the Reasoned Opinion

(usually of 2 months) for MS to reply to their complaints. None of these acts or decisions can be subject to judicial review or transparency legislation (Lenaerts et al. 2014). What might explain why the Commission affords a longer period to PTB? What might explain why it affords a shorter time?

3.3 Theoretical Framework

The Commission has a priority for settling infringements in structured dialogue, before any court referral. There are several reasons for this. The EU system is built on consensus and cooperation rather than conflict (Heisenberg 2005; Hix and Hoyland 2011). Compliance is essentially voluntary and requires the cooperation of MS as implementers and control authorities (Neyer 2004). Furthermore, infringement procedures are repeated interactions rather than one-off events meaning that the Commission must also be conscious of potential repercussions that the decision to escalate will have in other cases (Mailath and Samuelson 2015). Similarly, issue linkages between the enforcement and decision-making stage means that the Commission is 'negotiating' compliance with existing legal acts while simultaneously trying the win the support of the MS for new legislation (Blauberger and Weiss 2013). Finally, other relevant aspects of the enforcement system relate to the audience costs[24] of

[24] An audience is any actor that observes the agency and can monitor it. Examples include political institutions, interest groups, the media and the mass public. Audiences empower or weaken an agency – for example political institutions increasing or reducing the agency's formal authority, or firms accepting or challenging its regulation. Agencies therefore need to adapt to their audiences

pursuing infringement cases through the ECJ, i.e. the bad publicity for the EU resulting from having open conflicts with the MS (Dorussen and Mo 2001).

Following on from the above, the Commission decision to refer a case then should take into account the likelihood of resolving the case without a referral as well as the anticipated consequences of a referral (Closa 2019). This may lead the Commission to treat MS differently depending on: (a) their capacity to resolve the infringement case; (b) the potential for negative domestic reaction; (c) their potential to inflict costs on the Commission's legislative ambitions.

Turning first to how MS capacity to resolve the infringement case may inform the Commission's decision on the duration of PTB. MS non-compliance can stem from either lack of will or a lack of capacity. A consistent finding in both the theoretical and empirical compliance literature is that both institutional veto players (Börzel, Hofmann, and Panke 2012; Giuliani 2003; Linos 2007) and bureaucratic efficiency (Berglund, Gange, and Van Waarden 2006; Haverland and Romeijn 2007; König and Mäder 2014) affect the capacity of a MS to resolve compliance. If it non-compliance is caused by the lack of capacity, a referral to court may not solve the case and may leave the Commission looking vindictive for "unfairly" punishing the MS.

MS are likely to be aware of this themselves. This means that they may try to exploit the uncertainty to their gain by exaggerating the difficulties they face in compliance. For the MS the discussions with the Commission may approximate a two-level game in which any agreement that it makes with the Commission will need to be implemented domestically (Putnam 1988). The model predicts that through synergistic linkages, MS could use these constraints (or perceived constraints) at the domestic level to "win" longer negotiating time from the Commission, as long as the Commission believed these complaints to be credible. The first hypothesis predicts: *As Member State capacity to resolve infringement cases decreases the duration of pre-trial settlement bargaining increases*.

Secondly, the Commission may anticipate that an ECJ referral may provoke a negative domestic reaction which could inflict audience costs on itself as well as make compliance more difficult to attain by galvanising constituencies opposed to compliance. Audience costs are high when the decision to litigate against a MS would lead to a decline in trust or support for the Commission or, more broadly, the EU integration project. The Commission should be an actor which is concerned by its reputation (Carpenter 2001; Carpenter and Krause 2012). Domestic audience costs should be of concern to the Commission because it is increasingly constrained by a politicized institutional context (Hooghe 2012). Additionally, as the Commission's legitimacy is the most indirect of the supranational institutions, being elected indirectly and its legitimacy source being predominantly output legitimacy (Kelemen and Schmidt 2012).

The risk of negative audience costs are higher when there is already a broad opposition to the EU. Firstly, under those conditions there are more likely to be constituencies opposed to compliance. Secondly, these constituencies have a more receptive audience to frame the referral in terms of a battle between the Commission and the MS. Therefore the second hypothesis predicts that: *As opposition to the EU increases, the duration of pre-trial settlement bargaining increases.*

A third proposition is that the Commission is influenced by the capacity of MS to retaliate and inflict costs on it (Börzel et al. 2010)). One argument in the literature is that MS with more structural power in the legislative process are better placed to block the Commission's goals in the Council. The anticipation of the MS blocking its legislative goals may induce the enforcement authority to act strategically and be reluctant to impose sanctions on powerful states (Börzel et al. 2010). Those MS which have more that: *As the aggregate structural power in the legislative process increases, the duration of pre-trial settlement bargaining increases.*

The final hypothesis comes from the understanding that the the institutional interest of the Commission is Single Market integration. Theoretical and empirical literature on delegation in the EU is consistent with the claim that the Commission enjoys more discretion in areas which are core market ones (Epstein and O'Halloran 1999; Franchino 2005; Pollack 1997). Signs of

prioritising market integration is seen in the treaty design of supplementary enforcement mechanisms. Firstly, we can see that byway of derogation from the procedure laid down in Articles 258 and 260 TFEU, Article 108(2) TFEU, Article 114(9) TFEU, and Article 348 TFEU empower the Commission to bring a matter directly before the Court of Justice. What is more is that in "state aid" cases – so crucial to a well-functioning single market, the Commission has even more discretion to come to its own judgements. Commission staff tend to be pro-market integration and identify it as a priority (Kassim et al. 2013). One of the functions of a pre-litigation bargaining is to weed out the more and less important cases which go to court. The court is unable to see all the cases all the time. As the Single Market is a priority of the Commission, I expect that: *the duration of pre-trial settlement bargaining is less in core single market policies.*

Following on from the logic that the Commission prioritises single market economic integration, I arrive at further hypothesis. Drawing on a political economy approach, it is suggested that the Commission (as motor of market integration) prioritises opening up markets which are less open than more open and also larger than smaller (Stone and Brunell 2012). This leads me to the following hypothesis: *As market openness increases, the duration of pre-trial settlement bargaining decreases*.

3.4 Research Design

The dependent variable, *duration of pre-trial bargaining* measures the duration of PTB (in days) and is captured from the sending of a Letter of Reasoned Opinion until the decision to refer the case to the ECJ. The data was downloaded and collected from the European Commission website.

The decision to choose Reasoned Opinions as the starting point is due to both practical considerations (the necessity to pick some starting point) and the substance of these letters. The full duration of PTB includes time spent before the issuing of a Reasoned Opinion. As the Reasoned Opinion is the stage in the infringement procedure which officially sets out the legal parameters of the case and which the ECJ takes into consideration during the court case, it was preferred over the Letter of Formal Notice as the starting point. Future research may wish to test these arguments on data that extends further back.

The first hypothesis predicts that the *compliance capacity* of the MS affects the duration of the PTB. Capacity is operationalised line with the compliance literature in terms of institutional capacities (Börzel et al. 2010; Hofmann 2018).

The first of indicator, *veto players,* provided by (Henisz 2000). The indicator captures the number of institutional veto players whose resistance can impede policy change. An increase in the number of effective veto players is an increase in domestic constraints. The

indictor measures on a scale of 0 – 1, with 1 being evidence of more domestic constraints. The second capacity variable is a Bureaucratic quality index that captures the qualitity of the bureaucracy. A higher measure of bureaucratic quality is indicative of higher capacities. Data comes from the Quality of Governance Index (Teorell, Jan, Stefan Dahlberg, Sören Holmberg, Bo Rothstein 2019).

The variable *EU opposition* taps into the domestic costs that can be inflicted on the Commission from an ECJ referral. The more prevalent opposition to the EU is, the higher the risk that an ECJ referral could lead to domestic opposition. This indicator measured using the question of the Eurobarometer that asks, “do you think that membership of the EU is..a good thing…a bad thing…neither good nor bad”. I use the percentage of respondents who answer “a bad thing” as an indicator of EU opposition.

Additionally, the Commission may be influenced by anticipated consequences for its legislative agenda. If this is so, then the Commission may be more reluctant to refer infringement cases involving MS with greater capacity to impede the Commission’s legislative ambitions. To capture this I integrate the variable, *aggregate structural power,* which is operationalised as in Borzel (2007) and captures the relative time that a MS is pivotal in votes in the Council of the European Union. I use the Shapley-Shubik (1954) indicator then for structural power in the European Union.

The fourth hypothesis tests for the effect of the Commission's priorities. The expectation is that it is quicker to refer a case to the ECJ in those policies which are core single market policies and in those markets which impede cross-border trade. The variable *core single market policies* captures policy areas which are core to the single market. The variable has a binary nature in that those policies which are central to the single market are coded 1 and others coded 0. Infringements sent from the following Directorate Generals (DGs) were considered as core single market policy areas: Internal Market, Industry & Services; Communication Networks, Content and Technology; Competitions; Energy; Environment; Mobility and Transport; Health and Consumers. The infringements which were sent from the following DGs were catagorised as non-core market policies: Agriculture and Development; Budget; Education and Culture; Home Affairs; Justice, Fundamental Rights and Citizenship.

The next independent variable, *market openness*, captures the degree to which the domestic market of a MS is more or less open to EU-imports. This captures the number of EU imports in relation to total imports. Data comes from Eurostat. In addition to market openness, the size of the economy may be relevant indicator of priority. To capture *market size* (i.e. the size of the economy) I use an indicator which captures the relative share of EU GDP that a MS holds.

I also included a number of controls. Firstly, *commission workload,* captures the workload that the Commission DG. This is calculated using data on the number of employees in a DG divided by number of Reasoned Opinions that it has emitted in that year. The data on numbers of employees come from the Commission reports.

Resource constraints are an important determinant of an agency's agenda (Bertelli & Lynn, 2006; Hammond, 1986; Jones, 2003). The Commission is far from a "bloated bureaucracy" that is its public image. The staff that it can deploy to infringement proceedings is limited as it has also other tasks such as draft proposals, implement EU law, coordinate policies, represent the Commission and execute a variety of other functions, enforcement being merely one of many (Szapiro 2013). Around 10% of staff are dedicated to infringement proceedings about 2/3 of the number that are deployed in policy making. Interviews in empirical research have revealed much variation in how Directorate-Generals (DGs) prioritise infringement proceedings and that this is attributable in a significant part to the amount of human and technological capital that they invest in evaluation, which can in part be explained by their total budgets and human resources (Borzel 2016; van Voorst 2017) (Hedemann-Robinson 2015; van Voorst 2017). Given that there is variation across DGs in terms of their workload and the resources to manage this workload, I expect that some of the variations across policy area can be explained by the workload and capacity of the Commission Directorate General. Therefore I control for this

I expect that additional case-level factors are important for explaining the duration of management negotiations before escalation to ECJ. I distinguish between infringements for *non-communication* of transposition measures and other infringement cases[25]. As discussed in chapter 2, non-communication cases have less scope for interpretative disputes and so by implication PTB should take less time. Because MS vary in the number of infringement cases caused by non-communication of transposition measures, some cross-state variation could be explained by this feature – making their inclusion necessary. Those cases which were for non-communication of transposition measures were coded 1, while all other cases were coded – 0.

A final control is the year of the infringement case. This might be relevant because of the expansion of EU membership during the time in my sample. The Commission is likely aware of its own resource constraints which mean that it cannot bring all cases to the ECJ. What is more is that it knows that the ECJ cannot read all cases. As the membership of the EU increased, it increases the workload of the Commission. Because the constraints on the Commission and Court increased, it might be that more cases are left for longer periods in the management phase as the Commission tries to get to grips with the workload.

[25] In practice there are three (in)actions which are considered as non-compliance by the Commission. These are: (1) failure to transpose a directive before the deadline; (2) incorrectly transposing the legal concepts in a directive; (3) maintaining in force laws which contradict the obligation in EU legislation (Treaties, Directives, Decisions or Regulations); (4) Failing to enforce or apply these directives on the ground.

3.5 Descriptive Analysis

The following section presents the descriptive analysis for all infringement cases which were escalated to an ECJ referral during the period 2002-2012. The dependent variable, *duration of pre-trial bargaining* captures the time (in days) from the sending of the Reasoned Opinion as the first formal management phase to the referral to the ECJ (the enforcement stage).

The data show that around 1/3 of infringement cases (1742 out of 4800) escalate from the management stage (Reasoned Opinion) to the enforcement stage (ECJ referral). This is a similar figure to data from the period 1978-99 (Börzel, Hofmann, and Panke 2012). The distribution of cases by MS can be seen in table 10. There is considerable cross-country variance. Italy (189) and Greece (176) stand out with the most ECJ referrals in the period 2002-2012. Next there is a cluster of states at around 125 cases which includes Belgium (125), Spain (128), France (118), Luxembourg (129) and Portugal (127). The Central and Eastern European (CEE) MS have the fewest cases, for example Bulgaria and Latvia have both 7. Poland stands out as a CEE MS with a relatively high number of cases (74) and Denmark as an older MS with few (9). But what about the time afforded to the PTB before escalation to the enforcement phase? How long are cases normally negotiated before they are escalated? Are some cases negotiated for a longer time than others before they were escalated?

Table 10 (pg. 97) also shows the duration of time (in days) that infringement cases were negotiated in pre-trial bargaining. The first table shows the variations between MS, the mean, standard deviations as well as the minimum and maximum duration of PTB. Figure 6 (pg. 98) illustrates this information graphically.

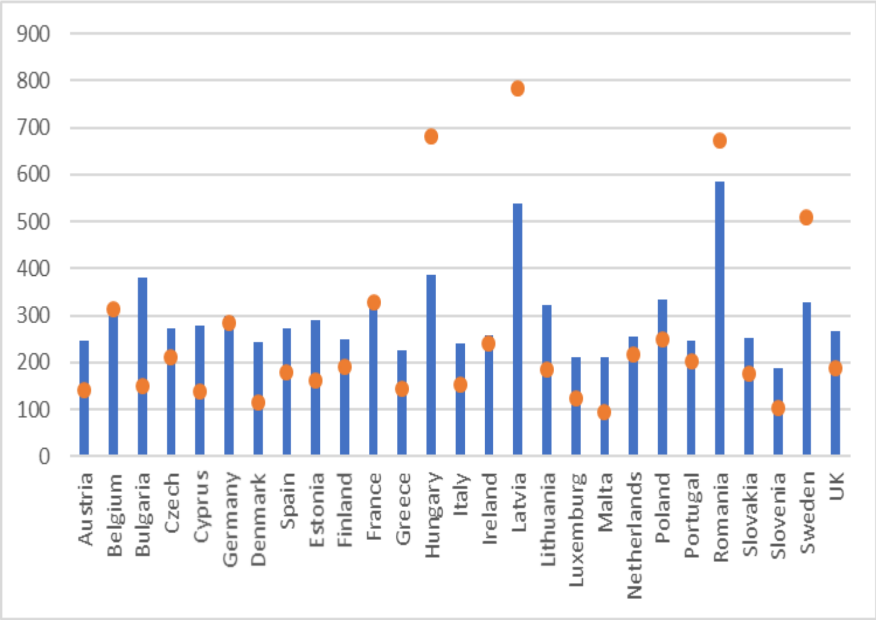
If we look at the mean duration, Romania (583 days) has the most, while the fewest is Slovenia (186 days). However, there are relatively few observations in these states. If we compare the mean of MS with over 50 cases, those in Luxembourg (211 days), Greece (226 days) and Italy (233 days) have the fewest days in the management phase. France (315 days), Belgium (299 days) and Germany (298 days) have a mean of around 2 months longer PTB duration.

Table 12 shows the number of ECJ referrals in which PTB lasted for longer than 6 months, 12 months, 18 months and 24 months. The data shows that Spain, France, Poland, Greece and Germany stand out as having a higher number of ECJ referrals in which PTB lasted longer than 18months before they were escalated (between 10 – 15 cases each).

Table 60 Table showing the overall distribution of cases by Member State, the mean duration of time between sending of Reasoned Opinion and ECJ referral, with standard deviations and means

	N	Mean	Std. Dev.	Min	Max
Austria	100	245.95	141.3867	62	938
Belgium	127	299.7323	314.4493	69	2514
Bulgaria	7	379.1429	150.721	168	631
Czech	31	272.3548	211.2609	112	1064
Cyprus	18	277.1667	138.5799	98	602
Germany	93	298.1613	284.9648	98	1779
Denmark	10	243.2	115.1056	126	476
Spain	130	272.9769	178.9624	21	1000
Estonia	28	291.2857	160.8334	111	946
Finland	55	248.3636	191.1285	98	1064
France	119	316.6218	327.1662	98	1693
Greece	176	226.7841	143.9293	92	1064
Hungary	14	387.0714	682.7932	126	2751
Italy	192	239.2917	152.7305	85	1087
Ireland	71	257.493	241.3743	57	1549
Latvia	7	537.5714	782.6063	119	2290
Lithuania	4	321.25	184.7997	160	517
Luxemburg	129	211.325	124.49	92	777
Malta	25	210.28	94.26272	98	562
Netherlands	80	254.0375	216.2853	98	1554
Poland	77	334.7273	247.5336	112	1244
Portugal	132	245.6742	201.2745	72	1547
Romania	7	583.8571	671.7885	161	2079
Slovakia	17	252.4706	174.8596	112	884
Slovenia	17	186.5882	103.7094	85	510
Sweden	45	328.3333	508.5995	98	2668
UK	66	266.1515	188.9094	85	1092
OVERALL	1742	265.036	941.0745	21	2751

Figure 6: Showing the mean number of days between the sending of a Reasoned Opinion and the escalation of the case to the ECJ and Standard Deviation by MS



A noticeable trend in the descriptive data is that the Commission affords CEE MS longer PTB periods. The Commission negotiates with the EU-15 MS on average two months less than CEE states (Table 11). The minimum number of days that an infringement case also differs. Spain, for example, had a case which was referred after only 21 days while no CEE MS had a case referred with fewer than 112 days (Czech Rep. and Slovakia being those with 112 days). The most recent states to join Romania and Bulgaria have no case referred before 160 days PTB.

Table 11 Table showing the mean, standard deviation, minimum and maximum time in days between the sending of a Reasoned Opinion and the escalation of the case to the ECJ, by EU 15 and CEE Member States

	N	Mean	Std. Dev.	Min.	Max.
EU 15	1497	258.062	228.269	21	2668
CEE	245	307.649	301.763	85	2751

What the data also demonstrate is that there is wide variation in cases within MS. The standard deviation of cases within MS is high. This suggests that in addition to state level factors, there are case level factors which also have an effect on the duration of management negotiations. To this end, I explored variations across policy area. Table 13 shows the variations across policy area showing the number of infringements which had a PTB period of 6 months, 12 months, 18 months and 24 months before being escalated. Policy area is captured as the Directorate General which sent the Reasoned opinion.

The data suggest that policy area is a relevant variable to explain which cases are negotiated for longer or shorter before being referred to the ECJ. What stands out is that the infringements sent from the DGs of Budget, Employment Social Affairs & Equality, Justice, Fundamental Rights and Citizen Affairs, Home Affairs, Energy, and Taxation are negotiated for longer periods of time. Tax cases stand out with over 20 % of ECJ referrals (32 / 156 cases) in this area having been negotiated for longer than 18 months.

Table 17 Table showing the number of ECJ referrals that remained at the Reasoned Opinion Stage for more than 6 months, 12 months, 1 8 months and 24 months before being referred to ECJ by Member State

Member state	N	>6 Months	>12 Months	>18 months	>24 months
Austria	96	56	12	4	1
Belgium	125	65	26	14	8
Bulgaria	7	6	2	1	
Czech. Rep.	31	14	6	4	2
Cyprus	18	14	4	2	
Germany	93	54	16	9	6
Denmark	9	6	2		
Spain	128	72	29	13	5
Estonia	28	19	5	1	1
Finland	53	25	6	3	3
France	118	63	25	13	10
Greece	176	78	14	9	5
Hungary	14	8	1	1	1
Italy	189	95	18	7	3
Ireland	71	33	10	7	2
Latvia	7	4	2	1	1
Lithuania	3	1	1		
Luxemburg	129	53	7	5	3
Malta	25	14	2	1	
Netherlands	74	37	7	2	2
Poland	74	58	16	11	8
Portugal	127	57	14	6	4
Romania	7	5	5	1	1
Slovakia	16	8	1	1	
Slovenia	15	4	1		1
Sweden	43	16	7	4	3
UK	66	36	11	6	2
Total	1,742				

The different types of infringements (non-communication vs other) are analytically relevant insofar as they present different levels of legal clarity and therefore different scope for negotiation. Tables 14 and Table 15 display the mean number of days for infringements involving non-communication (table 14, pg. 104) and for other cases (table 15, pg. 105). Figures 7 and 8 (pg. 106) show this information graphically. In total, there are 1032 cases for non-communication of transposition measures and 710 other cases. For non-communication cases the mean number of days in the management phase is 230 days, while for other cases it is much longer 357 days. The variation between MS is much lower in non-communication cases. If we compare MS with more than a handful of cases involving non-communication, Belgium (270 days) has the highest mean, while Spain has the lowest (164 days). For other cases the range is higher, with France (482 days) and Austria has a mean of 246 days. The difference in non-communication cases is significant, 106 days – or nearly 3 months. Meanwhile in other cases the difference is a considerable 236 days – nearly 8 months.

Table 13 Table showing the number of ECJ referrals that remained at the Reasoned Opinion Stage for more than 6 months, 12 months, 18 months and 24 months before being referred to ECJ by Policy Area

Memberstate	Total Cases	>6 Months	>12 Months	>18 months	>24 months
Agriculture and Rural Development	6	4	2	1	1
Budget	24	15	5	2	
Climate Action	1	1			
Communication Networks, Content and Technology	82	39	5	3	2
Competition	13	6	2	2	1
Education and Culture	1	1			
Employment, Social Affairs and Equal Opportunities	104	67	22	11	8
Energy	70	44	26	9	4
Enterprise and Industry	112	54	6	3	2
Environment	357	167	49	23	12
Eurostat	1				
Financial Stability, Financial Services	2	2	1	1	
Health and Consumers	134	54	12	6	4
Health and Food Safety	3	3	1	1	
Home Affairs	71	41	5	2	
Human Resources and Security	2	2			
Internal Market and services	337	141	32	14	7
Internal Market, Industry, Entrepreneur	9	9	7	5	5
Justice, Fundamental Rights and Citizen	41	25	10	4	2
Legal Service	2				
Maritime Affairs and Fisheries	3	3	2	1	1
Mobility and Transport	209	102	11	6	1

Neighbourhood and Enlargement Negotiati	1	1			
Taxation and Customs Union	156	120	52	32	22
Total	1,742				

Table 14 Table showing the overall distribution of cases by Member State, the mean duration of time between sending of Reasoned Opinion and ECJ referral, with standard deviations and means for Non-Communication cases.

Memberstate	Total Case	Mean	Std. dev.	Min.	Max
Austria	67	236.8806	150.3397	62	938
Belgium	62	270.1935	239.1697	97	1479
Bulgaria	3	326.3333	9.814955	315	332
Czech. Rep.	21	212.9524	131.4931	112	561
Cyprus	9	206.5556	69.64394	98	308
Germany	51	189.0588	86.82843	98	490
Denmark	1	476	.	476	476
Spain	48	164	47.23234	98	281
Estonia	17	220.7647	77.42135	111	336
Finland	34	172.1471	49.16708	98	295
France	66	183.6212	81.12038	98	617
Greece	114	174.9561	60.32147	98	490
Hungary	5	189.2	87.47685	126	343
Italy	114	222.5351	133.6026	85	1087
Ireland	46	185.087	102.1691	98	609
Latvia	3	151.6667	29.14332	119	175
Lithuania	1	167	.	167	167
Luxemburg	103	194.7379	99.62616	92	777
Malta	11	185.3636	36.81921	161	281
Netherlands	47	173.7234	61.2815	98	364
Poland	42	254.9048	158.463	112	987
Portugal	74	178.5676	61.39767	98	358
Romania	4	754	889.7914	161	2079
Slovakia	8	206.25	79.52493	112	343
Slovenia	11	142.2727	34.58639	85	189
Sweden	27	174.7778	93.43708	98	538
UK	43	193.6279	83.04159	85	504
Total	1,032	229.626	118.116		

Table 15 Table showing the overall distribution of cases by Member State, the mean duration of time between sending of Reasoned Opinion and ECJ referral, with standard deviations and means for cases other than Non-Communication cases

Memberstate	Total Case	Mean	Std. dev.	Min.	Max
Austria	29	246.2069	101.2562	98	538
Belgium	63	329.2381	378.0176	69	2514
Bulgaria	4	418.75	201.2186	168	631
Czech. Rep.	10	397.1	291.2446	160	1064
Cyprus	9	347.7778	157.2917	154	602
Germany	42	430.6429	374.4807	98	1779
Denmark	8	228.75	84.21189	160	412
Spain	80	335.925	197.244	21	1000
Estonia	11	400.2727	196.802	160	946
Finland	19	385.9474	271.5688	160	1064
France	52	482.6538	433.4296	123	1693
Greece	62	322.0806	196.0594	92	1064
Hungary	9	497	845.987	161	2751
Italy	75	250.72	158.48	85	1064
Ireland	25	390.72	349.027	57	1549
Latvia	4	827	981.7152	197	2290
Lithuania	3	372.6667	188.0541	160	517
Luxemburg	26	277.0385	182.2935	120	756
Malta	14	229.8571	120.096	98	562
Netherlands	27	355.7407	312.3602	154	1554
Poland	32	448.7813	306.561	119	1244
Portugal	53	342.4906	283.6998	72	1547
Romania	3	357	176.672	168	518
Slovakia	8	294.375	242.7856	155	884
Slovenia	4	281.25	178.429	139	510
Sweden	16	598.6875	788.063	140	2668
UK	23	401.7391	250.546	154	1092
Total	710	356.607	322.052		

Figure 7: Showing the mean number of days between the sending of a Reasoned Opinion and the escalation of the case to the ECJ and Standard Deviation by MS (Non-Communication Cases)

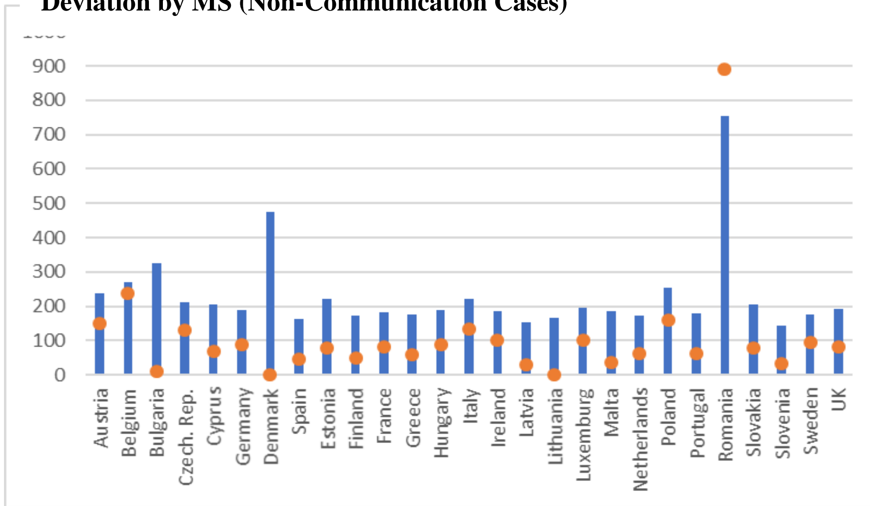
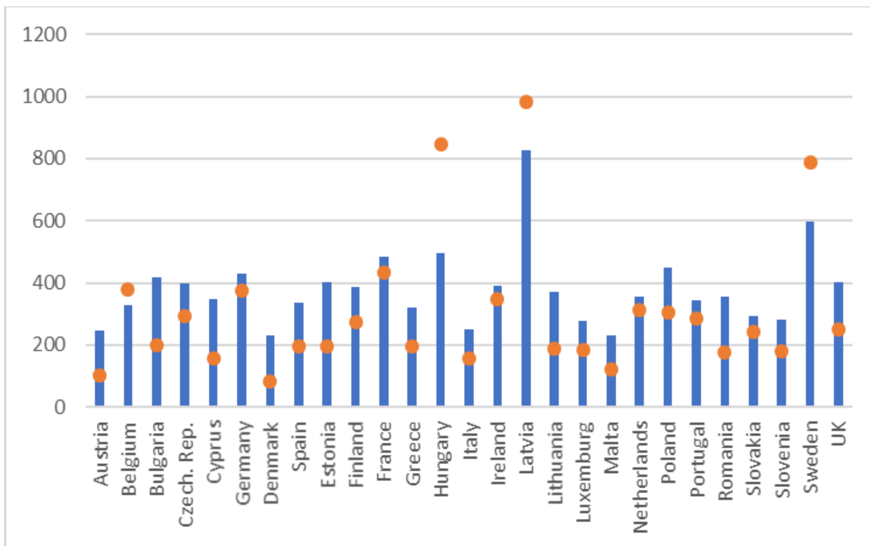


Figure 8: Showing the mean number of days between the sending of a Reasoned Opinion and the escalation of the case to the ECJ and Standard Deviation by MS (All other cases)



Finally, I made some additional checks to see if there are other factors which could be explain variations between states and that I could not include in the statistical analysis. To do this looked at the case files for the infringements in the MS with the highest and lowest means – of the states which had substantial number of cases (France, Germany, Belgium – higher; Italy and Greece – lower). Firstly, I analysed whether the MS regularly challenged the Commission's interpretation of EU law. Challenging the interpretation of the Commission might lead to longer bargaining or it could lead to a quicker referral to resolve the case by the Court. I found no relevant differences between states with each challenging the interpretation of the law in around 75 % of cases. Secondly, I analysed the subject matter in more detail including reviewing the case files and analysing the cases along the coding scheme that I used in my second article. There were no relevant differences.

Table 16 presents the results of an OLS regression analysis with robust standard errors. In order to carry out the empirical analysis, several preceding steps were necessary. As the descriptive data and results from plotting the residuals of an OLS regression suggest that heteroscedasity is an issue with the dependent variable, it was decided to standardise the data by logging the dependent variable, *duration of pre-trial bargaining* (Manning 1998). This means that we can have greater confidence in the significance of the results, although the coefficients are no

Table 16 Showing OLS Regression Analysis showing relation between structural and case-level variables and the dependent variable, "duration of pre-trial bargaining" for all ECJ referrals 2002-2012

Variable	Coeffic.	Robust Std. Err.
Commission Preferences		
Core Market Policies	-.2547769***	0.041944
Market Openness	.0049434***	0.001947
Market size	-0.00207	0.004553
Commission Capacity		
Workload	.8674755***	0.246965
Domestic Constraints		
Veto Player Index	0.250145	0.211305
Bureaucratic quality	-.2763516*	0.151663
Shapley-Shubik Index	0.009005	0.009079
EU opposition	0.334871	0.263896
Case Level		
Non-Communication case	-.3941966***	0.031592
Control		
CEE Member States	0.058642	0.047045
Year 2003	-.1264871**	0.060192
Year 2004	-.1350535*	0.069316
Year 2005	-.1606341**	0.068959
Year 2006	-.2075669***	0.061652
Year 2007	-0.01035	0.085145
Year 2008	-.1189569*	0.068383
Year 2009	-0.08622	0.070693
Year 2010	-0.14042	0.08829
Year 2011	-0.01697	0.096181
Year 2012	.258327**	0.123041
Constant	5.489562 ***	0.148666

N =1726 ; $R2 = .205$ * $p<0.1$; ** $p<0.05$; *** $p<0.01$

longer interpretable as unit increases in the dependent variable. To ensure that the outliers were not driving the results, I ran the test but excluded the cases over 2000 days, 1750 days and 1500 days. The results did not change. The data in table 16 exclude cases over 1500 days.

In a log linear regression model coefficients are interpreted as the percentage change in the dependent variable for a unit increase in the independent variable. The standardised beta coefficients are presented in each regression. The first hypothesis predicted that the compliance capacity of a MS may inform the decision to afford more or less time to PTB The results show that domestic veto players are not statistically significant predictors of the duration of the management stage. However, the model also shows that the quality of bureaucracy is relevant. A single unit increase in the indicator of the quality of bureaucracy is equivalent to -.2763516 % decrease in the dependent variable.

In addition to MS compliance capacity, the second hypothesis tested whether the duration of PTB was a function of Commission reluctance to refer a case to the court due to anticipated audience costs or a perception that it would not be an effective strategy to achieve MS compliance or that it would negatively impact on its legislative ambitions. The results indicate that this is not the case. The variables which capture structural power and audience costs point in the direction as predicted by the hypotheses, but the results are not significant.

The results provide support for the hypothesis that the duration of pre-litigation negotiations is shaped by Commission priorities and their capacities, the third hypothesis. Firstly, infringements in core single market policy areas are equivalent to a negative -.2547769 % change in the dependent variable (duration). The result is statistically significant. Secondly, there is evidence that the Commission prioritises referring infringement cases in less open domestic markets. A unit increase in market openness (% of EU imports as % of all imports) is equivalent to .0049434 % increase in the dependent variable. This is statistically significant. However, there is no empirical evidence that the duration of pre-litigation bargaining is influenced by the overall size of the market.

3.7 Discussion and Conclusions

This article set out to examine the dynamics of the infringement process. In particular, I sought to analyse Commission's use of discretion in the process. This is understudied in the literature. To this end, I analysed the length of time that the Commission committed to negotiating a resolution to the infringement case in the management stage before escalating it to the enforcement stage. I presented data on all infringement cases between 2002-2012 across all MS.

There is currently no systematically collected data on the variations in the time that the Commission committed to PTB before it referred to the Court. This is important to study because the longer an infringement goes on, then this deprives citizens and other

stakeholders of whatever benefits government policy creates. This paper has provided a rich new source of data on this issue. The descriptive analysis showed that there was substantial variance in the duration in days afforded to the management phase before a case was escalated to the enforcement stage. There were variations across MS, policy area and case.

The second objective of the paper was to contribute to our knowledge on (a) how the Commission behaves in the infringement proceedings; and (b) what were the determinants of that behaviour. There is a relevant debate still unanswered in the literature (Closa 2019). While there is somewhat a consensus that being a rational actor, the Commission has has "political goals" there are disputes regarding the scope of discretion that the Commission enjoys and the extent to which it is constrained by MS (Becker et al. 2016; Bickerton, Hodson, and Puetter 2015)

The paper has contributed to these debates by testing both the extent to which the Commission pursues its "political" goals in infringement proceedings and the degree to which it is acts for other reasons. The descriptive analysis revealed an interesting insight in that the Commission consistently gave CEE MS more time and that the earliest they were referred to the court was much later than the other EU 15. The reason I have suggested for this is that the Commission is concerned about the capacity to resolve the case and affords them more time to try to resolve it before court. The same can be said to explain why those states with lower bureaucratic

quality received longer time. Though this is only light evidence in favour of this hypothesis, taking these three hypotheses together has implications for understanding the legitimacy of the Commission's behaviour in infringement proceedings. Evidence suggests that it does not kowtow to larger more power states, something which would raise legitimacy concerns. Offering states with lower capacities more time to resolve it seems a reasonable and practical approach.

Several theoretically grounded hypotheses were developed and tested quantitatively. I tested whether the Commission decision to give more or less time to PTB was informed by anticipated consequences of its actions. Three variables tested this argument. Firstly, I tested if MS with lower capacities received more time in PTB, secondly whether those states which could potentially impose higher domestic costs on the Commission were afforded more time and thirdly I tested if MS with more EU specific power who could apply costs in the legislative process received more time.

There was no significant evidence for hypothesis 2 or 3. There was no evidence, then, that the Commission was deterred by potential domestic conflict nor MS capacity to inflict legislative costs on it. This is in line with findings elsewhere (Closa 2019). There was some evidence that those states with lower capacities received more time.

In the same line the results indicate that the Commission prioritises referring infringement cases which are in domestic markets that are less open. Again, this is consistent with the literature that indicated the Commission's market-making priorities. The paper can be added to the evidence from the authors (Blauberger and Weiss 2013) that the Commission uses infringement proceedings strategically to open markets. Evidence that the Commission uses infringement proceedings to open "closed markets" is particularly relevant because recent years has seen the Commission publically re-establish its political ambitions to widen and deepen the single market following the economic crises that swept Europe in 2008 (Egan and Guimarães 2017; Pelkmans 2006).

My results would predict that faced with potential state barriers to implementation in this renewed opening of markets, the activity of the Commission in infringement proceedings may increase. However, given the resource constraints that have been identified in the theoretical literature it remains an open question as to whether it is capable of managing this effectively. Therefore, a policy implication of this research is to afford the Commission more resources in future budget negotiations.

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4. CONCLUSIONS

4.1 Summary

In this thesis, I have addressed the important issue of compliance in the European Union (EU). We know from both high profile and less high-profile cases that the 28 Member States (MS) of the EU often do not comply with EU rules. Matters of compliance are extremely important for the EU for at least two reasons. Firstly, the EU's central policy goals are clearly undermined if EU policies are not complied with by its MS. Secondly, answering these questions matters because compliance affects the functioning of the political system and the broader EU integration project.

The goal of this thesis has been to make a relevant contribution to the EU compliance literature (Mastenbroek 2005; Treib 2006, 2014). This thesis began in the introduction by establishing three important gaps and I have sought to fill these gaps. In the following, I summarise what these three gaps were as well as their importance. Then I will present the key findings of each paper. The next section discusses the results and their implications.

4.2 The Three Empirical Puzzles

Firstly, I identified that the current literature demonstrates the important role of capacity explanations for why MS fail to comply

with EU rules. A prominent line of enquiry in the literature is to explore the effect of institutional constraints, and in particular veto players, on non-compliance.

I identified sub-state actors as very important potential veto players. The literature has done little empirical work to understand to what extent there is non-compliance at this level and if so, what are its determinants. Therefore, the first aim was to contribute an answer to this gap. I did so by asking and answering the following questions:

1. To what extent are there sub-state variations in EU non-compliance levels?
2. What are the main causes of sub-state non-compliance?

Next, I identified that while there is significant output which analyses why non-compliance occurs in the EU, much less has been done on the processes behind turning non-compliance into compliance. The EU possess a highly institutionalised mechanism – infringement proceedings, however, we know little about the dynamics of how it functions.

I identified an interesting empirical puzzle in that 1/3 of cases that the Commission opens against the MS result in a referral to the ECJ. All states have some cases which go to court and others which are settled out of court. There has been little empirical analyses of case-level factors which can explain these variations. Therefore, the

second aim was to fill this gap. I did this by asking and answering the following question:

1. What are the case-level determinants of whether an infringement reaches an ECJ judgement?

Thirdly, I have identified the Commission as having broad discretion in how it carries out its enforcement function during the infringement procedure. Not only does it select which cases to pursue, but it also has control over the timing of these decisions. I identified that the duration which it gives to pre-trial bargaining can vary. So far there is no empirical work which systematically maps the variation in the time afforded to pre-trial bargaining, nor empirical testing that seeks to explain these patterns. Therefore, the third aim was to contribute an answer to this gap. I did so by asking and answering the following questions:

1. To what extent are there cross-state and cross-policy variations in the duration of pre-trial bargaining?
2. What are the main determinants of cross-state and cross-policy variations in the duration of pre-trial bargaining?

In answering these different questions, I collected three brand-new datasets. Some of the data collection was especially laborious in that it involved reading (sometimes translating) many documents which the European Commission provided me. In a next move, I tested theory derived hypotheses using these three novel datasets. In

order to demonstrate the plausibility and functioning of the mechanisms which had been identified in the theoretical framework and statistical analysis, where possible the statistical analysis was supplemented by rich description of cases.

4.3 The Principal Results

In the first paper, I have explored the main determinants of non-compliance at the sub-national level. I presented the cases of sub-state non-compliance with EU law from regions in Austria, Belgium, Czech Republic, Germany, France, Finland, Spain, Italy, and the UK. The descriptive analysis showed that regions in Belgium had the most infringements while the data revealed that sub-state regions in federal and regionalised states (Autria, Germany or Spain) have more cases of non-compliance than those regions in decentralised unitary states (France or Czech Republic).

As an initial step, the paper set out to examine whether governance networks within MS which presented higher transaction costs would lead to higher numbers of infringements. A critique of recent research fails to take into account the role, relevance and capacities of and interactions between all actors involved in the execution of a certain policy program. The paper tests the explanatory power of governance networks in explaining sub-state non-compliance. Governance networks are relevant insofar they establish the level of coordination and transaction costs involved in implementing EU rules. This research also explores whether characteristics of the

actors involved in governance networks matter. It tests whether: (1) diverging preferences of the actors in the network affect non-compliance levels; (2) administrative capacities of the actors in the network affect non-compliance levels; (3) political support for implementing EU rules affects non-compliance levels. The results of our descriptive analysis support this. The second objective of the paper was to explore whether, after controlling for the effects of the network, characteristics of the sub-state actors mattered for explaining sub-state infringements.

Empirical evidence suggests that non-compliance at the sub-national level is a combination of structural and agency factors. Structural factors, according to this research, are related to governance structure within sub-national units and between those and the federal or central governments while agency factors are more associated to the diverging preferences of the actors that are part of the network. Therefore, in those cases in which actors involved in the implementation process share the same preferences over how the implementation of EU law has to be done, the possibility for coordination problems are lessened, and consequently, there are fewer problems of EU infringement. Thus, this mechanism is actually activated by both structural and agency factors.

This has been corroborated in the empirical analysis as well as in the cases analysed in more detail. Those cases (Flanders and Aragón) revealed that much of the source of the disputes centered

around the allocation of costs and resources within the governance structure. Both prevented to resolve inter-institutional bargaining quickly. The lack of hierarchy exacerbated this joint-decision trap and bargaining slowed down the implementation. The competitive nature of institutional relations in both of these MS only exacerbated the delay.

In paper 2 I have tested for case-level determinants to explain which infringements resulted in ECJ adjudication. I presented descriptive data on all ECJ rulings between 2002 -2012 as well as a statistical analysis of infringement cases from Austria, Belgium, Czech Republic, Germany, France, Finland, Spain, Italy, and the UK.

In a first step, the paper set out to examine whether disputes over the interpretation of the scope of EU rules leads to an increased likelihood of an ECJ adjudication. The empirical evidence suggests that disputes over the scope interpretation of EU rules contributes to explaining which cases go to adjudication. The results from the descriptive analysis indicate that the Commission and the MS frequently clash over the interpretation of the scope of EU law. The statistical analysis demonstrated that, after controlling for other variables drawn from the literature, the ambiguity and complexity of the legislative act with regards scope mattered for explaining which infringements resulted in ECJ adjudication.

The evidence suggests that the problems are activated when both structural and agency factors are in operation. This has been

corroborated in the empirical analysis as well as in the cases described in more detail. Those cases revealed that much of the source of the disputes centred around the allocation of competences within the multi-level governance structure.

Paper 3 deals with the empirical puzzle that the Commission sometimes grants MS considerable time to settle a case before it referring it to trial, while in other cases it grants states only a few weeks. The empirical puzzle at the heart of this research what causes these variations. The dependent variable, time before referral, measures the duration in days between the Commission beginning the first formal management stage with legal effect (Letter of Reasoned Opinion) until the date at which the case was referred to the ECJ. The sample includes all MS and all policy priorities. All infringement cases which were referred to the ECJ between 2002-2012 for all MS and all policy areas. Of the 4,800 infringements, a total of 1742 were referred to the ECJ.

The paper tests an argument set out by several authors that the Commission, in its role as enforcement agent, takes its decisions based on the anticipated outcomes as well as its own priorities (Closa 2019). This led me to predict that the Commission's decision to grant more or less time to pre-trial bargaining was informed by the capacity of MS to resolve the infringement case; the potential for domestic opposition; and the potential for MS to inflict costs on the Commission's legislative goals.

The results of a descriptive analysis and reveal that the time the Commission dedicates to the management phase varies extensively. The study reveals systematic variations across MS, policy area and infringement case. The results of the statistical analysis provide evidence that the Commission's priorities influences the time that it affords to pre-trial bargaining. The time afforded to pre-trial bargaining is less when the infringement directly concerns the functioning of the single market. Moreover, the Commission affords less time to those national markets which are less open to EU trade than to more open and integrated markets. There is no strong evidence that potential domestic costs or capacity to inflict costs on the Commission's legislative goals matter, while there is some evidence that it responds to MS capacity to comply.

Having presented the principal findings of the different research questions, I will provide a summary and synthesis of the empirical, theoretical, and methodological contributions of the dissertation with respect to existing scholarship EU compliance and discuss the implications of the findings. I will also indicate where appropriate directions for future research lie.

4.4 Wider Contributions and future research

Beyond answering the specific research questions, an objective of the thesis was to make a contribution to the EU compliance literature and where possible broader literatures such as international relations (Chayes and Chayes 2012; Downs, Rocke,

and Barsoom 2007; Fearon 2002) policy implementation (Mazmanian and Sabatier 1989; Van Meter and Van Horn 1975; Pressman and Wildavsky 1984) and public administration (Bouckaert, Peters, and Verhoest 2010; Peters and Pierre 1998).

Contribution 1: Empirical data

Firstly, in a narrow sense the thesis contributes brand-new empirical data-sets. These data-sets are innovative to the literature. The first dataset codes many EU infringement files to establish for the first time a database which indicates cross-regional variations in non-compliance. The second, which is used to analyse case-level determinants of ECJ adjudication, contributes a more detailed dataset on those infringement proceedings than previously available. Previous datasets that have explored this question have only had access to the policy area of the infringement. Through cross-referencing Commission documents, I was able to ascertain the piece of legislation which was the subject of the infringement. This adds a level of detail which allows for more case-sensitive analysis. Additionally, I coded detailed case-level data from all ECJ cases over a 10 year period (2002 -2012). Finally, the third dataset includes infringements of all MS across a ten-year period (2002-2012), which totals 1742 cases. All of these datasets are useful beyond the current study and can provide a basis for future enquiry.

Contribution 2: Descriptive Results

As regards the descriptive results, the thesis achieves a number of important contributions. The first paper provides provides a picture of the levels of sub-state non-compliance in the European Union. This has yet to be presented in such a systematic way. The descriptive analysis shows that there is an important level of variation in non-compliance with EU legislation across EU regions.

The second paper presents rich descriptive data on ECJ case files. This data reveals an extremely interesting finding. The data shows that MS may win more cases than previously suggested. The literature frequently asserts that 90 % of the cases are won by the Commission. My results paint a more complex picture.

The answer to my third puzzle also makes an innovate contribution with regards its descriptive data. There is currently no systematic data of variations in the duration of time that the Commission affords to pre-trial negotiations. The descriptive analysis shows that there is an important level of variation in the time that the Commission affords to pre-trial bargaining.

Contribution 3: Wider Theoretical, Conceptual and Analytical Contributions

Analytically, the three papers contribute to our understanding of both why non-compliance occurs in the EU and why the

infringement procedure unfolds as it does. Like other studies of non-compliance in the European Union, this paper has drawn on the international relations literature for theorizing why non-compliance occurs (Chayes and Chayes 2012; Downs, Rocke, and Barsoom 2007; Tallberg 2002). International Relations approaches to compliance can be distinguished according to what they consider as the source of non-compliant behaviour and the logic of influencing (non-compliant) behaviour. Management approaches argue that non-compliance is involuntary and occurs when MS lack capacity or when there are diverging interpretations of law. On the other hand, the enforcement approach situates non-compliance as voluntary and occurring because MS try to avoid the costs of compliance or that the rules lack legitimacy (Chayes and Chayes 2012; Fearon 2002)

This thesis contributes to this debate by demonstrating that domestic institutions can affect the capacity of MS to comply. I identified sub-national actors, who are brought together with central government actors in governance networks, as relevant veto-players in implementing EU rules. Early implementation studies took a deterministic view of veto players, in that more of them made implementation more difficult and increased the likelihood of implementation failures (Pressman and Wildavsky 1984). The same critique has been levelled at studies in the EU compliance literature (Treib 2014). What this paper showed was that implementation failures in multi-level settings are a combination of structure and agency.

Non-compliance occurred in multi-level settings when the actors could not reach agreements over what was to be done. For example, in Belgium this was the access and control over the tax information while in Spain, it was bargaining over who would pay for the policy. The structure brings the actors together but it is their different preferences that leads to non-compliance. The case studies did not suggest that implementation failure was caused directly by structural concerns, for example due to long chains of command. These results. therefore, make a useful contribution to the literature that explores the impact of such multilevel structures on policy outputs. (Van Meter and Van Horn 1975; Pressman and Wildavsky 1984; P. Sabatier and Mazmanian 1980).

A consequence of this finding is that the EU compliance literature, when studying sub-state non-compliance, should borrow more insights from studies that explore inter-governmental relations (Mandell 1988) as well as organisational literature which specifically looks at the management of relations (Ferguson 2018). Further research could look into what facilitates or impedes the resolution of these conflicts between sub-state actors and federal and central governments when implementing EU law. Future research could be designed with the aim of adequately conceptualizing "administrative coordination" and developing suitable survey-based measures of this concept. This can be achieved through carefully constructed case studies designed for theory building. The extent to which administrative decision-

making is decentralized could be traced throughout the implementation phase to assess the importance of this factor.

Future studies could also evaluate the effectiveness of institutions in MS that are designed to manage the multi-level EU implementation demands. In many states there are inter-governmental bodies which are supposed to manage these relations (Panara 2015). These were either created for managing inter-governmental relations generally or even specifically to manage the demands of implementing EU policies. While there are studies which explore how these bodies coordinate in the upstream policy making stage (Kassim et al. 2001), there is relatively little as regards how effectively they function on the downstream policy implementation. Owing to different institutional designs between countries, it provides an interesting opportunity to compare and contrast different institutions and their effectiveness. The sense, after speaking to the administrative staff in Belgium and Spain, was that they were largely ineffective. The fact that the staff confessed to them not really working effectively suggests the states should try to improve them. Therefore, research into this could have a real-world impact by showing what works well and what does not.

The case evidence is also of interest for Europeanisation literature (Bulmer and Radaelli 2004; Graziano and Vink 2007; Radaelli 2004). This literature looks at the effect of integration and EU policies on domestic institutions policies and polity (Falkner 2002; Knill 2001; Thielemann 2000). The case studies are particularly

relevant for the latter as they showed how the EU rules were re-shaping the balance of competences within MS. In the Belgian case the evidence suggests that that the re-shaping of competences was in favour of the federal government. The evidence in this case illustrated how the requirement to have a single point of contact for sharing tax information in each country in order to share tax information was leading to a loss of competences in the regions as the federal government became involved in managing this when previously the regions managed this information. The case contributes evidence then to the Europeanisation literature which has debated whether EU integration was having a centrefugal or centripetal effect on its regions by providing evidence of a centralising effect (Börzel 2002; Falkner 2002). This was caused by the functional demands of the single market in which a single point of contact is more efficient which led to a centralisation of competences.

The first paper is relevant also to implementation literature in that it provides a research strategy to overcome some of the difficulties in empirical analysis. Implementation in the EU involves actors at supranational, national and sub-national levels. To get a full picture we need to see how they interact with each other. One difficulty is that policy implementation studies by their nature can often only address the implementation of a policy in one country. However, this paper provides a research strategy that could help overcome this. Studying how EU rules are applied across differently decentralized systems can give leverage for understanding how

institutional settings shape the outcomes.

The second paper makes a significant contribution to important debates in the literature around dispute settlement. The two perspectives (management and enforcement) which dominate the theoretical and empirical work on the occurrence of non-compliance have also left a strong imprint in theoretical and empirical work on international dispute settlement. One perspective regards dispute settlement as an enforcement instrument in settings characterized by incentives to violate international law, domestic interest group pressure, and international power politics. The other, less antagonistic perspective views dispute settlement as a capacity increasing tool. One of the ways in which a dispute settlement instrument can increase capacity is as a complexity reducing and rule clarification device. This is particularly relevant in settings (like the EU) where laws and agreements are often incomplete and states require help in clarifying, coordinating, and implementing their international obligations.

The second paper provides empirical evidence that the ECJ referral, as an example of an international dispute settlement mechanism is used to clarify ambiguous and complex rules. Börzel (2004) had previously identified this as a possible “compliance strategy” but there had been no empirical testing whether this was the case in the EU. My paper provides evidence in favour of its existence. The paper derived a novel empirical approach to test this claim that explored complexity and ambiguity in relation to politically

sensitive disputes over the scope of EU law. The results offered support that, even when controlling for the capacity and power of MS, these disputes were more likely to result in adjudication. Rich description of the types of disputes which reached the ECJ provided additional support for this hypothesis. The main implication of our results is support for the perspective which views the dispute settlement process as a complexity reducing and rule clarification device.

This finding contributes to important debates over questions of legitimacy. Clearly the EU is suffering from crises related to its legitimacy. One of the claims is that EU voice is not heard (lacking input legitimacy) another is that these supranational institutions are pushing an "ever-closer" Europe and the process is opaque and underhand. If the Commission is working with the court to do this, then this could prove problematic for the stability of the project in the long term as populations grow increasingly frustrated. So far, only a handful of case-study research have investigated this so really it needs more (quantitative) work to establish if the Commission truly acts like this.

Taking the results of the first to papers together, it suggests that the EU should contribute to more capacity building in order to avoid non-compliance. The results of paper one and paper two indicate that both institutional capacities, resources and rule clarity are important factors. The European Commission has limited competences and resources for steering the implementation of

European Union policies and capacity building. However, this does not mean that it has no ability to act in this manner. In order to overcome these deficiencies, the Commission and MS have established European Administrative Networks (EANs). Existing literature has mapped the development of these networks, but in light of the findings of this thesis which show that capacity building is important to address non-compliance future research could explore questions of how effective these networks are (Trondal 2010; Mastenbroek 2018).

The third paper made an additional contribution to the enforcement and management debate by exploring the extent to which the European Commission – the EU enforcement authority – is significantly constrained by its anticipation of the impact of its decisions. The work failed to find direct empirical support for the constraining effects of MS power on the behavior of the European Commission. MS with more capacity to impose domestic audience costs and frustrate the European Commission's legislative goals did not receive more pre-trial bargaining time.

What the paper did find, though, was evidence of the enforcement agent acting in pursuit of its own interests. The results provide evidence that the Commission's priorities and capacities influences the time that it affords to pre-trial bargaining. The time afforded to pre-trial bargaining is less when the infringement directly concerns the functioning of the single market. Moreover, the Commission affords less time to those national markets which are less open to

EU trade than to more open and integrated markets.

This finding is of interest to studies which investigate the behaviour of the Commission as enforcement agent. It has been of interest to these authors has been to find whether the Commission treats MS differently and if so what are the reasons for this. My results can contribute something to these studies.

In addition, the results may be of use to the literature which explores whether Commission has discretion to pursue its own political goals, or is constrained by MS. For example Bickerton, Hodson, and Puetter (2015) have argued that the discretionary room enjoyed by the Commission is limited whereas Bauer and Becker (2014) argue that the Commission enjoys broad discretionary space. While most studies look at discretion to pursue its political goals in the legislative process, it is worth studying the same issue in the infringement process given its close links with legislative outcomes (Blauberger 2012; Blauberger and Weiss 2013). The paper provided evidence that it was not constrained at least by aggregate structural power.

A further significant insight for these debates was the finding (paper 2) that the ECJ finds against the MS more frequently than previously expected. This has implications for how we understand the Commission's capacity to influence the ECJ as well as its capacity for using the infringement process as a kind of "legislation by other means". It does not provide evidence to reject this claim,

but rather suggests that the Commission cannot always get its way. Hence this finding also provides a promising starting point as to examine when it gets its way and when not. The literature which analyses whether the ECJ is constrained by MS would no doubt find this result rather interesting too.

The accumulated evidence in this research points towards the strategic nature of compliance (Fjelstuland Carrubba 2018; König and Mäder 2014). Future research could pursue this avenue. For example, in relation to sub-state compliance one could analyse whether by virtue of not being held publicly responsible for non-compliance in the ECJ courts, sub-state actors behave differently than state defendants during the litigation process. Future research could also look into the strategic enforcement of the Commission by looking into the specific policies it prioritises at a case-level.

Finally, the general trend in recent decades has been towards stronger legalization of international relations (Goldstein et al. 2000). As part of this process, states have delegated authority to international institutions more and more dispute settlement mechanisms. Future work could make use of a comparative framework to test whether the findings in this thesis are relevant in other institutional contexts.

4.5 Final Thoughts

I set out at the beginning of this thesis to fill three prescient gaps in the literature. I designed and implemented three studies which carried out statistical analyses and where possible combined this with rich description. I mapped out variations in sub-state compliance, ECJ adjudication and Commission behaviour that had not yet been systematically explored. The results of these analyses have led to some innovative insights into explaining why non-compliance occurs in the EU and explaining the functioning of the main enforcement mechanism. I hope that this provides a jumping off point for many future research along the lines outlined above.

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