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Who's Afraid of the ECJ?
Member States, Court Referrals, and (Non-) Compliance

– Very first draft, comments most welcome –

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Abstract

Why do European Union (EU) member states respond differently to the referral of “their” cases of non-compliance to the European Court of Justice (ECJ)? How come that some member states shy away from conflict with the European Commission while others do not even bother to comply with rulings of the ECJ after being convicted twice – once for infringing on EU law (article 226 of the EC treaty) and the second time for not acting upon the court’s first judgment (article 228 ECT)? Can the same independent variables that explain a country’s number of prosecuted violations at the first formal stage of the infringement proceedings also explain the number of court referrals? Why are some infringement proceedings settled faster and at an earlier stage than others?

To answer at least some of the questions above, we develop several hypotheses in the theoretical part of our paper. For this, we revert to our previous work on non-compliance with European law as well as accounts of the enforcement and management school. Employing advanced econometrics, we use data on non-compliance with EU law to test these hypotheses in the empirical part of the paper. There, we find some support for both capacity and power based explanations to the empirical puzzles raised above. Overall, administrative capacity helps member states to avoid and to overcome involuntary forms of non-compliance. In contrast, political power enables them to defy the Commission and the ECJ and to sit out long and escalating infringement proceedings.

1. Introduction

Although states' compliance with law beyond the nation-state is generally high, non-compliance occurs frequently (Börzel 2001, Chayes and Handler-Chayes 1993, Reinhardt 2001, Tallberg 2002, Tallberg and Jönsson 2001). For the European Union, current research has shown that non-compliance most often occurs involuntarily because member states lack the capacities necessary for transposing and implementing European rules (Börzel et al. 2003, Mbaye 2001). Other variables pointing towards voluntary defection, such as economical or military power, duration of membership, or type of political system, have far less explanatory power than the managerial variable "political and administrative capacity". Since non-compliance, caused by capacity problems, can never be completely prevented, a major task of every international institution is the provision of institutional instruments for the transformation of non-compliance into compliance. The European Union's toolbox is extensive: managerial, adjudication, and enforcement mechanisms are at the European Commission's or the European Court of Justice's disposal. The EU's infringement procedure (article 226 ECT) starts off with an informal and formal managerial dialogue between the Commission and the accused member state. The Commission sends a reasoned opinion to the state. When non-compliance prevails after the Commission has sent a reasoned opinion, it can refer the case to the ECJ and thereby initiate the adjudication phase. If no settlement occurs, this phase ends with a judgment of the ECJ. If the state does still not comply with European law, the Commission can initiate a second procedure (based on article 228 ECT), in which the ECJ may impose a financial penalty. However, the institutional design of the EU's infringement procedure is constant and cannot explain the observed variance of

transformational prospects between states. Why do some member states shy away from conflict with the European Commission while others do not even bother to comply even after having been convicted by the ECJ twice – once for infringing on EU law (article 226 ECT) and the second time for not concurring with the court’s first judgment (article 228 ECT)? As for the occurrence of non-compliance in the first place, the two most prominent approaches – enforcement and management – offer hypotheses on transformational patterns and can be tested against each other. Our previous research shows that management factors deploy the greatest explanatory power. But is capacity as important for the success of the official infringement proceedings as it is for the explanation of the occurrence of non-compliance? In other words, does the explanatory power vary across the different stages of the infringement procedure?

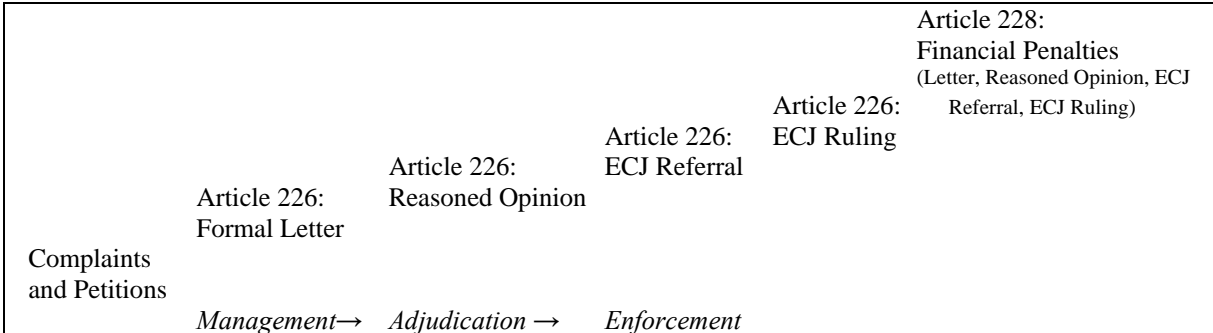
Our paper proceeds in the following steps. First, we outline the empirical puzzle focusing on the differing transformational patterns across stages of the infringement proceedings. Drawing on the two major approaches to compliance, we then derive alternative hypotheses to account for the variance observed. The third section tests the hypotheses using advanced econometric methods. The paper concludes with a summary of the main findings and some considerations on future research.

2. Enforcement vs. Management: Competing Approaches to Compliance

2.1. Empirical Puzzle

The EU’s infringement proceedings (article 226 ECT) combine management, adjudication, and enforcement elements in order to transform member state non-compliance into compliance with European law (Tallberg 2002, Zangl 1999). Within the management stage, the European Commission interacts with the accused state on a purely bilateral basis. Only if the informal interactions do not settle the issue – either by concluding that no violation occurred or by the member state rectifying the instance of non-compliance – the Commission initiates the formal stage sending a reasoned opinion. When non-compliance is still not transformed into compliance, the Commission refers the case to the ECJ. Thereby, the adjudication stage is initiated, followed by an enforcement stage. At the end of this stage, the Commission can ask the ECJ to impose monetary sanctions (article 228 ECT) if non-compliance prevails.

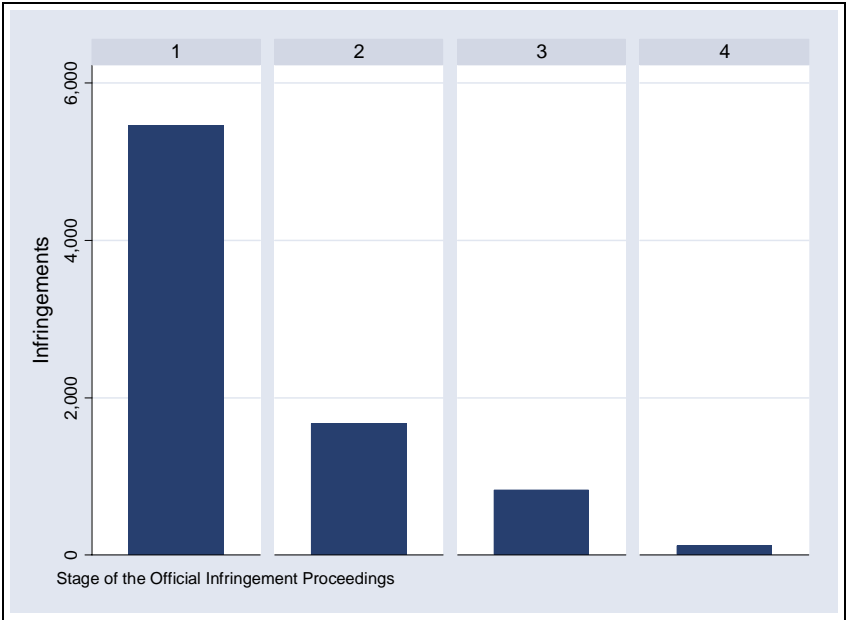
Graph 1: Stages of the Infringement Proceedings and Compliance Mechanisms



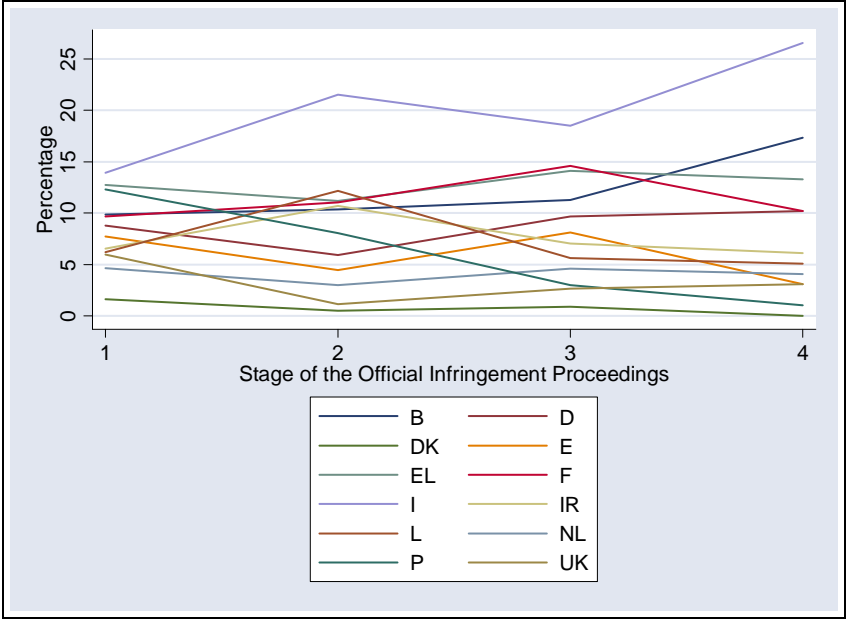
Empirically, we find that the vast majority of infringement cases is solved during the early stages of the infringement proceedings (cf. Mendrinou 1996, Tallberg 2002, Tallberg and

Jönsson 2001). Of the almost 6000 cases, which reached the adjudication stage of the official infringement proceedings between 1978 and 1999, less than a third are referred to the ECJ. Of those 1675 referrals, the ECJ ruled on 822 – in 19 out of 20 times against the member states. Only about 100 cases are referred to the ECJ a second time as member states do not comply with a first judgment of the ECJ in accordance with article 226 of the EC treaty (cf. graph 2). In fewer than a dozen cases, the ECJ has imposed financial penalties.

Graph 2: Infringements at Different Stages, 1978-99



Graph 3: Member States' Non-Compliance across Stages, 1986-99



While the number of infringements drops sharply from stage to stage, we find significant variation regarding the member states' propensity to transform non-compliance into compliance during the proceedings (cf. graph 3). At the management stage, which is still unofficial, the difference between member states is rather modest. However, in the subsequent official stages the initial range of 12.3 percentage points starts to widen. It almost doubles for the first ECJ referrals (21 points) and climbs another 5.5 points to a maximum of 26.5 points for the second ECJ referrals. However, leaving a side Italy as an extreme outlier, the variance becomes less pronounced (chart 3).

The majority of the member states show a relatively “decent” level of non-compliance. Five countries – Denmark, the Netherlands, the UK, Luxembourg, and Ireland – remain well below the Community average of infringements while Spain and Germany oscillate around it. The only member states that show a consistent pattern of non-compliance are Italy, France,

Belgium and Greece. Portugal's initial performance is also rather poor but improves significantly when entering the adjudication stage. The same applies to France, which remains, however, among the "top laggards". The group is led by Italy, whose non-compliance record almost makes it a class of its own! Italy is followed by Greece, whose records remain consistently bad, and Belgium, whose performance even deteriorates with each stage. The share of Italy, France, Belgium and Greece in the different infringement stages starts with a modest 46.2 % of the reasoned opinions and 54.1 % of the ECJ referrals, only to reach 58.4 % of the ECJ judgments and 67.3 % of the cases of delayed compliance with ECJ judgments.

What explains the fact that some cases of non-compliance are settled at an early stage, while others drag on? Why do EU member states respond differently to the referral of their cases to the ECJ? How come that some member states shy away from conflict with the European Commission while others do not even bother to comply with orders of the ECJ after being reprimanded twice – once for infringing on EU law and the second time for not reacting on the court's first judgment?

2.2. Explaining the Transformation of Non-Compliance into Compliance

Almost since the beginning of the establishment of International Relations as a field of academic research, the development of international norms has been of great interest. With the enormous quantitative increase of international institutions in the twentieth century, especially liberal theories on international co-operation have mushroomed (Keohane 1984, Keohane and Nye 1989). It is remarkable that those (rationalist) theories overwhelmingly

assume compliance with international norms to be the rule. It is argued that states agree to a norm only if it reflects their substantive preferences and interests to an extent, which is proportional to their bargaining power. Therefore, the emergence of an international norm is explained with reference to the state's own substantial preferences and the state's preferences, in turn, prevent non-compliance.

However, this line of reasoning overlooks some important sources of non-compliance. (1) Theories of incomplete contracting point towards the uncertainties of the future (Garrett 1995). The state's substantial interests and preferences might change over time, either because of domestic changes or because of environmental changes. This, in turn, provides incentives for defection and for non-compliant action as a consequence. (2) The impact of norms often goes along with a redistribution of costs and benefits among the actors. In all situations, in which one state, seeking to avoid compliance costs, can count on reaping the benefits of other states reproducing the norm, a free-rider problem emerges since non-compliance becomes the dominant strategy (Axelrod 1984, Hardin 1986). (3) Management school approaches attribute non-compliance to the limited capacity of states, restricted timetables for the implementation of norms, and the ambiguity of norms in content and scope (Chayes and Handler-Chayes 1991, 1993, 1995).

Approaches of incomplete contracting, management, and enforcement suggest particular institutional designs for reducing non-compliance. Nevertheless, institutional design cannot completely prevent non-compliance resulting from ambiguities, adverse substantial preferences, or strategic preferences. Even in the highly legalized EU, non-compliance rates

are significant (Börzel 2001). For the effectiveness of law beyond the nation-state, it is crucial that states are induced into compliance. There are three prominent approaches for the explanation of how non-compliance can be transformed into compliance within international institutions. The legalization literature emphasizes institutional mechanisms such as mediation and adjudication by dispute-settlement bodies. The EU's institutional design is a constant. Hence, it cannot explain differences between states. By contrast, enforcement and management approaches are actor-centered theories and emphasize the role of the power (enforcement) and capacity (management) of states. Thereby, they offer hypotheses not only on why the level of overall non-compliance decrease with each stage of the infringement proceedings but also on why some states are more responsive than others to the compliance efforts of the Commission and the ECJ.

2.2.1. Legalization Approach

The legalization literature offers insights on institutional provisions of adjudication systems, which are conducive to the successful transformation of non-compliance into compliance (Abbott et al. 2000, Abbott and Snidal 2000, Kahler 2000, Keohane et al. 2000, Mitchell 1996, Smith 2000). Institutional instruments serve various purposes. They shall increase the transparency, allow for the detection of non-compliance, provide access to infringement procedures, regulate the roles and independence of third parties (i.e. arbitrators, mediators, or judges), and the character of the results of infringement proceedings, which can be binding or non-binding judgments or recommendations. Due to the high degree of transparency, the interpenetration of member states' and the EU's legal systems, the role of the European Commission, the independence of the ECJ, and the bindingness of its judgments, the EU

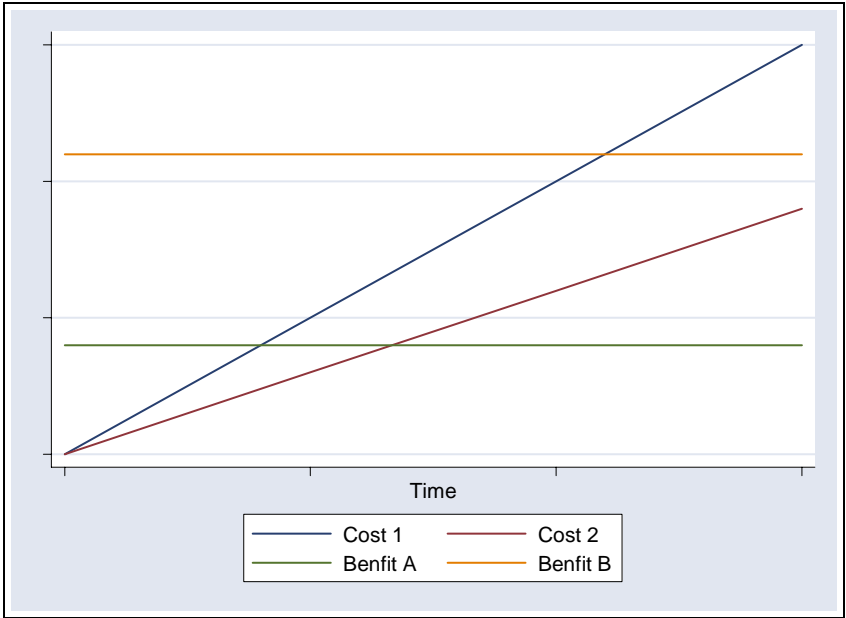
almost provides empirically an extreme type for highly legalized international institutions. Nevertheless, the prospects for the successful transformation of non-compliance into compliance during infringement procedures vary between member states. Since institutional variables are constant, institutionalist legalization approaches cannot explain interstate and intrastate variations. Compared to the legalization literature, management and enforcement approaches are going a step further in allowing for the deduction of hypothesis on transformative differences between the EU's member states.

2.2.2. Enforcement Approach

The enforcement approach is based on rationalist assumptions, namely strategic rationality of actors and exogenous substantial preferences. Accordingly, non-compliance is voluntary. It results from strategic cost-benefit calculations (Martin 1992, Martin and Simmons 1998, Downs et al. 1996, Downs 1998). Increasing external constraints can alter strategic cost-benefit calculations and preferences over strategies, accordingly. While the benefits from non-compliance are constant over time (cf. graph 4, benefit curves A and B), institutional provision can raise the costs of non-compliance (e.g. shrinking shadow of sanctions, financial penalties, and losses of reputation) (cf. graph 4, cost curves 1 and 2). According to the enforcement approach, the probability for transformations of non-compliance into compliance increases with rising external constraints – such as possible sanctions. Therefore, the enforcement approach would expect that the number of cases declines towards the later stages of the infringement procedure. Transformational dynamics during the European infringement procedure cannot only be theorized on the aggregate level but also on the level of individual states. Given constant costs of non-compliance, states are distinct in their power and, thus, in

their sensitivity for costs. In turn, differences in the cost-sensitivity influence states' propensity for altering their preferences over strategies from non-compliance into compliance. Material sanctions, as they might emerge in article 228 ECT proceedings, matter less for powerful states than for weak states. With an increase of economic power, states are less inclined to alter the cost-benefit calculations and chance their strategic preferences towards compliance in the wake of future material losses.

Graph 4: Costs and Benefits of Non-Compliance



Regarding the transformational dynamics in European infringement proceedings, the enforcement approach offers two hypotheses. First, with the transposition of a case from one stage of the infringement procedure to another, the overall rate of compliance rises if costs for non-compliance increase. Second, since weak states are more cost sensitive than powerful states, non-compliance of weaker member states can be transformed into compliance more easily and at an earlier stage of the infringement procedure than that of powerful states. The

more powerful a state is, the longer it takes to alter its preferences over strategies and the further the infringement procedure is carried on.

2.2.3. Management Approache

Unlike enforcement approaches, management approaches rely on the premise that non-compliance is involuntary since the preconditions for states' actions – qualifying as compliance – are absent. The management school names three sources of involuntary non-compliance: lacking or insufficient state-capacities, ambiguous definitions of norms, and inadequate transposition-timetables (Chayes and Handler-Chayes 1993, 1995).

With respect to the legal transposition of European norms into national legal acts, political and administrative capacities are necessary for the production as well as adaptation of preexisting national legal acts. The higher the number of veto players (the lower the political capacity), the more difficult is to produce the national legal acts required for compliance. Hence, higher rates of non-compliance can be expected in states with low political capacities. In addition, non-compliance caused by a lack of sufficient political capacities cannot be transformed into compliance during infringement procedure if the number of veto players remains constant over time. While political capacity is of importance regarding the timely, correct, and complete legal transposition of European legal acts into national laws, administrative capacities are important for the transposition via decrees and for the practical implementation of European norms.

Too restrictive deadlines for the transposition of European norms into national law are a second source for involuntary non-compliance. However, they do not deploy explanatory power of their own. Rather, the causal mechanism between transposition timetables and (non-) compliance operates through political and administrative capacities. The lower the administrative and political capacities of a state and the tighter the timetables for transposition are, the higher is the number of non-compliance cases and the lower are the prospects for a successful transformation of non-compliance into compliance during the different stages of the European infringement proceeding.

The third source for involuntary non-compliance to which the managerial school refers is interpretational differences resulting from the ambiguity of norms. There are several reasons why norms are inherently ambiguous and open windows for diverging interpretations. First of all, European norms are most often compromises between member states, the Commission, and the European Parliament. Second, norms must be applicable to a range of different circumstances. Third, uncertainties of the future might require adaptations. For all those reasons, norms are formulated abstract and are inherently ambiguous. Interpretational differences between the European Commission and a member state can be resolved during the managerial stage in which the Commission and the respective state act on a purely bilateral basis in order to clarify the content and scope of the norm at hand and the characteristics of the case. Also, interactions before the ECJ allow for the clarification of a norm's content and applicatory scope (Börzel et al. 2004). Hence, the further infringement proceedings are carried on, the higher is the likelihood that non-compliance is transformed into compliance.

Management approaches provide two hypotheses on variations in the transformational success between states and stages of infringement proceedings. First, the prospects for transforming non-compliance into compliance increase during ongoing infringement proceedings because the dialogue with the European Commission and the ECJ reduces ambiguity and helps to clarify the meaning and scope of norms. While the infringement proceedings can address two out of three sources for involuntary non-compliance, lacking administrative and political capacities are not altered as quickly. Nevertheless, the management approach leads to the expectation that on the aggregate level the number of successful transformations increases from stage to stage of the infringement proceedings because states have more time to comply.

In sum, the aggregate hypothesis of management and enforcement approaches state the same expectations, albeit for different reasons. On the level of individual states, the enforcement hypothesis suggests exactly the opposite of what management approaches would expect. The more resources a state has, the more powerful it is and, hence, the more it can afford to resist compliance. At the same time, resources shape the capacity of states to comply. As a result of this, more resources lead to higher capacity and a decreasing probability of non-compliance.

3. Empirics

As theory does not give us a clear answer to whether power or lacking capacity is the driving force behind non-compliance, we use various data analyses to test the hypotheses developed in the above theoretical part of our paper. For these analyses, we draw on a database comprising almost 6000 cases of non-compliance with EU primary and secondary law, which

reached at least the first official stage of the infringement proceedings (reasoned opinion) between 1978 and 1999.¹ These cases are tracked until they are settled and are ordered by member state, time, policy area, legal act infringed on, and type of violation. This allows for the generation of different data sets for different purposes and analyses along different dimensions of interest.

We also draw on some of our earlier work on the importance of the various forms of capacity – based on financial, administrative, and political resources – for non-compliance of EU member states. The capacity model in this paper (table 1, model 1) is a replication of a model developed and tested in the German *Zeitschrift für Internationale Beziehungen* (Börzel et al. 2003). First of all, this capacity model includes the variable gross domestic product per capita (“GDP per capita”) as an indicator for the financial resources of a member state. We assume that wealth is a proxy for the capacity to decide whether and to what extent the means for the implementation and enforcement of European law are generated and deployed. The data for the variable “GDP per capita” in thousand constant US dollars comes from the *World Development Indicators* of the World Bank (2004). In order to make an additional and more direct statement about the means for compliance at a state’s disposal, we use tax revenue relative to gross domestic product (“tax revenue”) (cf. Martin et al. 1997, Byun 2001, Mbaye 2001). The data for this indicator are also provided by the World Bank (2004).

The operationalization of human resources is more complicated. States require sufficient and adequately qualified personnel to effectively apply and enforce legal acts. Not only is it

¹ Reasoned opinions are preceded by warning letters at an informal stage (cf. graph 1 above). As these letters by the European Commission are confidential, there are no reliable data with respect to this informal stage of the infringement proceedings.

necessary to have legal knowledge of the requirements which result from regulation but also to have technical expertise on implementation and monitoring. First, we assume that the more a state spends on civil servants relative to the gross domestic product (“expenditure”) and the larger the proportion of civil servants of the entire working population (“civil servants”) is, the more human resources it has at its disposal for implementation and enforcement. The data for both quantitative indicators of human resources were collected by Cusack et al. (1989) and Cusack (1998). Second, in order to account for the qualification of civil servants, we use the average length of higher education of the population over the age of 20 in years (“education”). The higher the level of education is, the more probable it is that civil servants are well trained and qualified. The data for the length of education come from Barro and Lee (1993, 1994, 2001). The second qualitative variable for the analysis of the importance of human resources follows Mbaye (2001), who used data from Auer et al. (1996) to create an index of bureaucratic efficiency and professionalism of the public service (“efficiency”). This index consists of three components of bureaucratic efficiency: performance related pay for civil servants, lack of permanent tenure, and public advertising of open positions.

Finally, the number of actors having the possibility to block political decisions has a crucial influence on the autonomy of a state to make the necessary changes to the *status quo* for the implementation of costly rules (Scharpf 1988, Alesina and Rosenthal 1995, Tsebelis 2002). Thus, the number of veto players should increase the probability of infringements in the process of legal implementation of European legal acts. However, even if the number of the institutional and partisan veto players remains constant over time, the interests of these actors – for example regarding (non-) compliance – may change. Therefore, we use the veto player

index (“checks”) developed by Beck et al. (2001) which allows for the interests of veto players in such a way that interdependences between veto players and the respective political system are taken into consideration.

Testing the outlined capacity model², we find that there is a strong relation between the administrative capacity of a member state and its number of infringements. If we temporarily ignore the positive signs of the coefficients for gross domestic product per capita and the first quantitative human resource variable (“expenditure”), we can see that larger administrative capacity brings about fewer violations of European law. The coefficients for education and efficiency of civil servants are significantly different from zero and the overall fit of the model is good. However, three contra-intuitive results remain and we can give no more than *ad hoc* explanations for these so far.

² Testing of the capacity, the power, and the integrated model as well as the models in the tables 2 and 3 is conducted using pooled regression. Pooled models entail a number of pitfalls (Hsiao 1986, Kittel 1999, Maddala 2001) which become manifest in violations of some assumptions of the classical linear regression model (Greene 2000). We employ the Beck and Katz technique to counteract problems of panel heteroscedasticity (Beck and Katz 1995, 1996, Beck 2001). This technique consists of a pooled OLS-regression with panel corrected standard errors (PCSEs). Autocorrelation is another frequent problem of pooled analyses and it is not addressed by Beck and Katz (1995, 1996). However, this does not affect us because we primarily use infringements per European legal act in force – rather than the absolute number of infringements – as the dependent variable. The main advantage of this variable is that it controls for the growing number of legal acts that can potentially be infringed on and the political events that spark this development. It helps us to escape problems of time trends and structural breaks. Therefore, there is no need to use additional controls for serial correlation in the residuals and suchlike (Gujarati 2000, Banerjee et al. 1993, Enders 1995). Furthermore, we can do without a lagged dependent variable as theory does not suggest the probability of current infringements being dependent on the number of past infringements. As to fixed effects, we decided against the use of country or year dummies in accordance with Plümper et al. (2005). The simultaneous use of dummies and other categorical variables amongst the independent variables causes problems of multicollinearity. Our indicator for bureaucratic efficiency belongs to this group of variables. In addition and aggravating, fixed effects cannot explain why countries or years vary with respect to their constants. They statistically “explain” that part of variance which is most interesting from a comparative point of view without being able to give substantial explanations of the differences. Last but not least, fixed effects consume degrees of freedom on a big scale.

As we will argue in the context of the power model, gross domestic product per capita – although frequently used in the literature – may not be an indicator for a state’s implementation and enforcement capacity at all. The same could hold true for a state’s expenditure on its civil service. In line with Mbaye’s (2001) findings, our analysis shows bureaucratic efficiency to be the variable with the greatest explanatory power. Large expenditure may be the exact opposite of efficiency. It may be an indicator for the inefficient use of (abundant) financial resources, waste, or even corruption. In addition, veto players seem to reduce the number of infringements and not to increase them. Countries with several veto players commit less violations of European law than countries with few veto players. This contra-intuitive result can be ascribed to the problematic operationalization as well as to problems of endogeneity. On the one hand, our way of testing the veto player hypothesis implicitly alleges that the interests of veto players are always directed towards non-compliance. However, it can be the case that European legislation strengthens actors who want to change the *status quo* but have failed with their efforts to reform so far because of domestic resistance (Milner 1988, Rogowski 1989, Börzel and Risse 2002). On the other hand, the apparent favorable influence of veto players could also be explained by the fact that veto players are already involved in the process of decision-making. If domestic veto players did not block the development and resolution of a rule in the first place, there is no good reason for a blockade of its implementation. However, this implies that all actors with potential veto power are actually included into the negotiation process. This is not probable in the case of European rules. Therefore, only the phase of domestic implementation offers all veto players the possibility to block.

Having seen that our capacity model of non-compliance with EU law explains a fair share of variance at the first stage of the official infringement proceedings, we can compare the explanatory power of this model with a power-centered enforcement model. As the capacity model accounts for different aspects of capacity, the power model incorporates different dimensions of power, which again can be operationalized in various ways. Apart from economic and population size and financial power, there is EU and country-specific political power.

First, we use gross domestic product per capita (“GDP per capita”) as an indicator for the financial power of a member state. As mentioned above, gross domestic product per capita is not only an indicator for a state’s implementation capacity but also for its power to defy “inconvenient” rules. Rich member states may transform their financial resources into political weight as they contribute more to the EU’s budget than poor states relative to geographic and population size and the financial benefits received from the EU. This corresponds to the central assumptions of the power hypothesis. However, it does not solve the problem of endogeneity mentioned before. The data for the variable “GDP per capita” come from the *World Development Indicators* of the World Bank (2004).

Second, gross domestic product (“GDP”) is a proxy for economic power. The data come from the World Bank (2004) as well. Third, direct EU specific political power can be operationalized via the proportion of votes in the Council of Ministers (“votes”). Finally, we have country-specific political bargaining power. As addressed when discussing the estimated effects of political capacity on non-compliance and in accordance with the literature on two-

level games (Putnam 1988, Fearon 1998, Milner 1997), national veto players may confer power to member states by having an influence on the process of European rule making and national rule implementation. As before, we use the veto player index (“veto players”) by Beck et al. (2001) in our empirical analysis.

Table 1: Capacity, Power, and Infringements

	(1)	(2)	(3)
	Capacity Model	Power Model	Integrated Model
GDP per Capita	0.000*** (0.000)	-0.000* (0.000)	
Tax Revenue	0.003 (0.003)		
Expenditure	0.034*** (0.012)		0.050*** (0.007)
Civil Servants	-0.005 (0.009)		
Efficiency	-0.233*** (0.042)		-0.282*** (0.027)
Education	-0.995*** (0.318)		
Veto Players	-0.025* (0.014)	-0.015 (0.013)	-0.036*** (0.011)
Votes		0.030*** (0.008)	0.032*** (0.008)
GDP		-0.000 (0.000)	0.000 (0.000)
Public Support			0.004*** (0.001)
Constant	0.610*** (0.200)	0.450*** (0.103)	-0.086 (0.186)
Observations	177	233	177
R²	0.398	0.147	0.527
Chi²	211.861	93.215	280.260
Prob. > Chi²	0.000	0.000	0.000

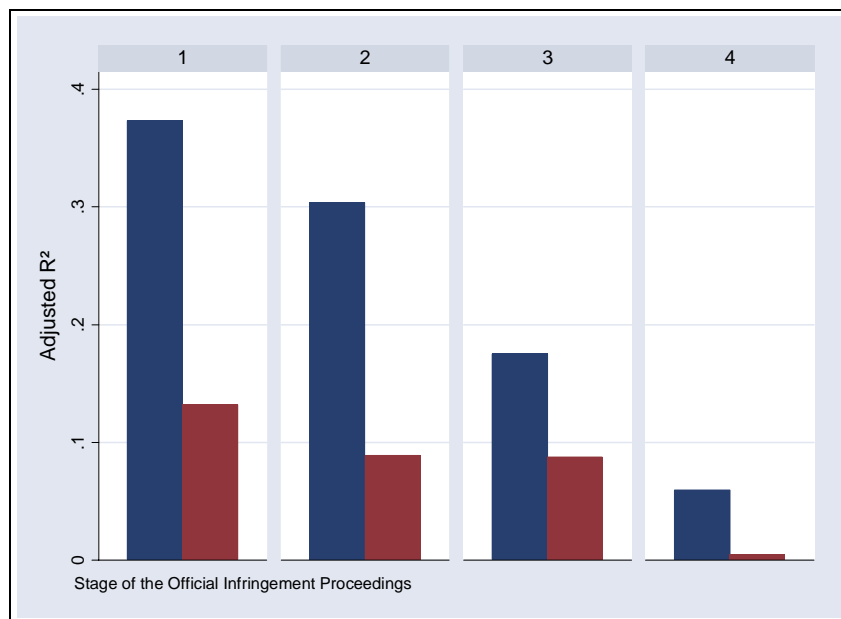
Dependent variables are infringements per legal act in % at the first stage of the official infringement proceedings. OLS regression with two-tailed t-test, PCSEs in parentheses. *** = $p < 0.01$, ** = $p < 0.05$, * = $p < 0.1$.

The results for the power model (cf. table 1, model 2) show that only the share of votes in the Council of Ministers has a significant and substantial effect on infringements per legal act at the first stage of the official infringement proceedings. Member states with more votes violate

EU law more frequently than others. Overall, the power model fares much worse than the capacity model with respect to the explanation of non-compliance. While the lack of capacity can explain more than one third of the variance at hand, the independent power variables lack this explanatory power.

Do these findings change, when we have a closer look at the subsequent stages of the official infringement proceedings? The answer is yes and no. As we can see in graph 2, the adjusted R^2 of the capacity model (blue bars) is higher than the one of the power model (red bars) at each stage. Capacity is better than power in explaining the non-compliance records of member states at the reasoned opinion, first ECJ referral (article 226 ECT), ECJ ruling, and second ECJ referral (article 228 ECT) stage. However, even though the power model comes in second, the lead of the capacity model decreases from stage to stage. We can infer from this that power becomes relatively more important as official infringement proceedings proceed. Albeit it is a bad predictor with respect to occurrence of non-compliance, national power may be responsible for the persistence of non-compliance in fact.

Graph 5: Variance Explained by Capacity and Power



A closer look at an integrated model, which combines capacity and power indicators and adds public support for European integration as a prominent control³, does not disconfirm this hypothesis – at least not for the official stages two (cf. table 2, model 4) and three (cf. table 2, model 5). Alongside the capacity indicators “expenditure” and “efficiency”, EU specific political power has a significant effect on the number of infringements per legal act, member state, and year at the first three stages. A greater share of council votes makes countries less compliant with EU law, while more bureaucratic efficiency reduces the number of violations. The sign of the coefficient for public support is only contra-intuitive on first sight. On the one hand, euro-skeptic countries comply particularly well with European law because they pay attention to the protection of their (national) interests in the forefront of a decision. Therefore, once a euro-skeptic country has agreed on the passing of a European law, the

³ The assumption is that the stronger the public support for European integration is, the more a member state complies with EU Law (Lampinen and Uusikylä 1998, Mbaye 2001, Börzel et al. 2004). We use Eurobarometer data in our analyses.

implementation of this European law is relatively unproblematic in this member state (Börzel 2003, Börzel et al. 2004). On the other hand, Sánchez-Cuenca (2000) convincingly shows that support for European integration is directly linked to lack of state capacity. This lends even more support to the capacity argument.

Table 2: Infringements at Different Stages

	(3)	(4)	(5)	(6)
	Reasoned Opinions	ECJ Referrals (Art. 226)	ECJ Rulings (Art. 226)	ECJ Referrals (Art. 228)
Expenditure	0.050*** (0.007)	0.018*** (0.003)	0.008*** (0.002)	0.002** (0.001)
Efficiency	-0.282*** (0.027)	-0.114*** (0.014)	-0.043*** (0.006)	-0.008*** (0.002)
Veto Players	-0.036*** (0.011)	-0.005 (0.005)	-0.003 (0.003)	0.000 (0.001)
Votes	0.032*** (0.008)	0.014*** (0.004)	0.005** (0.002)	0.000 (0.001)
GDP	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)	0.000 (0.000)
Public Support	0.004*** (0.001)	0.001 (0.001)	0.001*** (0.000)	0.000*** (0.000)
Constant	-0.086 (0.186)	-0.042 (0.081)	-0.062 (0.042)	-0.023 (0.019)
Observations	177	177	177	177
R²	0.527	0.392	0.287	0.105
Chi²	280.260	122.613	99.338	31.004
Prob. > Chi²	0.000	0.000	0.000	0.000

Dependent variables are infringements per legal act in % at the indicated stage of the official infringement proceedings. OLS regression with two-tailed t-test, PCSEs in parentheses. *** = $p < 0.01$, ** = $p < 0.05$, * = $p < 0.1$.

If capacity and power were related to the persistence of non-compliance, there should be a significant effect of the respective independent variables on the number or percentage cases of non-compliance which are not settled at the reasoned opinion stage but carried to one of the subsequent stages. As we can see in table 3, none of the power variables has any significant effect on whether cases are referred to the ECJ or not. Member states certainly vary with respect to power. However, lack of power does not translate into being afraid of the ECJ.

Member states with few votes in the Council of Ministers are as unflinching in the face of ECJ referrals and judgments as member states with many votes. What makes a difference is bureaucratic efficiency again. Member states with qualified and motivated civil servants are in a better position to transform non-compliance into compliance before cases reach the ECJ or an ECJ judgment is given. Having realized this, it should not be kept secret that the overall model fit is rather disappointing. There has to be something else – perhaps at a non-state level – that explains the hitherto unexplained variance.

Table 3: Infringements Carried on to Subsequent Stages

	(7)	(8)	(9)
	ECJ Referrals (Art. 226)	ECJ Rulings (Art. 226)	ECJ Referrals (Art. 228)
Expenditure	0.412 (0.737)	0.427 (0.625)	-0.054 (0.126)
Efficiency	-7.543*** (1.794)	-0.086 (1.257)	-0.637* (0.381)
Veto Players	0.271 (0.724)	0.373 (0.525)	0.145 (0.173)
Votes	0.573 (0.540)	0.071 (0.372)	-0.111 (0.105)
GDP	-0.000 (0.004)	0.002 (0.003)	0.001 (0.001)
Public Support	-0.125 (0.115)	0.071 (0.081)	0.040** (0.020)
Constant	38.299*** (13.479)	3.272 (11.351)	1.079 (2.929)
Observations	177	177	177
R²	0.081	0.015	0.085
Chi²	24.122	3.300	30.619
Prob. > Chi²	0.000	0.770	0.000

Dependent variables are % of infringements reaching the indicated stage of the official infringement proceedings. OLS regression with two-tailed t-test, PCSEs in parentheses. *** = $p < 0.01$, ** = $p < 0.05$, * = $p < 0.1$.

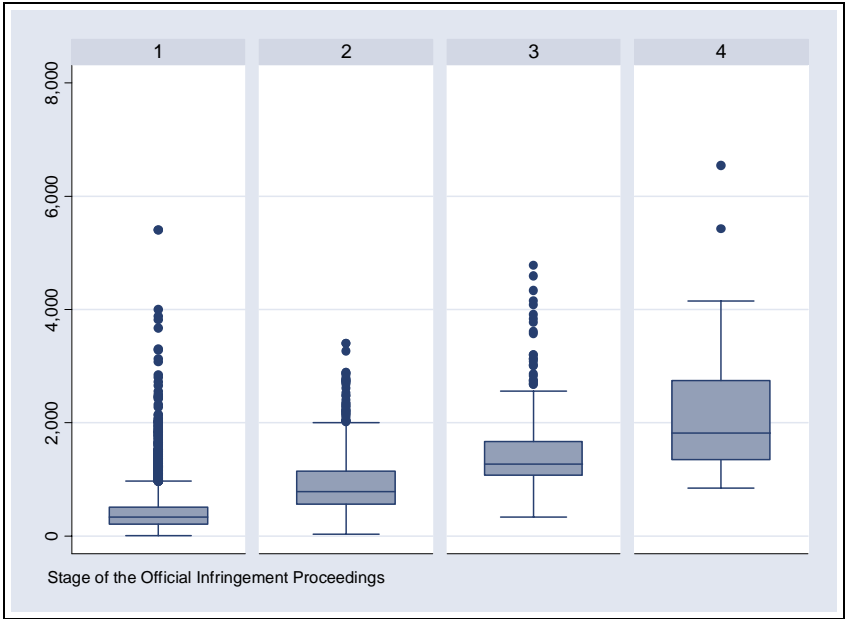
In fact, it might be fruitful to refine the management and the enforcement hypotheses through a focus on policy variables. The causal mechanism of enforcement approaches basically rests on the assumption of strategic rational actors. They adapt their actions according to altered

external constraints and cost-benefit calculations in turn. So far, we have implicitly assumed that the cost-benefit curves are constant within a member state. However, this neglects that policies might differ in their respective compliance costs and benefits for a state. The issue salience of policies can vary within a state – fishery-related norms may matter less than environmental norms to Austria than Spain – and bring about more or less benefits while the costs of non-compliance are constant. Therefore, the refined enforcement hypothesis reads: The more important a policy is for a member state and the higher the benefits of non-compliance with respect to a specific rule, the less cost sensitivity is the state and the longer it takes during the infringement proceedings until the cost of non-compliance exceeds its benefits.

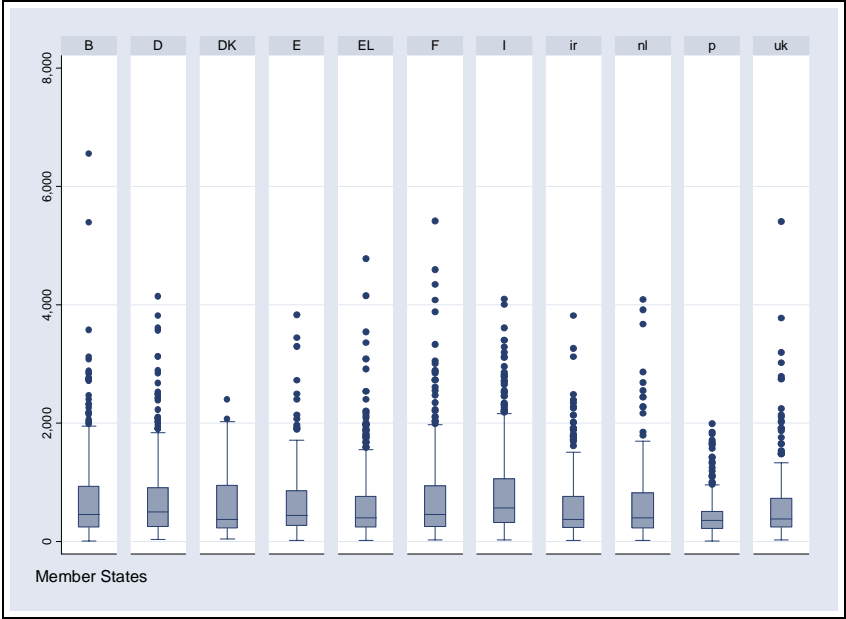
Policy aspects matter for management approaches, too. European laws can vary with respect to their complexity and the resource-intensity of their implementation. The precision of a norm's content and its scope of application can be more or less defined. Only some norms require adaptations on the polity, politics, or policy dimension or the employment of resources to be complied with. Hence, the prospect of transforming non-compliance into compliance during the infringement proceedings differs in accordance with a norm's requirements for adaptation and its degree of ambiguity. Therefore, the refined management hypotheses are: First, the more ambiguous a policy is, the longer it takes until a consensual norm interpretation is reached and the further an infringement proceeding is carried on. Second, the higher the adaptational requirement of a norm is, the more likely it is involuntary infringed on.

To incorporate the policy-specific explanation into our analyses, we can look at single infringements instead of countries and years. As can be seen in graph 6, for example, we find enormous variance in the length of individual cases even if we control for the number of stages these cases reach. The same holds true if we control for countries or years. While some cases are settled within less than ten days, others go on for more than a decade. Both, implementation leaders and laggards have their fair share of short-term and long running infringements (cf. Graph 7). Hence, country-specific variables, such as power and capacity, are not able to fully account for the variation observed.

Graph 6: Length of Proceedings by Stage



Graph 7: Length of Proceedings by Member State



What determines when or at which stage proceedings are terminated? To answer this question, we use two different models. The ordered probit model (table 4, model 10) analyzes the probability of 3993 individual cases to reach one of the four stages of the official infringement proceedings given a member states capacity and power as well as policy and time effects. The survival model (Cox Proportional Hazard Model) looks at how many days individual cases survive until they finally die, that is how long it takes them from reasoned opinion to termination. It estimates whether country-specific independent variables and policy dummies – controlling for the stages of the official infringement proceedings reached – make an early “death” more probable or not.

As expected, we see in table 4 that cases from member states with high capacity (i.e. high “bureaucratic efficiency” and low “public support”) are less likely to make it to a subsequent stage. The result for “votes” is contra-intuitive. We would have expected power to have a

positive impact on the probability to reach another stage of the proceedings. It might be the case that power does not put member states in a position to sit out the infringement proceedings but to stop their cases from being referred to the ECJ or being given a judgment on. If this turned out to be true, we would have to rephrase the title of our paper and ask: Is the ECJ afraid of powerful member states? However, as this is an *ad hoc* explanation, it needs to be examined in more detail before it can be accepted.

Another notable finding is the significant influence policy-specific factors exert on the probability of infringements to make it to the next stage. Even though the specific coefficients and their significance is nothing but a function of the arbitrarily chosen reference category – that is the policy sector of energy and transports⁴ in the analysis at hand – it is beyond doubt that the characteristics of policy sectors play a significant and substantial role when it comes to ongoing non-compliance. For example, infringements in the fields of agriculture or enterprise are on average less likely to be referred to the ECJ than infringements in the fields of transports and energy or fisheries. However, why do policy sectors vary with respect to this probability? Even though the fixed policy effects statistically explain parts of the overall variance, they cannot give a substantial answer to this question. It remains open which characteristics can be hold responsible for the policy sector-specific differences. Therefore, we can not tell which one of the above developed rule and policy related hypotheses of non-compliance hold true.

⁴ The other policy sectors are: ADMI: administration, AGRI: agriculture, BUDG: budget matters, COMP: competition, EACU: education and culture, ECFI: economic and financial affairs, EMPL: employment and social affairs, ENTR: enterprise, ENVI: environment, FISH: Fisheries, INSO: information society, MARK: internal market, SJUR: judicial service, SNCO: health and consumer protection, STAT: Eurostat, TAXU: taxation and customs union, and TRAD: trade.

The survival model (cf. table 4, model 11) supports the finding discussed above: Policy matters! The coefficient estimates indicate that cases from the agriculture, budget matters, enterprise, information society, and trade policy sectors have higher hazard rates, i.e. higher conditional death rates and hence shorter survival times than cases from the energy and transports sector. At the same time, the estimates imply that, at each survival time, the hazard rates for cases from member states with high bureaucratic efficiency and a large share of votes is significantly smaller than that for cases from member states that lack administrative capacity and political power. On the one hand, this finding contradicts the capacity hypothesis. We would have expected capacity to promote swift transformation of non-compliance into compliance. On the other hand, however, the power hypothesis is strongly supported by the data. The more powerful a state is, the longer it takes until preferences over strategies are altered and the longer infringement procedures are carried on.

Table 4: Stages, Duration, and Survival

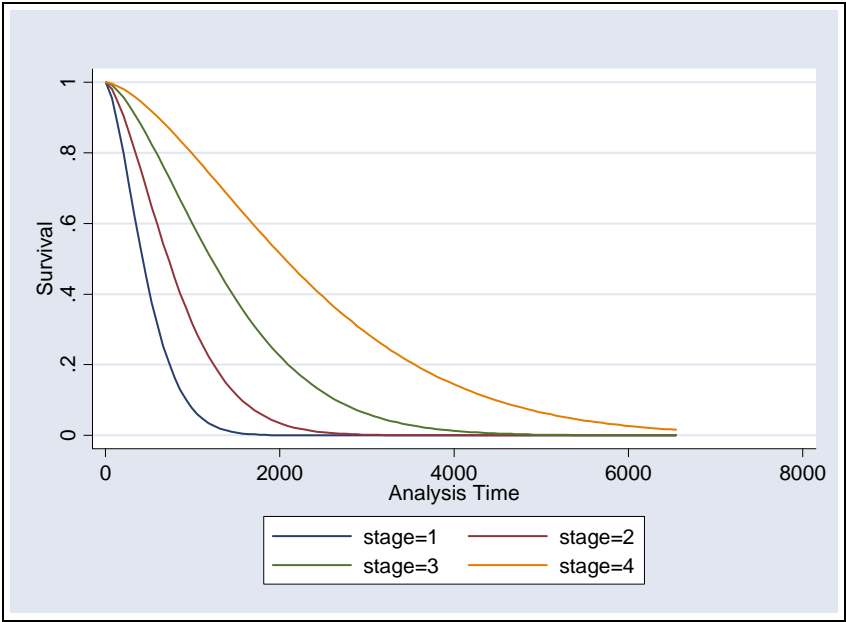
	(10)	(11)	
	Ordered Probit Model ⁺	Cox Proportional Hazard Model [#]	
		<i>Coefficients</i>	<i>Hazard Ratios</i>
Expenditure	0.003 (0.012)	0.024** (0.010)	1.024** (0.010)
Efficiency	-0.220*** (0.045)	-0.096** (0.041)	0.908** (0.037)
Veto Players	0.013 (0.011)	-0.016 (0.011)	0.984 (0.011)
Votes	-0.020* (0.011)	-0.069*** (0.008)	0.934*** (0.008)
GDP	0.000*** (0.000)	0.000*** (0.000)	1.000*** (0.000)
Public Support	0.006** (0.002)	-0.002 (0.002)	0.998 (0.002)
ADMI	0.349	-0.419**	0.658**
AGRI	-0.322***	0.496***	1.642***
BUDG	-0.325	0.630***	1.878***
COMP	-0.332	-0.358*	0.699*
EACU	0.317	-0.352	0.704
ECFI	0.150	0.051	1.052
EMPL	-0.114	-0.205*	0.815*
ENTR	-0.679***	0.367***	1.443***
ENVI	0.001	-0.008	0.992
FISH	0.589***	-0.465*	0.628*
INSO	-0.171	0.572***	1.772***
MARK	-0.239**	-0.148	0.862
SJUR	-1.183**	0.308	1.361
SNCO	-0.112	-0.027	0.973
STAT	-6.916***	-0.317***	0.728***
TAXU	0.047	-0.033	0.967
TRAD	-0.142	0.360*	1.433*
Stages		-0.777*** (0.024)	0.460*** (0.011)
Cut Point 1	.229		
Cut Point 2	.753		
Cut Point 3	1.727		
p		1.543	
Observations	3993	3759	
Failures		3759	
Time at Risk		2689742	
Pseudo R²	0.037	0.032	
Chi²	5096.388	1433.897	
Prob. > Chi²	0.000	0.000	

⁺ Dependent variable is number of stages of the official infringement proceedings. Maximum-likelihood ordered probit estimation with two-tailed t-test, robust standard errors in parentheses. *** = $p < 0.01$, ** = $p < 0.05$, * = $p < 0.1$. Coefficients and standard errors for year dummies are not reported. Standard errors for sector dummies are not reported.

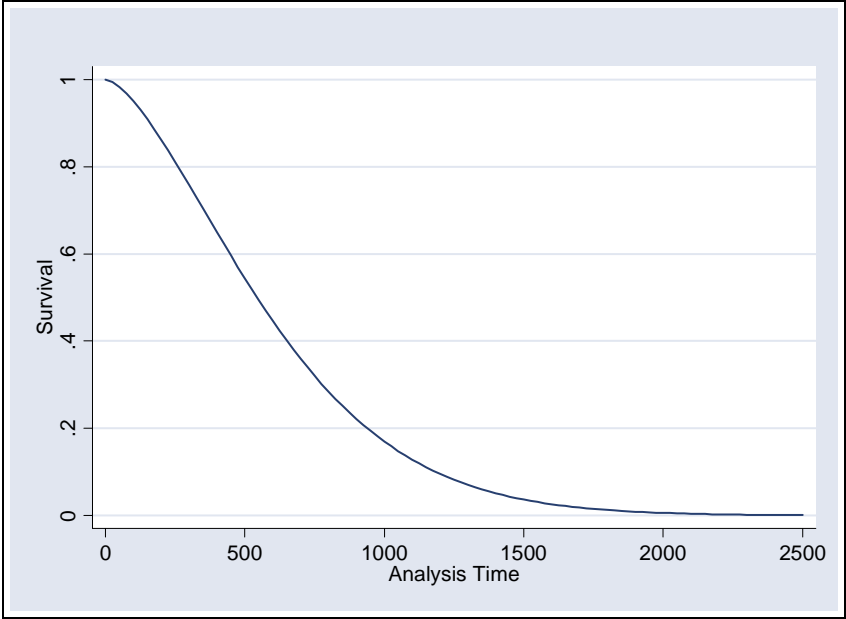
[#] Dependent variable is number of days until termination of the official infringement proceedings. Maximum-likelihood proportional hazard estimation with two-tailed t-test, robust standard errors in parentheses. *** = $p < 0.01$, ** = $p < 0.05$, * = $p < 0.1$. Standard errors for sector dummies are not reported.

In addition and not surprisingly, we find that it takes significantly longer to terminate cases which have reached later stages of the infringement proceedings (cf. graph 7). The median and mean survival times differ significantly by stages reached. The overall median is about 500 days (cf. graph 8). Finally, graphs 7 and 8 as well as the estimates (i.e. $1 < p < 2$) suggest that the hazard rate is increasing over time at a decreasing rate. That is, cases tend to be settled rather sooner than later. However, once a case manages to stay alive for a while its chances to do so for some more days are reasonable even though all cases are terminated eventually.

Graph 7: Survival Function at Means by Stages



Graph 7: Survival Function at Means



The fact that the hazard rate is increasing over time at a decreasing rate could actually support both management and enforcement accounts of non-compliance. The majority of involuntary non-compliance cases is settled as time goes by and even capacity-lacking member states manage to mobilize the necessary resources for the implementation of the infringed on European rule at hand. The decreasing rate might be due to the few cases of voluntary non-compliance which sometimes hold out for years.

4. Conclusion

In this paper, we have analyzed why some member states shy away from conflict with the European Commission while others do not even bother to comply with orders of the ECJ after being convicted twice – once for infringing on EU law (article 226 ECT) and the second time

for not concurring with the court's first judgment (article 228 ECT). We have done this in two steps.

First, we developed hypotheses from two competing theoretical accounts. While the management school of thought argues that acts of non-compliance are involuntarily committed by EU member states which lack the necessary capacity to properly and timely implement European rules, the supporters of enforcement approaches claim that non-compliance is voluntary and related to a member state's power vis-à-vis the European Commission and the ECJ. Second, we do extensive econometric testing of the contending hypotheses. Doing this, we start from a capacity-centered model developed to explain the variance of the number of yearly infringements per European legal act in force between the member states and go on to testing different types of power-centered as well as integrated models.

Our main finding is that management and enforcement accounts are not mutually exclusive but complementary. Both, independent capacity and power variables explain parts of the analyzed variance. Moreover, we can specify scope conditions under which the two compliance theories deploy explanatory variables. The lack of capacity causes "early" and involuntary infringements on EU law, while political power explains those infringements that go on for years and make it to the later stages of the official infringement proceedings. Finally, our analyses show that non-country related factors play an important role with respect to the stage that a specific case of non-compliance reaches and the time it takes to be settled. This is done empirically by incorporating policy effects in the tested models. While policy

appears to matter, we are at this point unable to specify which policy-related factors are at work. As a merely educated guess, we could hypothesize that cross-policy variance is due to the different distributional implications of policy sectors, which may vary with respect to scope and reach or the market making (negative integration) and market shaping (positive integration) nature of European legislation (cf. Majone 1993, Börzel et al. 2003, Scharpf 1996, Zürn 1997). Moreover, even if we identify the causal mechanisms that make policy matter, we are still left with a considerable amount of variance unexplained. Therefore, further research into alternative causes of non-compliance – such as the characteristics of individual legal acts (e.g. degree of precision, regulatory scope) and the types of violation (e.g. delayed, incomplete, or incorrect legal transposition) – is required.

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