Sieps
Swedish Institute for European Policy Studies
October 2022:18epa

EUROPEAN POLICY ANALYSIS

The Commission *v* the Member States: who wins in court, and why?

Markus Johansson and Olof Larsson*

Summary

Member states' non-compliance with European Union law has been a recurring problem throughout the EU's history. To remedy this problem, the European Commission monitors the member states, alerts them when they break common rules, and brings them to the Court of Justice of the EU when it considers that they have failed to correct their non-compliance voluntarily. In this European policy analysis, we analyse 853 such cases lodged at the Court between 2004 and 2014.

We explore how these cases vary in important aspects, such as the behaviour and success of the accused member states. Some member states concede to the Commission's accusations in almost all cases against them and primarily face problems with implementing EU rules on time. Others often contest the Commission's accusations, and the cases against them comparatively frequently involve complicated legal battles on the interpretation of EU treaty rules.

Crucially, while the Commission wins almost all cases in the first category, it loses a substantial amount of cases in the second category. Contrary to the common understanding in many studies of non-compliance in the EU, our analysis reveals that compliance cases are not simple affairs that the Commission easily wins. This calls on scholars and practitioners not to underappreciate the extent to which these cases entail complicated legal issues, contestation, and uncertain outcomes.

* Markus Johansson is a researcher at the Department of Political Science at the University of Gothenburg and a senior researcher in political science at the Swedish Institute for European Policy Studies (SIEPS).
Olof Larsson is a researcher at the Department of Political Science at the University of Gothenburg.

1. Introduction

Non-compliance, that is, the failure to implement EU law correctly, has been a problem for the European Union (EU) ever since the creation of its forerunner, the European Economic Community, in 1958. On 19 December 1961, the first case concerning non-compliance was decided by the Court of Justice of the EU (the Court); in this case, the Commission accused Italy of having suspended imports from other member states in contradiction to the EEC treaty.[1] The Commission won. On 27 October 2021, the Court ordered Poland to pay a penalty of €1,000,000 per day because of its refusal to abide by the Court's previous rulings on breaches of the fundamental principles of the rule of law in Poland.[2] Between these two dates, the Commission launched thousands of *infringement proceedings* against member states for violating EU law, and almost one-fifth of them progressed all the way to the Court of Justice.

> "Scholars need to be mindful of the fact that infringement procedures are not necessarily clear-cut or obvious affairs but contain large variations in both outcomes and degrees of contestation across issues, legal bases, and member states."

These proceedings are often viewed as relatively homogeneous affairs. The legal issues are assumed to be clear-cut, the Commission is presumed to be correct in its accusations, and the degree to which the member states or other actors contest whether non-compliance actually took place is often ignored (e.g. Börzel, 2021; Börzel et al., 2010; Pircher & Loxbo, 2020; Thomson et al., 2007; Treib, 2014). In contrast, we show that these affairs are more contested and more often won by member states than has hitherto been believed. In this analysis, we draw on new data to explore the variations in success and contestation that we believe to be of the most fundamental interest to both scholars and practitioners within the compliance field. Scholars need to be mindful of the fact that infringement procedures are not necessarily clear-cut or obvious affairs but contain large variations in both outcomes and degrees of contestation across issues, legal bases, and member states. Practitioners should be aware that even infringement cases that progress all the way to the Court are open-ended affairs and that contestation and argumentation matter, both for defending member states and for third parties.

For many of the questions that have interested infringement scholars, the issues of contestation and success in the proceedings carry important implications. For example, for those interested in determining how much and why a certain state breaks common EU rules (Börzel, 2021; Börzel et al., 2010, 2012; Finke & Dannwolf, 2015; Mbaye, 2001; Thomson, 2010; Treib, 2014), it is relevant to study the degree to which the cases against that state are non-contested, relatively simple affairs in which the Commission wins or highly contested affairs in which the member state wins a non-trivial amount of cases. For the question of Commission strategy (Carrubba et al., 2008; Fjelstul & Carrubba, 2018; König & Mäder, 2014), the extent to which the Commission wins different types of cases will offer important clues to its strategy and its capability of anticipating the outcomes of different types of cases.

In this European policy analysis, we present novel data[3] on the substance of infringement cases brought all the way to the Court of Justice by the Commission against the member states. We have read all the 853 cases[4] in the period, starting with the big bang enlargement in 2004 and ending with the start of Jean-Claude Juncker's presidency of the European Commission in 2014. Both these events coincided with policy changes of the infringement procedure. We specifically analyse 1) the extent to which member states contest the claims against

---

[1] C-7/61 *The Commission of the European Community v the Government of the Italian Republic*.
[2] C-204/21 *Commission v Poland.*
[3] Gathered in the Swedish Research Council funded project *Regelbrott som hot mot Internationellt Kollektivt Handlande*. Vetenskapsrådet Dnr: 2018-01693.
[4] The subsequent percentages do not include the penalty cases. See section 3 for further details about these.

them, and in what types of cases, and 2) the extent to which the Commission wins the cases that it brings and how this varies for different case characteristics and member states.

A court case in front of the Court of Justice of the EU often involves multiple "claims", that is, multiple rules that the Commission asserts that the defending member state has violated. Our analysis shows that the Commission is partially successful, in the sense that it wins some claims but loses others, in 90 per cent of the cases studied here. It is only fully successful, that is, it wins all claims, in 80 per cent of the cases. However, these high success rates are caused by the large share of low-profile cases, such as cases that the member states do not contest (34 per cent of cases) or that raise no points of law interesting enough to warrant the involvement of an Advocate General (AG) (72 per cent). In high-profile cases, in which member states contest the Commission's claims and that warrant an AG opinion (230 cases, 27 per cent), the Commission is only fully successful in 57 per cent of cases. The infringement procedure is in short a much more varied and multifaceted procedure in terms of contestation, wins and losses, and other important issues than has hitherto been believed or assumed.

2. Why non-compliance matters

For the rules, obligations, and agreements between EU member states to matter, these states have to comply with them. This is true for all sectors of EU cooperation, ranging from rules pertaining to the functioning of member states' legal and democratic systems to more practical or economic issues concerning, for example, public procurement, the environment, or working time. The EU is primarily a regulatory system based on common rules, and most policies rest on actions taken by the member states to implement and realize these rules. Non-compliance is thus a critical problem – if common rules are not followed, there is not much EU left.

Specifically, compliance is crucial for the effectiveness of the EU cooperation for multiple, often overlapping, reasons:

- Firstly, compliance is necessary if states are to reach common goals – such as cutting emissions or decreasing their energy dependency on Russia. If states do not take the actions proscribed, there will be no policy change.
- Secondly, compliance is a matter of fairness, both between individuals and between market operators such as companies on the EU's internal market. Unless the rules apply equally to all, those who can shirk them will benefit in various ways, not least economically, and possibly outcompete those who do follow the rules. In light of this, the functioning of the internal market depends on member states' compliance.
- Thirdly, non-compliance can create various spillover effects, such as carbon leakage (Böhringer et al., 2012) or social dumping (Majone, 2005, p. 155) – that is, market actors moving their capital to the non-complying country (c.f. Holzinger, 2005; Ruhs & Palme, 2018).

For these reasons, scholars have long studied why states fail to comply and how the situation can be resolved (Simmons, 2013; Tallberg, 2002). Research on non-compliance in the EU has centred on issues such as why states fail to comply, which states are the worst offenders, and whether compliance works differently across different groups of states, such as old versus new members, northern versus southern members, or members with different market economic models (Ademmer, 2018; Börzel, 2021). The dominating explanations in these debates have been that member states fail because they do not want to follow the rules (Thomson, 2009, 2010); because they lack the capabilities to follow them (Zhelyazkova et al., 2016); or because different national cultures and histories produce different compliance behaviours (Falkner et al., 2007). Some studies have also discussed why non-compliance is a more severe problem in some policy areas (e.g. the environment) than others (Börzel, 2021; Haverland et al., 2011), whereas others have analysed the variation over time (Pircher & Loxbo, 2020).

Another stream of research has focused on the question of whether the Commission is objective in performing its role as the guardian of the treaties or whether it takes strategic concerns into account when it decides which cases to pursue. Some scholars have argued that the Commission takes into consideration, for example, the chances

of winning when deciding which cases to pursue (Fjelstul & Carrubba, 2018; König & Mäder, 2014). The Commission's strategic considerations are here understood to be a consequence of necessary priorities in light of its limited resources to perform the task of overseeing member states' implementation. A smaller literature has investigated whether the Court is strategic, ideological, or objective in its responses to non-compliance charges by the Commission (Carrubba et al., 2008). Other studies have argued that the Commission is not biased towards certain member states (Börzel, 2021; Börzel et al., 2010).

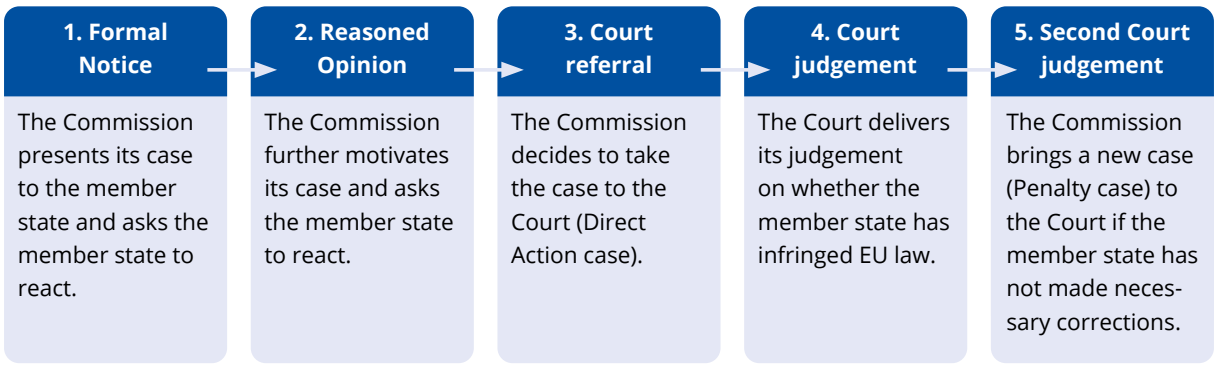
Behind all of these debates lies the question of how best to foster compliance and work against non-compliance – should states be punished when they do not want to follow the rules or aided when they cannot follow the rules, and what should the institutions enforcing and managing these systems look like?

3. The EU's system to handle non-compliance

The EU has two main systems to deal with non-compliance on the part of the member states. The first relies on "fire alarms", that is, national courts that utilize the so-called preliminary reference procedure to ask the Court for guidance on how to interpret EU law.[5] Here, non-governmental actors can also be influential by going to their respective national courts if they believe that some rule under EU law has been breached. Second, in contrast to this decentralized system of securing member state compliance, the EU has a centralised system that involves the Commission "police patrolling" the member states via the infringement procedure[6] (European Commission, 2017; Tallberg, 2002). Here, the Commission acts as something akin to a prosecutor, identifying the EU rules that it believes member states to have breached and, if necessary, brings them all the way to the Court. The cases that emanate from the latter procedure are the focus of this report, in which the Commission has a core role.

The infringement procedure, as outlined in Figure 1, starts with the Commission detecting a possible breach of an EU law by a member state, either by its own volition or because another actor within the EU notifies it of alleged breaches of EU law. It is the Directorates General (DGs) in the Commission that oversee the national implementation of EU laws and investigate possible infringements by the member states, supported by the Commission's legal service. Based on this investigation, the Commission can initiate an infringement proceeding, which can consist of several steps. It is always the decision of the College of Commissioners about when to launch infringement proceedings and when to progress from one step of the procedure to another. When the Commission starts an infringement procedure, it does so by sending a so-called *formal notice* to the government of the member state in question, giving it the possibility to respond to the alleged breach. If the Commission is not satisfied with the response, it can proceed with the case by sending a

Figure 1. Stages of the infringement procedure



[5] Article 267 of the Treaty on the Functioning of the European Union (TFEU).
[6] Article 258 TFEU.

so-called *reasoned opinion* to the member state. The member state is once again given the opportunity to respond. If the Commission is still not satisfied with the member state's response, it can decide to bring the case to the Court of Justice to settle the dispute in a so-called *direct action for failure to fulfil obligations*. In all cases that proceed to the Court, it is the Commission's legal service that represents the Commission (Leino-Sandberg, 2021; Smith, 2010).[7]

At each of these steps, it is the Commission's prerogative to decide whether to proceed to the next step or to drop the case. The Commission can decide to drop cases for various reasons, for instance because the member state adjusts its behaviour or changes its domestic rules or because the Commission re-evaluates its accusation in light of the member state's response. If a case ends up in Court and is decided in the Commission's favour, the member state must adjust its behaviour and comply with the Court's decision. If the member state does not comply even after a Court judgment, the Commission can take the member state to the Court again in a penalty case, in which the Court can decide to issue fines against the member state in question (article 260 TFEU). Penalty cases are relatively rare and only constitute 3 per cent of cases (27 out of 853).

> "The Commission's task to be the guardian of the treaties via the infringement procedure is potentially gargantuan as it includes both the task of scrutinizing member states to detect possible violations and that of bringing these cases before the Court."

The Commission's task to be the guardian of the treaties via the infringement procedure is potentially gargantuan as it includes both the task of scrutinizing member states to detect possible violations and that of bringing these cases before the Court. The decentralized preliminary reference procedure therefore also has the function of easing the burden of monitoring member states and securing compliance in the EU by relying on national private actors (European Commission, 2017). While the Commission can make its own investigations, it is often dependent on information from third parties, like various societal actors in the member states (Andonova & Tuta, 2014), and can also rely on information coming directly from other member states (article 259 TFEU).

4. Problems in the EU compliance literature

While a broad array of studies of compliance in the EU exists (e.g. Börzel, 2021; Börzel & Buzogány, 2019; Falkner et al., 2004, 2007; Mbaye, 2001; Thomson, 2009, 2010; Thomson et al., 2020), there are several recurring problems regarding the way in which non-compliance is measured. The first problem is that the data that they have used are not necessarily representative of either non-compliance at large or all cases in the infringement procedure. The second problem is that the infringement procedure is not necessarily reliable as an indicator of non-compliance – that is, just because there is a case, there is not necessarily non-compliance.

4.1 Are infringement cases a reliable indicator of non-compliance?

Many studies in the field of EU non-compliance have relied on data from the infringement procedure and measured the extent of non-compliance by counting the number of cases against a certain state in a given year. Most studies have used the second step of the infringement procedure, in which the Commission sends the member state a *reasoned opinion* outlining the alleged infringement (Börzel, 2021; Börzel et al., 2010; Thomson et al., 2007), while some have also included the stage of *referral* to the Court (Mbaye, 2001; Perkins & Neumayer, 2007).

It is often unclear exactly why reasoned opinions are studied instead of the other stages of the infringement procedure, such as the Court

[7] No reliable statistics exist on the number of formal notices, but, according to Tanja Börzel (2021), 13,367 reasoned opinions were issued in the period between 1978 and 2017, of which 4,044 (30 per cent) were referred to the Court. Of these, 1,635 were later withdrawn and 2,304 (17 per cent) received a Court judgment.

judgments. To the extent that it is discussed, most scholars have referred to a combination of the drop in the number of cases (and hence observations in the data) between the stage of the reasoned opinion and that of Court referral and the Commission's high success rate in the cases that reach the Court (Börzel, 2021, pp. 28–29). Here, the Commission has been argued to win between 90 (Börzel et al., 2012, p. 456) and 100 per cent of cases (Mbaye, 2001, p. 268). Based on this high success rate, scholars have assumed that cases that do not proceed to the Court are dropped by the Commission because the member state has become compliant (Hofmann, 2018) – since the Commission wins almost all cases that go to Court, it is assumed that the Commission is correct in those that do not.

However, it is important to realize that, formally, the Commission's decision to launch the infringement procedure is based on an instance in which the Commission *considers* that a member state has failed to fulfil an obligation. From a legal perspective, such launches should primarily be understood as *claims*, which is also how the Court describes them when direct action cases appear in front of it. From this perspective, it is questionable whether these pre-judgment steps can be taken as direct indicators of member state non-compliance for three reasons:

- Firstly, as described above, a growing literature has argued that the Commission is strategic when it chooses whether to proceed with a case or not, and especially considers its chances of winning (Fjelstul & Carrubba, 2018). This argument suggests that the reasoned opinions that do not proceed to the Court are not only cases in which the member state conceded but also cases that the Commission found too risky to proceed with because it feared that it would lose – that is, they were not clear instances of non-compliance.

- Secondly, closely related to the first argument is the fact that the infringement procedure contains a large number of highly contested and legally complicated cases. As we show below, while some cases are clear-cut and uncontested by the defending state (i.e., they "confess"), many are not. Moreover, some member states contest more than others, and the more states contest, the more likely they are to win. While it is certainly possible that the cases that do not proceed to the final stage are not complicated, the argument and findings discussed above suggest otherwise.

- Finally, while we confirm that the Commission won, at least to some degree, in 90 per cent of the cases that we have studied, this overall figure masks a considerable degree of variation, specifically differences in Commission success across different member states and types of cases.

In short, the mere existence of an infringement case should not be taken as an indication that non-compliance has occurred. At the stage of formal notices, there are limited data to use; at the stage of reasoned opinion, we do not know how certain the Commission is or whether the Court would agree. While the final stage of the procedure, that is, judged cases, has some limits, not least that a substantial amount of non-compliance will have been resolved before it reaches that stage, it also has the benefit of capturing real instances of non-compliance.

4.2 Is the Commission biased?

The literature on infringements has largely agreed that infringement proceedings, irrespective of which step is studied, provide a very unreliable measure of overall compliance rates in the EU and that studies rather capture the tip of the iceberg of the phenomenon (Hartlapp & Falkner, 2009). However, it has often been maintained that, even if the raw numbers do not match the actual non-compliance, the distribution across states, laws, and policy areas does and that the infringement procedure therefore constitutes a representative sample of non-compliance cases (Börzel, 2021; Börzel et al., 2010; Börzel & Knoll, 2012). In effect, this line of reasoning suggests that if, for instance, Italy has the highest number of infringements, it is also safe to assume that it is the least compliant member state.

We will not be able to settle the issue of whether reported cases of non-compliance are representative of the unknown population of real non-compliance in this analysis. Instead, we focus on the fact that scholars often use subsets of cases to study instances of non-compliance, which we believe can bias their results in important ways. Firstly, many studies

have focused exclusively on directives and ignored cases involving treaties, regulations, or other forms of EU law (Haverland, 2000; König & Mäder, 2014; Linos, 2007; Perkins & Neumayer, 2007; Pircher & Loxbo, 2020; Steunenberg & Toshkov, 2009; Thomson et al., 2007; Zhelyazkova, 2013). Secondly, some have studied an even smaller subgroup within directives, namely cases concerning late transposition (Finke & Dannwolf, 2015; Haverland et al., 2011; König & Luetgert, 2009; Mastenbroek, 2003; Steunenberg & Toshkov, 2009; Thomson et al., 2020).

> "The focus on directives is likely to bias the results in many aspects – Commission success, which member states violate which rules, and which policy areas members states comply with least."

The focus on directives is likely to bias the results in many aspects – Commission success, which member states violate which rules, and which policy areas members states comply with least. The modern EU was famously constructed to a large extent by giving direct effect and supremacy to its rules, including the treaties. These principles, developed in the case law of the Court, serve to ensure compliance with EU law. Much liberalization of trade barriers within the Union was also secured via the Court, which treated treaty articles prohibiting barriers to trade as fundamental principles of a quasi-constitutional character. Directives, on the other hand, are overwhelmingly used to reregulate the economy on the EU level. Across states and policy areas, we can therefore expect large variation in the kind of non-compliance that we will see if we only study directives (or treaties). Reregulatory policies, such as those on the environment or social policies, will primarily be found in directives, whereas many fundamental principles for the internal market have their basis in the treaties. Moreover, states that are more supportive of either kind of policy are more likely to comply with one over the other (Johansson & Larsson, 2020). Finally, the treaties are formulated in more general ways and are, in that sense, more open to interpretation than secondary EU law. Cases based on the treaties are hence more likely to be contested by the member states and lost by the Commission. In short, studies that only analyse directives are likely to report biased findings in favour of certain states and policy areas.

These kinds of problems are even more acute when studies focus solely on so-called *late transpositions*, that is, when member states fail to communicate whether and how they have implemented a certain directive on time. While many studies have investigated timely transposition as such, they have also frequently made claims about compliance as a broader phenomenon. In this regard, data on late transpositions suffer from all the problems discussed above as these figures only concern directives. Moreover, these data contain a very specific kind of non-compliance – the obligation to communicate to the Commission how a certain directive has been implemented before a certain deadline. It says nothing regarding whether this implementation was performed correctly or whether the member state subsequently complied with its obligations.

5. Empirical evaluation

The discussion above highlights two understudied aspects of the infringement procedure: the Court phase and the degree to which the Commission and the member states win or lose cases in this phase (but see Toshkov, 2019). The limited focus on the Court phase is especially surprising given the fact that it is only after a judgment that we have legal certainty about whether a member state has failed to comply. This is also the stage of the infringement procedure, in which we have the best availability of public information about the substance of the cases, and a host of case-related factors, such as the specific arguments of the Commission and the states and their interpretations of the rules in question. Below, we make use of this kind of information to investigate the variation in Commission and state success and the conflict across different categories of cases.

5.1 Data and coding

In this analysis, we used a dataset for which we have read and systematically coded all 853 Court judgments in infringement cases during the period 2004–2014. The period of study was chosen to cover the post-enlargement EU from 2004 onwards. The enlargement coincided with changes

to the policy concerning when an AG opinion should be delivered in the Court,[8] which is central to our empirical analysis. The end year of 2014 marks the appointment of the new Commission under president Juncker, in which the policy regarding the launch of infringement cases became even more strategic and restrictive, which, amongst other things, also led to a drop in the number of cases per year[9] (European Commission, 2017; Leino-Sandberg, 2021, pp. 181–189). When reading each case, we coded two outcome variables of interest. These contain information about, firstly, whether the defending member state contested the claims against it (*Contestation*) or whether it agreed with the Commission's claims and, secondly, whether the Commission won the cases that it brought or lost in part or in full (*Commission success*).

To code whether the defending member state contested the Commission's claims, we read the descriptions in the case judgments about how the member states argued, both in the pre-litigation phase and in the proceedings in front of the Court. A case was coded as *uncontested* if the descriptions include phrases that explicitly suggest that the defending member state did not dispute the Commission's claims. In such cases, the member state often excused itself by stating that it had not had the time to change the laws, that new laws are underway, or that adjusting the rules in question had been a complex procedure for other reasons. However, these excuses fall short of actually contesting the Commission's claim – the state never disputed that it had failed to comply with the rule in question; it only argued and/or debated the reason for this failure.

In *contested* cases, by contrast, the defending member state disputed the Commission's claim in one of two ways – either it claimed that it has not done what the Commission claimed or, most commonly, it disputed the Commission's interpretation of the rule. In the latter case, when the Commission claimed that the member state had failed to abide by a certain provision, the state responded that that is not what the provision means. This type of contestation often contains a claim that the member state is allowed some derogation from a general provision in the invoked law. In some cases, the member state contested some parts of the Commission's claim but not others or otherwise partially contested the claim. In this report, we treat these cases (68 cases) as *contested*.

To code the outcome of the cases, whether the Commission or the member state won, we coded how the costs of the case were distributed by the Court across the parties. The Court's judgments in direct action cases always include a decision on how to split the costs between the Commission and the member state based on the extent to which each party has been correct in its arguments.[10] If the Court finds that the two parties have won equally in the case, the costs are split evenly (50–50), whereas, if the Commission has won three-quarters of the case, the member state should pay 75 per cent of the costs and the Commission 25 per cent. In most cases, the Commission paid nothing, that is, it won the case (664 cases). In 85 cases, the Commission lost completely and had to bear the full costs. In 59 cases, the costs were evenly split between the parties, and 18 cases involved other cost divisions (e.g. the Commission paid 25 per cent of the costs).

In addition to these outcome variables, we coded a number of case characteristics that we will use to analyse contestation and success: 1) the types of laws on which the Commission's claims and the Court's judgments are based; 2) whether the cases resulted in an opinion by an AG; 3) whether the infringement was solely about the late transposition of a directive; and 4) whether the case received any observations from the other member states or institutions in support of either side of the case.

---

[8] The AG's role is to assist the Court by providing "reasoned submissions" in cases before it (TFEU, article 252) to make the Court's work as efficient as possible by exploring the legal issues of the cases in an effort to advise, and at times warn, the Court before it provides its judgments. AG opinions became formally optional with the entry into force of the Nice treaty in the previous year (Sharpston, 2008).

[9] Note, however, that 2014 is not a sharp juncture – Daniel Kelemen and Tommaso Pavone (2022) argued that the change started earlier – and the Commission strategy does not have a clear starting point either.

[10] See chapter 6 of the Rules of Procedure of the Court of Justice (Celex 32012Q0929).

Table 1. Distribution of contested cases

	Contested		Total
	Yes	No	
Treaty	137 91%	13 9%	150 100%
Directive	229 48%	250 52%	479 100%
Regulation and decision	62 74%	22 26%	84 100%
AG opinion	214 98%	4 2%	218 100%
No AG opinion	264 49%	276 51%	540 100%
Interventions	129 96%	5 4%	134 100%
No interventions	349 56%	275 44%	625 100%
Late transposition	14 7%	186 93%	200 100%
Directives, excluding late transposition cases	215 77%	64 23%	279 100%
Total	478 63%	280 37%	758 100%

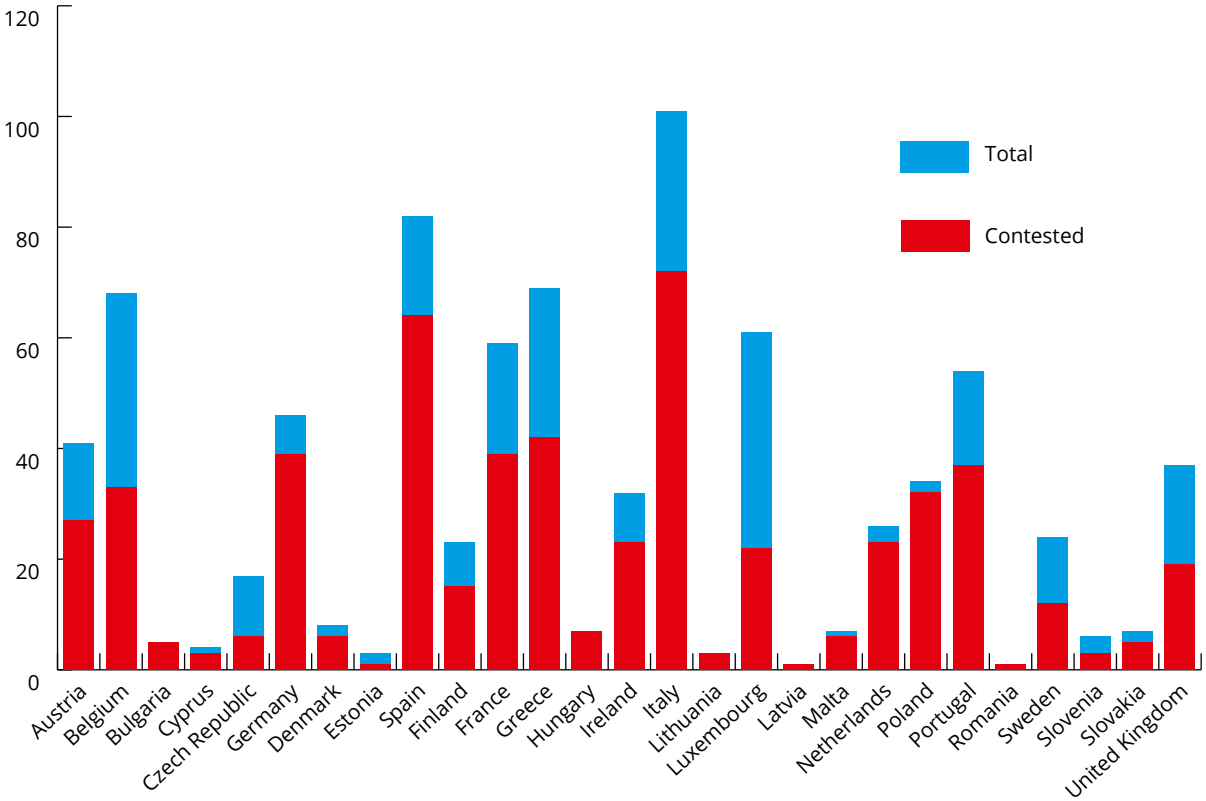
Note: The figures are based on the coding of judgments in infringement cases published at curia.europa.eu

5.2 Contestation in the Court

Table 1 presents the descriptive statistics on the cases that member states have contested in the Court and how these are distributed along key characteristics, like the type of law concerned, whether the case was subject to an AG opinion, whether other institutions or other member states have made interventions, and whether it concerns late transposition of a directive. The table includes the percentages of the cases *within each category* that were contested and uncontested to facilitate the comparison between case characteristics. For instance, the category *AG opinion* contains all cases in which an AG opinion was submitted and the number and share of those cases that the accused member state contested and did not contest. The table omits partially contested cases, which means that only 758 cases are included in these figures.

From Table 1, we observe that the member states contested the Commission's claims in a majority of the cases on which the Court delivered a judgment (63 per cent). It also highlights clear differences in contestation in some of the groups of cases that are displayed. We can, for instance, observe much more contestation in cases that concerned treaties (but also regulations and decisions) compared with cases that concerned directives. The high level of contestation in treaty cases may be driven by the fact that treaty provisions are often of a more general nature, giving room for conflicting interpretations, and they frequently deal with more principally important questions. The comparatively low contestation rate in cases concerning directives is in turn driven by the extent to which these cases involved late transposition of the directives, which are cases caused by the member states having failed to adopt the domestic laws necessary to implement an EU directive within the time limit set by the directive. Late transposition cases are generally legally clear, and the member state therefore usually does not contest the infringement; that is, it agrees with the Commission that the rule in question (the deadline) has been broken. Sometimes, however, the member states do contest late transposition cases (7 per cent). These can, for example, concern directives that the member

Figure 2 : **Number of Direct Actions against member states and the share of contestation**



Note: The figures are based on the coding of judgments in infringement cases published at curia.europa.eu

states argue that they did not have to implement. However, in most instances, late transposition cases are brief, uncontested, and uncomplicated affairs. If we exclude these cases, the level of contestation for the remaining cases increases from 63 to 83 per cent.

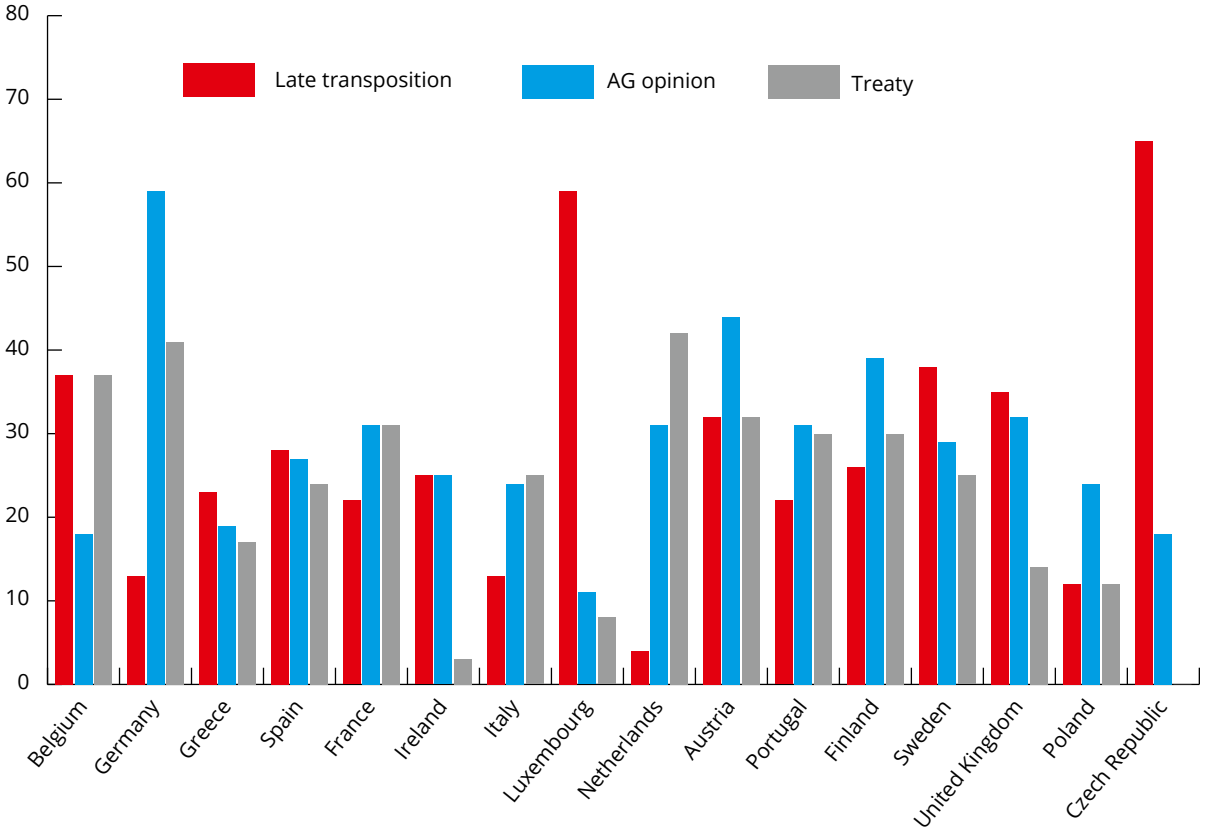
We also observe more contestation (96 per cent) in cases in which other institutions and member states make interventions, which can be seen as an indication of heightened conflict in these cases. The level of contestation is also higher in the cases that the Court has deemed to warrant an opinion by an AG (98 per cent). The Statute of the Court of Justice states that an opinion by an AG is not required for a case that "raises no new point of law",[11] which suggests that an AG opinion is only required when the legal situation is unclear; in that situation, it is not surprising that the Commission and the member state have divergent opinions about how to interpret the EU law.

Figure 2 displays the number of direct action cases against each of the member states (the blue bars) and the share of those cases that were contested or partially contested (the red part of each bar). The number of cases against each member state largely follows a well-known pattern of infringement cases found in other studies, looking at other steps of the procedure, in which southern EU member states have stood out in terms of non-compliance (Börzel, 2021). Regarding cases in which the Court delivered a judgment, the highest numbers are found for Italy, Spain, Belgium, and Greece. Eastern member states had comparatively low numbers of cases against them in this period, even though research has suggested that non-compliance took place (here, more research is needed, but see Börzel & Sedelmeier, 2017; Falkner & Treib, 2008).

We also observe substantial variation in contestation between member states. Some states have contested all cases against them (Bulgaria,

[11] Article 20 of the Protocol (No. 3) on the Statute of the Court of Justice of the European Union.

Figure 3: **Member states' share of cases with different case characteristics (percent)**



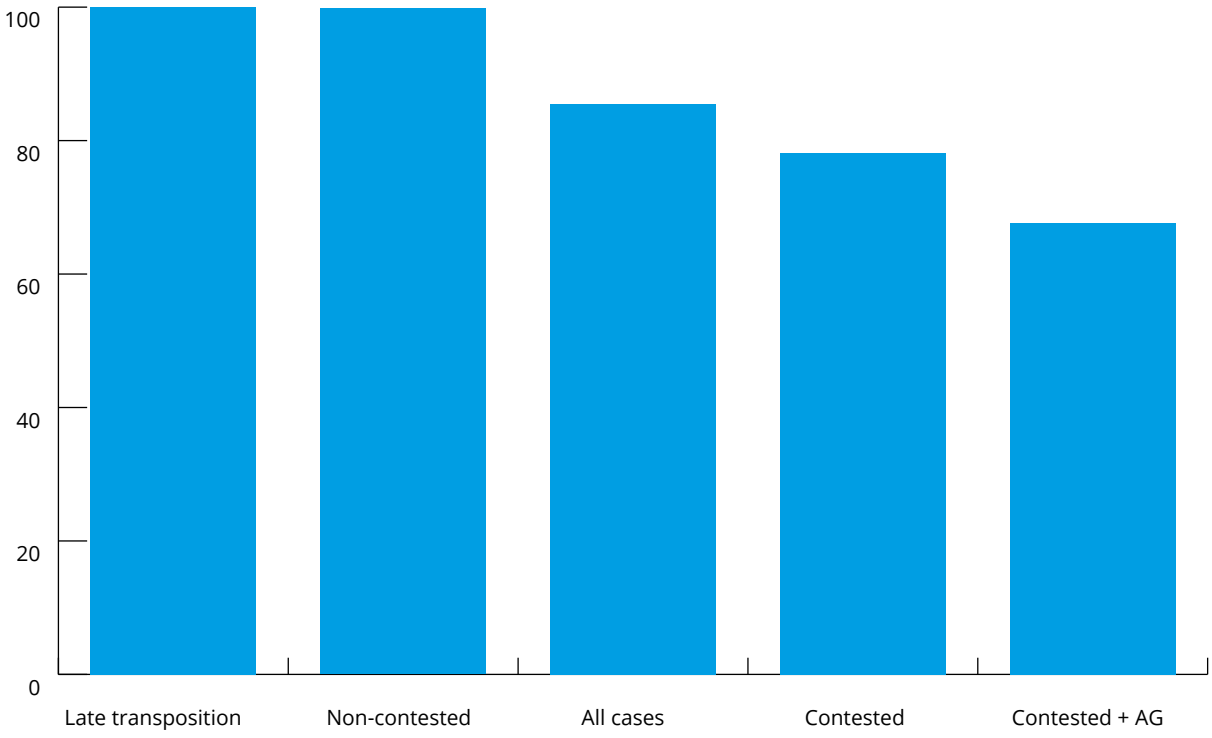
Note: The figures are based on the coding of judgments in infringement cases published at curia.europa.eu

Hungary, Lithuania, Latvia, and Romania), but these member states at the same time have had a very low total number of cases against them (fewer than 10). This inevitably means less variation to explore. Among the member states with a higher total number of cases against them, there are clear differences between states like Germany, Poland, and the Netherlands, which contested the Commission's claims in most cases. A member state like Luxembourg in turn contested fewer than one-third of the cases, while Sweden and the Czech Republic also have comparatively low contestation levels (below 50 per cent).

Figure 3 displays the shares of cases against each member state that contain the most decisive characteristics of contested cases based on Table 1.[12] The figure only includes states that have more than 10 cases against them in the studied period. Again, we observe substantial variation between the member states. Starting with Germany, the Netherlands,[13] and Poland, which have often contested the Commission's claims in the Court, they all have a comparatively small share of late transposition cases (the red bars in the figure). The cases against Germany and the Netherlands instead concerned the treaties, and they have often been subject to AG opinions. The request for an AG opinion indicates that the cases against these member states were less clear from a legal perspective. The cases against Poland less often concerned the treaties and were less often subject to AG opinions, indicating that Polish contestation was driven to a lesser extent by unclear legal

[12] While interventions are one of the most decisive case characteristics for contestation, they are also comparatively rare and hence are omitted from this graph.
[13] The Netherlands is also the member state with the largest share of cases that progressed to the Court on which the Court also delivered a judgment (Panke, 2010, p. 253). This might further indicate that the Netherlands has contested the Commission's claims against it more often.

Figure 4: **Mean of Commission success for different types of cases (percent)**



Note: The figures are based on the coding of judgments in infringement cases published at curia.europa.eu

norms. Among the states with the lowest levels of contestation in Figure 2 (e.g. Luxembourg, Sweden, and the Czech Republic), we instead observe larger shares of late transposition cases.

At this stage, we can thus identify two groups of cases, which tended to lead to different levels of contestation involving different member states. The first group contains cases that were subject to AG opinions and concerned treaty interpretation and were often contested by the member states. The second group consists of the simpler late transposition cases, which were almost never contested. Some states appeared as defendants more often in the first group of cases, for example Germany and the Netherlands. Other member states appeared more often in cases of the second kind, notably the Czech Republic and Luxembourg. The way in which the different case characteristics are distributed across cases against different member states can offer important clues to explain both the state behaviour and the possible biases that inform the Commission's choices to bring cases to the Court. In the next section, we turn to the matter of success in infringement cases and how this is affected by the case characteristics that we have discussed.

5.3 The Commission wins often, not always

Our second empirical step is to evaluate how the different categories relate to the Commission's (and member states') success in the Court. The general expectation here is that the Commission's success will vary between these categories of cases. Most notably, cases in which the member state did not contest the Commission's accusations should be almost impossible for the Commission to lose. Conversely, the higher the levels of contestation and legal uncertainty, the more the Commission's success rate is expected to drop.

Figure 4 displays the mean value of *Commission success* against the member states across five groups of cases. In line with the expectation, the Commission has a 100 per cent success rate in the cases in which the member state did not contest the Commission's claims. The figure also presents the equally high success rate for the Commission in

cases that concerned late transposition of directives, in which the member states hardly ever contested the claims (these two categories largely overlap).

The Commission's high overall success rate that previous studies have referred to is visible in the bar displaying *all cases*. Note that this measurement is somewhat different from the measurement of success employed in previous studies. As we use the share of the costs allocated by the Court, *Commission success* can vary from 0 to 1, including intermediate steps like 0.5 (the Commission and the defending state shared the costs, i.e. the Commission and the state each won on some points) or 0.75 (the Commission won substantively on most but not all points). The bars of Figure 4 display the mean of this variable (0.85 for *all cases*).

To the extent that it is possible to discern (it is sometimes unclear exactly what measurement studies have used), previous studies' claims about the Commission's success rate are based on whether the Commission won *anything* at all in the cases and thus whether the Court found that the member state was non-compliant on any of the claims that the Commission put forth. While this is reasonable if the interest is in detecting whether *any* non-compliance occurred in a given case, it is less useful for determining the overall share of cases or claims that the Commission has won. Here, the costs offer a useful metric. The Commission paid zero costs (i.e. won the full case) in 80 per cent of cases and paid less than the full cost (i.e. won at least partially) in 90 per cent of cases.

Figure 4 also displays the drop in the Commission's success rate for cases in which the accused member state contested[14] the Commission's claims (78 per cent) and cases that were both contested and involved the AG (67 per cent). In sum, the overall high success rate of the Commission masks substantial variation depending on how the success rate is counted and on the presence of these case characteristics. Scholars and practitioners alike should be careful not to assume that the Commission "always wins" in the infringement procedure. It has won in easy cases in which the member states readily admitted to non-compliance; however, this is not the majority of cases (34 per cent of all cases in the dataset were non-contested). Most cases were contested (66 percent), and many of these also included an AG opinion (28 per cent). In these cases, the Commission was far from always being successful.

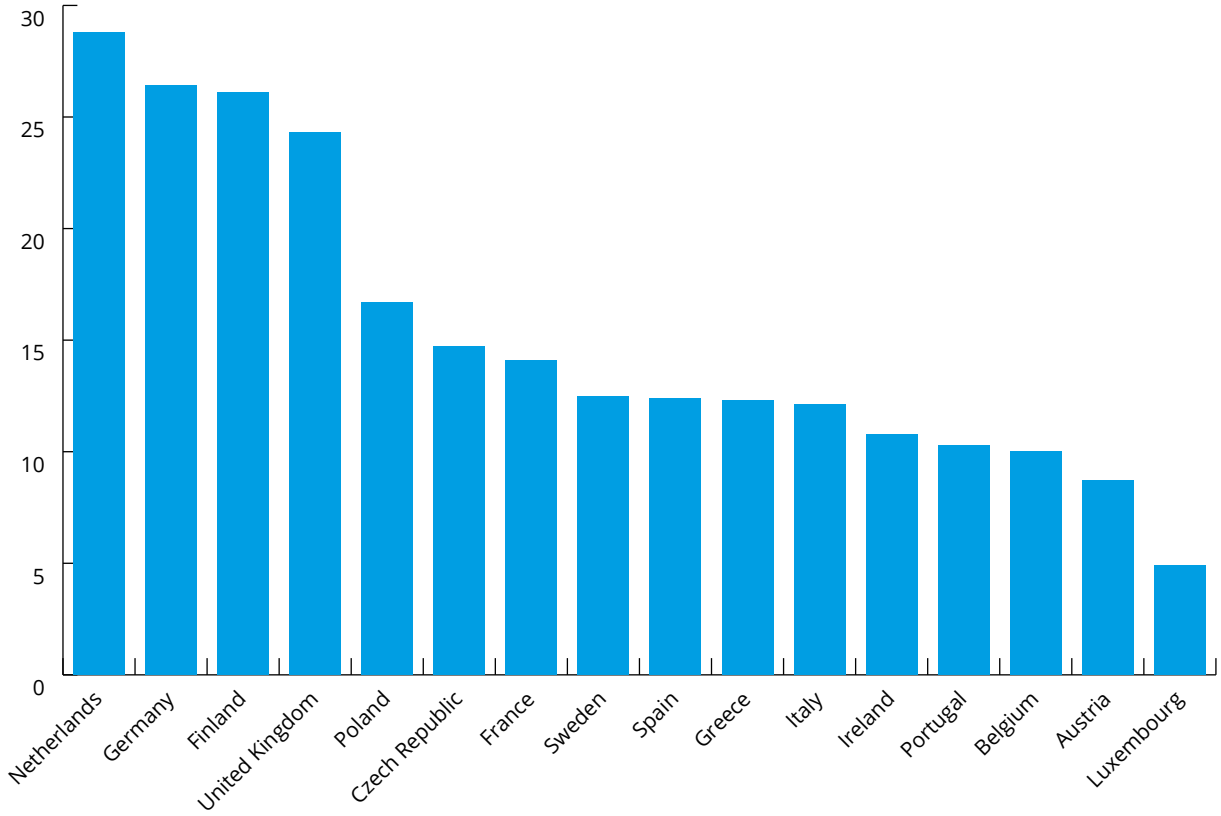
"In sum, the overall high success rate of the Commission masks substantial variation depending on how the success rate is counted and on the presence of these case characteristics."

The Commission's success rate varies not only between different kinds of cases but also across cases against different member states. In Figure 5, we display the mean of success for the member states, using the same (but reversed) variable as in Figure 4. This graph only includes states with more than 10 cases. While the member states overall won only in a minority of cases, there is also substantial variation in success rates. The Netherlands is the most successful member state in defending itself against the Commission's claims about non-compliance, followed by Germany, Finland, and the UK. Germany and the Netherlands were pointed out above as member states that have often contested the Commission's claims and that have high numbers of treaty cases and cases with AG opinions. Finland has the third-largest share of AG opinions in its cases, while the UK has the fourth-largest share of AG opinions. The UK, however, differs somewhat in that it has a small share of treaty cases and a large share of late transposition cases. Note that states like the UK can still be remarkably successful in cases that do not concern late transposition – here, the UK has won 37.5 per cent of its cases.

Luxembourg is positioned at the opposite end of the scale of member state success, which is to be expected given its large share of late transposition cases and low contestation rate. More surprisingly, Austria also has a comparatively low success rate, taking into account that it has the second-largest share of cases with an AG opinion.

[14] Including partial contestation.

Figure 5: **Mean of member state success (percent)**



Note: The figures are based on the coding of judgments in infringement cases published at curia.europa.eu

In sum, there is a considerable amount of variation among the member states. Some have more frequently ended up in Court in very clear-cut cases that they have not contested, whereas others have more frequently ended up in Court in complicated cases involving AG opinions. When cases have not been contested, the state has almost always lost, but, within the group of more complicated cases, there are differences among the member states.

6. Conclusion

In this analysis, we have evaluated the interactions between the member states and the Commission in the infringement cases that have reached the Court of Justice of the EU. Our ambition was to nuance the commonly held beliefs about the substance of the infringement proceedings that the Commission launches against the member states. Accordingly, we based our analysis on the cases that were brought to the Court by the Commission against the member states in the period 2004–2014. We focused particularly on whether the member states contested the Commission's claims against them and the extent to which the Commission (and the member states) won the cases in the Court.

We found that the member states are more prone to contest cases that concern the treaties, when the Court hears an AG, and when other institutions and member states make interventions in the cases. All these factors can be understood as indicators of case uncertainty. AG opinions are only delivered when a case raises new points of law, and treaty provisions tend to be more general in nature and thus open to a variety of interpretations. Interventions can in turn indicate more conflict, and this in sum increases the likelihood that the accused state will contest the Commission's claims. We have also observed that different member states, to various degrees, are subject to cases that display these different case characteristics. We cannot, based on this analysis, know whether this variation is a consequence of some member states being more likely to violate certain types of laws

or having national practices that make them more prone to behave in certain ways at the Court, but there are some indications that this might be part of the explanation (Johansson & Larsson, 2020). We cannot, however, exclude the possibility that part of the explanation is also to be found in the Commission's strategies regarding which cases it pursues against different member states. This variation should be the focus of further analyses to shed light on whether the Commission has biases against some member states.

> "In short, if we only consider the cases in which the outcome is uncertain, the Commission is far less successful."

We have also analysed the extent to which the Commission wins the infringement cases in the Court. Much of the literature on infringements has pointed out that the Commission almost always wins in the Court and taken that as evidence that the Commission has well-founded allegations against the member states throughout the procedure. Such conclusions have been based on whether the Commission won any of its claims in the Court and thus whether the accused member state was non-compliant at all. In our analysis, we instead coded the allocation of the costs between the parties and thus also whether the Commission was only partly successful in its claims against the member states. This is more reasonable when exploring the question of the success of the Commission versus the member states. With this measure of success, the Commission's success rate drops, and it falls even further when we contrast success with contestation and associated case characteristics. In short, if we only consider the cases in which the outcome is uncertain, the Commission is far less successful.

The success rates and the different case characteristics also vary greatly in cases against different member states. This is an indication that the Commission tends to push hard-to-win cases more against some member states than others. Our analysis thus offers a more nuanced picture of the Commission's success in the infringement cases in the Court, which should provide important motivation to analyse further the possible biases in the Commission's prosecution strategy against member states.

Finally, the fact that the Commission does not always win also means that many infringement cases are far from settled from the start. In particular, the cases in which the Commission is not the obvious winner and in which there are thus legal reasons for the member states to contest the Commission's claims are worth investing in for the member states. In this type of case, there is also likely to be some room for influence. In light of this, the member states' limited use of interventions in the cases that they are not part of is surprising. In the preliminary reference procedure – the EU's fire alarm system to secure compliance – member state interventions are much more frequent than in the infringement cases covered in this analysis, and research has also shown that interventions in preliminary reference cases have an impact on the Court's rulings. The comparatively limited use of this instrument in infringement procedures may therefore be a lost opportunity for influence for the member states (Cramér et al., 2016; Larsson & Naurin, 2016).

7. References

Ademmer, E. (2018). Capitalist diversity and compliance: Economic reforms in Central and Eastern Europe after EU accession. *Journal of European Public Policy*, *25*(5), 670–689.

Andonova, L. B., & Tuta, I. A. (2014). Transnational networks and paths to EU environmental compliance: Evidence from new member states. *JCMS: Journal of Common Market Studies*, *52*(4), 775–793.

Böhringer, C., Rutherford, T. F., Balistreri, E. J., & Weyant, J. (2012). Introduction to the EMF 29 special issue on the role of border carbon adjustment in unilateral climate policy. *Energy Economics*, *34*, S95–S96.

Börzel, T. A. (2021). Why noncompliance. In *Why noncompliance*. Cornell University Press.

Börzel, T. A., & Buzogány, A. (2019). Compliance with EU environmental law. The iceberg is melting. *Environmental Politics*, *28*(2), 315–341.

Börzel, T. A., Hofmann, T., & Panke, D. (2012). Caving in or sitting it out? Longitudinal patterns of non-compliance in the European Union. *Journal of European Public Policy*, *19*(4), 454–471.

Börzel, T. A., Hofmann, T., Panke, D., & Sprungk, C. (2010). Obstinate and inefficient: Why member states do not comply with European law. *Comparative Political Studies*, *43*(11), 1363–1390.

Börzel, T. A., & Knoll, M. (2012). *Quantifying non-compliance in the EU: A database on EU-infringement proceedings*.

Börzel, T. A., & Sedelmeier, U. (2017). Larger and more law abiding? The impact of enlargement on compliance in the European Union. *Journal of European Public Policy*, *24*(2), 197–215.

Carrubba, C. J., Gabel, M., & Hankla, C. (2008). Judicial behavior under political constraints: Evidence from the European Court of Justice. *American Political Science Review*, *102*(4), 435–452. https://doi.org/10.1017/S0003055408080350

Cramér, P., Larsson, O., Moberg, A., & Naurin, D. (2016). *See you in Luxembourg? EU Government's observations under the preliminary reference procedure*. SIEPS.

European Commission. (2017). *Monitoring the application of Union law*. https://ec.europa.eu/info/sites/info/files/report-2017-commission-staff-working-document-monitoring-application-eu-law-policy-areas-part2.pdf

Falkner, G., Hartlapp, M., Leiber, S., & Treib, O. (2004). Non-compliance with EU Directives in the member states: Opposition through the backdoor? *West European Politics*, *27*(3), 452–473.

Falkner, G., Hartlapp, M., & Treib, O. (2007). Worlds of compliance: Why leading approaches to European Union implementation are only 'sometimes-true theories'. *European Journal of Political Research*, *46*(3), 395–416.

Falkner, G., & Treib, O. (2008). Three worlds of compliance or four? The EU-15 compared to new member states. *JCMS: Journal of Common Market Studies*, *46*(2), 293–313.

Finke, D., & Dannwolf, T. (2015). Who let the dogs out? The effect of parliamentary scrutiny on compliance with EU law. *Journal of European Public Policy*, *22*(8), 1127–1147.

Fjelstul, J. C., & Carrubba, C. J. (2018). The politics of international oversight: Strategic monitoring and legal compliance in the European Union. *American Political Science Review*, 1–17.

Hartlapp, M., & Falkner, G. (2009). Problems of operationalization and data in EU compliance research. *European Union Politics*, *10*(2), 281–304.

Haverland, M. (2000). National adaptation to European integration: The importance of institutional veto points. *Journal of Public Policy*, 83–103.

Haverland, M., Steunenberg, B., & Van Waarden, F. (2011). Sectors at different speeds: Analysing transposition deficits in the European Union. *JCMS: Journal of Common Market Studies*, *49*(2), 265–291.

Hofmann, T. (2018). How long to compliance? Escalating infringement proceedings and the diminishing power of special interests. *Journal of European Integration*, *40*(6), 785–801.

Holzinger, K. (2005). Tax competition and tax co-operation in the EU: The case of savings taxation. *Rationality and Society*, *17*(4), 475–510.

Johansson, M., & Larsson, O. (2020, 17−18 September). Explaining non-compliance with affirmative and negative obligations [Conference presentation]. Conference on Non-Compliance in the European Union: Patterns, Explanations and Remedies.

Kelemen, R. D., & Pavone, T. (2022). Where have the guardians gone? Law enforcement and the politics of supranational forbearance in the European Union. *APSA Preprints.* https://doi.org/10.33774/apsa-2022-c0qjl.

König, T., & Luetgert, B. (2009). Troubles with transposition? Explaining trends in member-state notification and the delayed transposition of EU directives. *British Journal of Political Science*, 163–194.

König, T., & Mäder, L. (2014). The strategic nature of compliance: An empirical evaluation of law implementation in the central monitoring system of the European Union. *American Journal of Political Science*, *58*(1), 246–263.

Larsson, O., & Naurin, D. (2016). Judicial independence and political uncertainty. How the risk of override impacts on the Court of Justice of the EU. *International Organization*, *70*(2), 377–408.

Leino-Sandberg, P. (2021). *The politics of legal expertise in EU policymaking*. Cambridge University Press.

Linos, K. (2007). How can international organizations shape national welfare states? Evidence from compliance with European Union directives. *Comparative Political Studies*, *40*(5), 547–570.

Majone, G. (2005). *Positive and negative integration*. Oxford University Press.

Mastenbroek, E. (2003). Surviving the deadline: The transposition of EU directives in the Netherlands. *European Union Politics*, *4*(4), 371–395.

Mbaye, H. A. (2001). Why national states comply with supranational law: Explaining implementation infringements in the European Union, 1972−1993. *European Union Politics*, *2*(3), 259–281.

Panke, D. (2010). *The effectiveness of the European Court of Justice: Why reluctant states comply*. Manchester University Press.

Perkins, R., & Neumayer, E. (2007). Do membership benefits buy regulatory compliance? An empirical analysis of EU Directives 1978−99. *European Union Politics*, *8*(2), 180–206.

Pircher, B., & Loxbo, K. (2020). Compliance with EU law in times of disintegration: Exploring changes in transposition and enforcement in the EU member states between 1997 and 2016. *JCMS: Journal of Common Market Studies*, *58*(5), 1270–1287.

Ruhs, M., & Palme, J. (2018). Institutional contexts of political conflicts around free movement in the European Union: A theoretical analysis. *Journal of European Public Policy*, *25*(10), 1481–1500.

Sharpston, E. (2008). The changing role of the Advocate General. In A. Arnull, P. Eeckhout, & T. Tridimas (Eds.), *Continuity and change in EU law: Essays in honour of Sir Francis Jacobs* (pp. 20–33). Oxford University Press.

Simmons, B. A. (2013). International law. In W. Carlsnaes, T. Risse, & B. A. Simmons, *Handbook of international relations* (pp. 352–378). SAGE Publications Ltd.

Smith, M. (2010). *Centralised enforcement, legitimacy and good governance in the EU*. Routledge.

Steunenberg, B., & Toshkov, D. (2009). Comparing transposition in the 27 member states of the EU: The impact of discretion and legal fit. *Journal of European Public Policy*, *16*(7), 951–970.

Tallberg, J. (2002). Paths to compliance: Enforcement, management, and the European Union. *International Organization*, *56*(3), 609–643.

Thomson, R. (2009). Same effects in different worlds: The transposition of EU directives. *Journal of European Public Policy*, *16*(1), 1–18.

Thomson, R. (2010). Opposition through the back door in the transposition of EU directives. *European Union Politics*, *11*(4), 577–596.

Thomson, R., Torenvlied, R., & Arregui, J. (2007). The paradox of compliance: Infringements and delays in transposing European Union directives. *British Journal of Political Science*, *37*(4), 685–709.

Thomson, R., Torenvlied, R., & Judge, A. (2020). Incentives to comply: The impact of national governments' and stakeholders' preferences on compliance with EU laws. *Journal of European Public Policy*, *27*(12), 1801–1818.

Toshkov, D. (2019). Does Euroscepticism influence compliance and enforcement of EU law in the member states? In *Challenges to EU law in the member states*. Hart Publishing.

Treib, O. (2014). Implementing and complying with EU governance outputs. *Living Reviews in European Governance*, *9*. https://doi.org/10.12942/lreg-2014-1

Zhelyazkova, A. (2013). Complying with EU directives' requirements: The link between EU decision-making and the correct transposition of EU provisions. *Journal of European Public Policy*, *20*(5), 702–721.

Zhelyazkova, A., Kaya, C., & Schrama, R. (2016). Decoupling practical and legal compliance: Analysis of member states' implementation of EU policy. *European Journal of Political Research*, *55*(4), 827–846.