

QUANTIFYING NON-COMPLIANCE IN THE EU

A Database on EU Infringement Proceedings

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November 2012

Berliner Arbeitspapier zur Europäischen Integration Nr. 15

Berlin Working Paper on European Integration No. 15

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Die Berliner Arbeitspapiere zur Europäischen Integration werden von Prof. Dr. Tanja A. Börzel, Jean Monnet Lehrstuhl für Europäische Integration und Leiterin der Arbeitsstelle Europäische Integration am Otto-Suhr-Institut für Politikwissenschaft der Freien Universität Berlin, veröffentlicht. Die Arbeitspapiere sind auf der gemeinsamen Internetseite von Jean Monnet Lehrstuhl und Arbeitsstelle verfügbar: <http://www.fu-berlin.de/europa>

The Berlin Working Papers on European Integration are published by Prof. Dr. Tanja A. Börzel, Jean Monnet Chair for European Integration and Director of the Centre for European Integration of the Otto Suhr Institute for Political Science at the Freie Universität Berlin. The Working Papers are available on the joint website of the Jean Monnet Chair and the Centre: <http://www.fu-berlin.de/europa>

Abstract

This paper provides a detailed overview of a publicly available infringement database which contains 5.800 cases for the time period 1978-1999. We first address the question whether infringement proceedings are a reliable indicator for non-compliance in the European Union. In the following we present descriptive statistics on various characteristics of the infringement cases.

The infringement database is accessible by a user-friendly web interface. It is also possible to download the raw data.

<http://www.infringement-db.jmce.org/Index.html>

Please cite this paper when using the infringement database.

1. Introduction

Does the European Union (EU) suffer from a serious compliance problem? Early works on non-compliance in the EU argued that the legal transposition and effective application of EU Law is a systemic and pathological problem of the EU (cf. Krislov et al. 1986; Weiler 1988; From and Stava 1993). In 1985, the European Commission warned that political and legislative efforts to create the internal market “will be in vain if the correct application of the agreed rules is not ensured.”¹

Current transposition rates for internal market policies reach 99 per cent which could indicate that the alleged compliance deficit is a problem of the past.² But these transposition rates only describe the amount of notifications send to the Commission by the member states; incorrect legal transpositions and missing practical applications are not included. Without reliable data, it is impossible to assess the degree of non-compliance in the EU.

This paper discusses the various indicators for non-compliance developed by the literature to quantify non-compliance in the EU. We explore their strengths and weaknesses and compare them to data on infringement proceedings we compiled for the project “Non-compliance with law beyond the nation-state”, funded by the Deutsche Forschungsgemeinschaft (DFG) 2002-2006.³ With the help of a JMCE grant⁴, we made the infringement database accessible by a user-friendly web interface. It is also possible to download the raw data (<http://www.infringement-db.jmce.org/Index.html>). Funding by both the DFG and the European Union is gratefully acknowledged.

¹ Completing the Internal Market: White Paper from the Commission to the European Council COM(85) 310, June 1985.

² Internal Market Scoreboard 25, European Union, 2012.

³ BO 1831/1-1.

⁴ Jean Monnet Centre of Excellence: Project No. 2009-2856.

2. Infringement data – reliable non-compliance measure?

Since more than a decade, research on (non-) compliance with EU law has been one of the most productive, diverse, and controversial subfields in European Union studies. A wide variety of qualitative and quantitative research designs has been deployed to analyze and better understand the transposition and implementation of EU law.

Scholars using qualitative methods have relied on case studies to analyze cross-country and within country variation in the legal transposition, practical application, and enforcement of national transposition measures of EU directives as well as European regulations, decisions, and treaty provisions. The project by Falkner, Treib, Hartlapp, and Leiber (2005) studied no less than 90 country-directive cases. Most case studies, however, have focused on only a small number of selected member states and European legal acts. These studies certainly have the advantage of providing detailed and in-depth insights into the costs of compliance, the enforcement activities by the European Commission, the case-specific administrative capacity of member states, preferences of domestic actors, or other causes of (non-) compliance with EU law. However, they also pay a price for this advantage. Developing their own assessment criteria and collecting the empirical information in laborious case studies renders the comparison of empirical findings and theoretical claims difficult (Toshkov et al. 2010). Others, therefore, have drawn on statistical data provided by the European Commission as the enforcement agent of the EU.

Quantitative compliance studies fall into one of two camps – one studying the (correct and) timely transposition of EU directives in the member states, the other working with infringement proceedings that the European Commission launches against member states for violations of EU law (cf. Toshkov 2010). While these studies might generate results of higher generalizability and external validity, they have their own shortcomings and methodological obstacles.

Since 1990, the Commission reports the Directives implemented by the member states as percentage of the Directives to be implemented (Börzel 2001: 815). The data is reliable. Yet, timely transposition is only one form of non-compliance with EU law, and arguably not the most relevant one. Not only has average transposition always been high (above 90%). It has improved over the years, from an average of 91% in 1990 to

an average of 95% in 1999. Moreover, the notification of national transposition measures is not the same as the “correct” and “timely” implementation of EU directives (cf. König and Luetgert 2009). While the notification of transposition might be an acceptable proxy for the timeliness of some kind of national implementation measures, there is no guarantee that these measures constitute a correct transposition of EU law. Therefore, researchers are left with a choice between two evils. They can either assume that member states correctly transpose and implement EU directives or have to develop some subjective standard that allows them to tell a member state’s compliance with a particular EU directive when they see it (cf. Duina 1997; Knill 1998). Of course, any such standard is open to criticism as it is hardly applicable to all cases at all times (cf. Toshkov 2010). Since member states have substantial discretion when implementing directives with respect to their choice of transposition instruments, it is hard to distinguish correct vs. incorrect implementation. In addition, transposition data relies exclusively on the notifications of implementation measures by member states, which have strong incentives to “sugarcoat” their implementation efforts – not least to avoid the European Commission opening infringement proceedings against them. In fact, there is extensive anecdotal and systematic evidence that member states transpose the letter of the law, but fail to adhere to its spirit.⁵ While legal implementation may be timely and formally correct, transposing member states are often unwilling or unable to apply and enforce national transposition measures. This is not just a problem for the legal rights and protection of the average European citizen and the larger European integration project. Such compliance shortcomings fly under the radar of transpositions studies. Consequently, the “sequel of correct application” of the national measures transposing EU directives is one of the under-researched areas in EU compliance studies (Mastenbroek 2005; Treib 2008).

Furthermore, infringement proceedings opened by the European Commission for the non-notification of formal transposition make up only 57% of all infringement proceedings in the time period 1978-1999. Studies that rely exclusively on notification data miss a large proportion of non-compliance cases that get detected by the European Commission’s own initiative and by complaints of third parties. This might affect the

⁵ In our data set alone, there are nearly 800 infringement cases, which reached at least the Reasoned Opinion stage, that were opened due to the incorrect application of national measures, i.e., due to member states formally transposing EU directives on time, but failing to implement and enforce them subsequently on the ground.

conclusions these studies draw about the explanations of variation in compliance with EU laws. Finally, there is evidence that these explanations differ with regard to the different types of EU legislation (Börzel 2001; Mbaye 2001). For instance, Scott Siegel (2011) points out how analyzing only directives might lead to conclusions that underestimate the role of economic adjustment costs, legitimacy, or special interests since national parliaments and bureaucracies can bypass domestic opposition in the transposition process, but not when it comes to the application and enforcement of EU directives. Regulations do not require transposition but have immediate effect. Their number by far exceeds that of directives (cf. König 2006).

Studies relying on infringement proceedings “outsourcē the identification of violations of EU law. They either rely on the European Commission’s assessment or, following a strictly legalistic definition of compliance, considers member states’ actions to be in line with EU law unless (and only unless) the European Court of Justice declares them to be in breach of EU law (cf. Toshkov 2010). While this way of measuring non-compliance helps scholars to steer clear of the problems that they face when using transposition data, it comes with its own problems and pitfalls. There are reasons to question whether infringement proceedings qualify as a valid and reliable indicator of compliance failure and constitute a representative sample of all the violations that occur.⁶

There is no question that infringement proceedings present only a fraction of all instances of non-compliance. For reasons of limited resources, the European Commission can only prosecute cases that constitute the tip of the non-compliance iceberg (Falkner et al. 2005). It is not capable of detecting and legally pursuing all instances of non-compliance with EU law. While this might be unfortunate, the real concern is a potential bias in the data against particular member states. If infringement data did not constitute a “random sample” of all instances of non-compliance, such a bias in the data would also bias the findings on the causes of non-compliance. Therefore, the question that researchers that make use of the European Commission’s infringement data need to address is whether or not these data are a fair representation of the universe of non-compliance cases in the EU.

⁶ For a more detailed discussion of these issues, see Börzel (2001).

While it might not be possible to answer this question by statistical means, we can advance at least three arguments for why infringement data do not contain a systematic selection bias. First, the European Commission tends to perceive itself as “the guardian of the Treaties” and has a clear legal mandate to enforce the correct and timely transposition, implementation, and application of EU law. If it was systematically biased in its selection of infringement cases, it would not only undermine its self-conception, but its legal mandate and its legitimacy. In other words, there are two mechanisms at work that prevent the European Commission from abusing its discretion. Commission officials follow a powerful organizational “logic of appropriateness” (March 1998) and they are aware of the fact that the European Commission’s authority as the guardian of the Treaties depends in large parts on its credibility as an impartial adjudicator between competing interests. It has to avoid giving the impression of treating member states in an unequal and unfair fashion. Second, the unequivocal formulation of Article 258 of the Treaty on the Functioning of the European Union (ex Article 226)⁷ and the Commission’s role as the guardian of the Treaties mandate the Commission to enforce EU law and to prosecute any infringements it detects (Albin 1999: 290). This legal obligation alone might not prevent Commission officials from favoring their own country, but Morten Egeberg (2001) and others have argued that the European Commission’s identity as a supranational body makes it sufficiently inappropriate for Commission officials to block legal action against their own member state when it stands accused of violating EU law to avoid any systematic bias. Also, even if individual Commission officials had incentives to favor their own country, decisions to open and escalate infringement proceedings (i.e., to send Reasoned Opinions to member states that have failed to fulfill their obligations or to refer infringement cases to the ECJ) are made under the principle of collegiality. That is, “the decision to bring an action for a declaration of failure to fulfill obligations must be the subject of collective deliberation by the college of Commissioners and the information on which those decisions are based must therefore be available to the members of the college”.⁸

There are strong safeguards in place against any systematic “prosecution bias” by the European Commission. As it is bound to prosecute and the decision to start a proceed-

⁷ “If [...] a Member State has failed to fulfill an obligation under the Treaties, [the European Commission] shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.” (emphasis added).

⁸ Opinion of Mr Advocate General Jacobs delivered on 26 January 1999. Commission of the European Communities v Federal Republic of Germany (Case C-198/97).

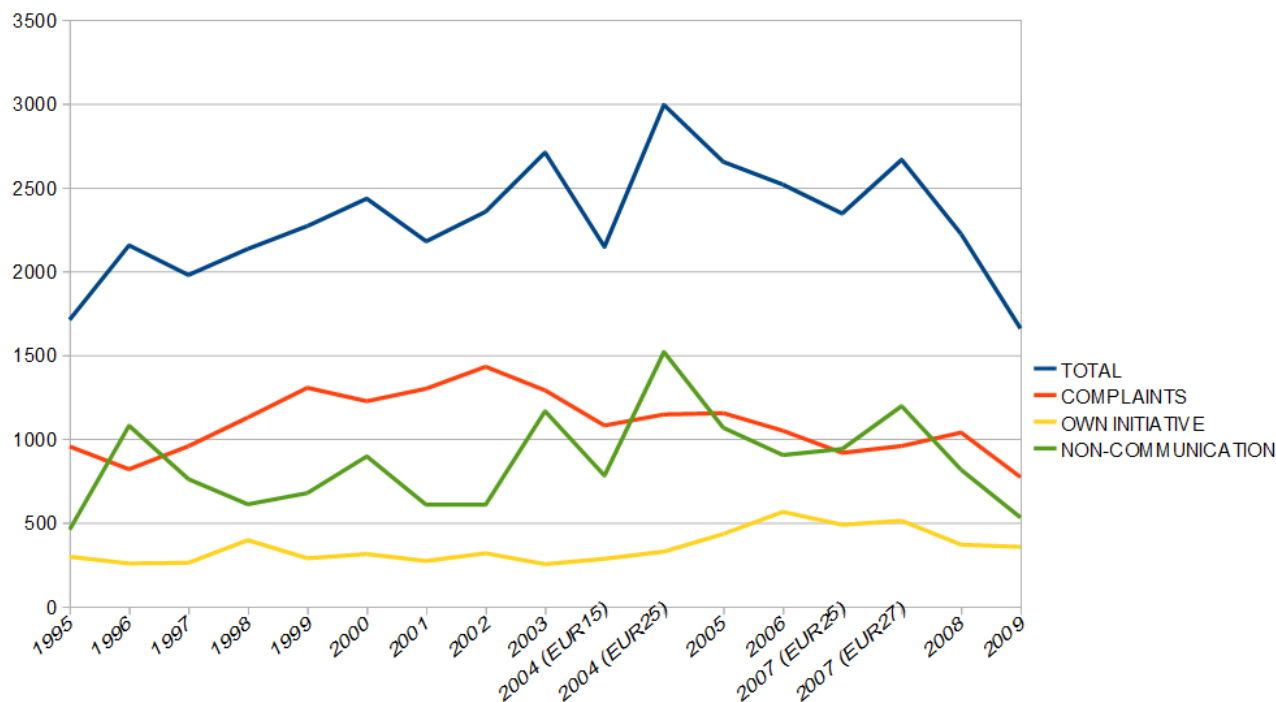
ing involves Commission officials from all countries, it is highly unlikely that the European Commission could treat some member states systematically different than others. However, there could be systematic “detection bias”, i.e., the European Commission might be prosecuting all infringements on EU law it detects, but systematically investigate and detect more infringements by some member states than others – independent of their true compliance records. Tanja Börzel (2002) has previously argued that the European Commission lacks capacity and that this lack of capacity prevents it from detecting more breaches of EU law. While Commission officials have a lot of expertise on EU law and potential problems with its implementation, they can only do so many on-site visits in the member states, and spot-checks tend to be time-consuming, politically fraught, and can easily be blocked by member states. Given the limited enforcement capabilities of the European Commission and the huge task of monitoring the implementation of every piece of European legislation in all member states, one can easily envision the European Commission not only to be overstrained, but strategic and selective in its investigation efforts.

While this is a valid point, it leads us to our second arguments for why infringement data do not contain a systematic selection bias. Simply put, the detection of non-compliance does not rely exclusively on the European Commission (see Figure 1). Instead, there is a sophisticated and parsimonious system in place, which combines mandatory notification of transposition, i.e., member states reporting back on their implementation activities, consultancy reports, whistle-blowing by national administrations, complaints lodged by European citizens, organized interests (e.g., trade unions and environmentalist non-governmental organizations), and companies, as well as petitions and questions by the European Parliament. This procedure that combines formal and informal aspects is not only more cost-efficient than systematic inquiries by the European Commission itself, but makes it possible to spot instances of incorrect implementation and application that might have otherwise gone undetected. Furthermore, Jonas Tallberg (2002) even argues that this procedure provides the European Commission with information about areas of EU legislation that are particularly ambiguous and require clarification in order to prevent unintended and accidental violations of EU law.

Even if the European Commission was biased in its own investigations, these are only responsible for a fraction of all detected and prosecuted violations of EU law. The com-

plaint mechanism has developed into the “chief source for detecting infringements”⁹, and is not clear why whistle-blowers, individuals, organized interests, or companies should be systematically biased in favor or against detecting and reporting (presumed) legal or actual non-compliance of some EU member states (Hartlapp 2005). Together with the non-notification of transposition measures, complaints by third party actors far outweigh the European Commission’s own investigations as sources for the detection of non-compliance and initiation of infringement proceedings.

Figure 1: Origins of infringement proceedings 1995-2009



Third and finally, the findings of an expert survey of legal experts confirm that infringement data do not contain a systematic selection bias. We conducted this survey asking the Committee of Permanent Representatives experts of the EU 15 member states how they assess the level of compliance of their own country vis-à-vis other EU countries, which member state they perceive as performing best and worst, and whether they think that the European Commission’s infringement data are biased toward certain member states (Börzel et al. 2010). In essence, the survey analyzes the extent to

⁹ 20th Annual Report on Monitoring the Application of Community Law, COM(2003) 669 final. Brussels.

which the infringement data collected by the European Commission reflect the member states perspective and assess whether and where national experts perceive a bias in the data. All but one Committee of Permanent Representatives experts replied, giving us a response rate of 93.3%. The most important findings are that more than two thirds of the respondents do not think that the infringement data contain any systematic bias toward certain member states. What is more, the experts' assessment of which member states violate EU law most and least is in line with the commission's infringement data, with France, Greece, and Italy being considered the main laggards and Denmark, Finland, and Sweden the compliance leaders.

Overall, there is no indication that the European Commission's infringement data contain a systematic bias due the European Commission being selective in its efforts to detect and/or prosecute violations of European treaty provisions, regulations, directives, and decisions. For the quantitative study of infringement proceedings against EU member states, it is not relevant how successful the European Commission is at monitoring the application of EU law. While we have no way of knowing how large the non-compliance iceberg really is, infringement data provide us with a means to explore whether and why some EU laws are better applied than others and why some member states comply better than others.

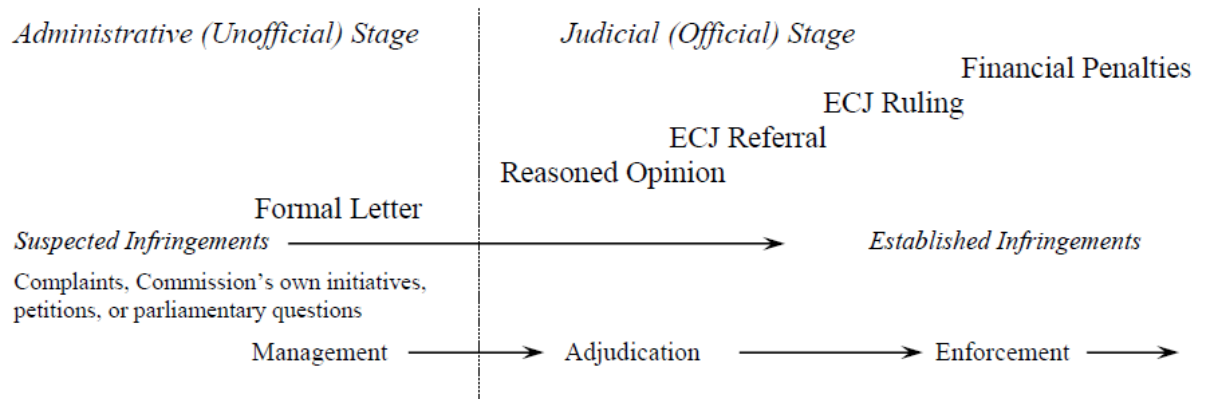
3. Descriptive statistics

Having discussed the caveats of using infringement data as a proxy of non-compliance in the EU, we now provide a detailed description of our data set. After a brief overview of the history of our infringement data set, we take a look at some of the major characteristics of the more than 5.800 official infringement cases for the time period 1978-1999. In particular, we highlight the number of cases across EU member states and time, the characteristics of individual infringement cases, and the policy areas (e.g., agriculture, environment, trade) of violated European legal acts.

In 2000, the European Commission provided us with all infringement proceedings opened by the European Commission between 1978 and 1999 that reached at least the Reasoned Opinion stage. We manually coded missing data using the Commission's Annual Reports on Monitoring the Application of Community Law and judgments from the European Court of Justice. We did not receive a complete list of those cases that were settled before the European Commission issued a Reasoned Opinion as information on complaints and Formal Letters is considered confidential (cf. Börzel 2001).

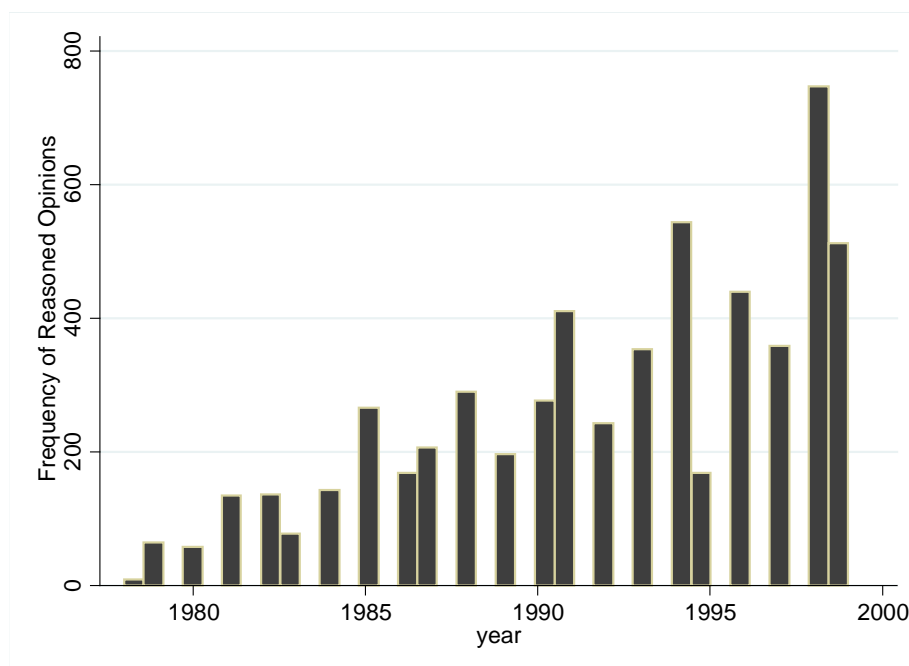
Infringement proceedings that reached at least the first official stage of the proceedings, i.e., the Reasoned Opinion stage, constitute the more serious infringement cases. They concern issues that could obviously not be solved through informal negotiations between the European Commission and the member state at the two previous stages of the proceedings. Following the issue of a Reasoned Opinion, an individual infringement case can go through several stages until it initially ends with a ruling by the European Court of Justice (see Figure 2). If the member states still refuse to comply, the Commission can open new proceedings that can lead to the ECJ imposing financial penalties. Of course, proceedings can be terminated at any stage if the member state decides to comply with the European Commission's demands to implement a specific legal act correctly or succeeds at convincing the European Commission that it is in fact already complying.

Figure 2: European Union Infringement Proceedings



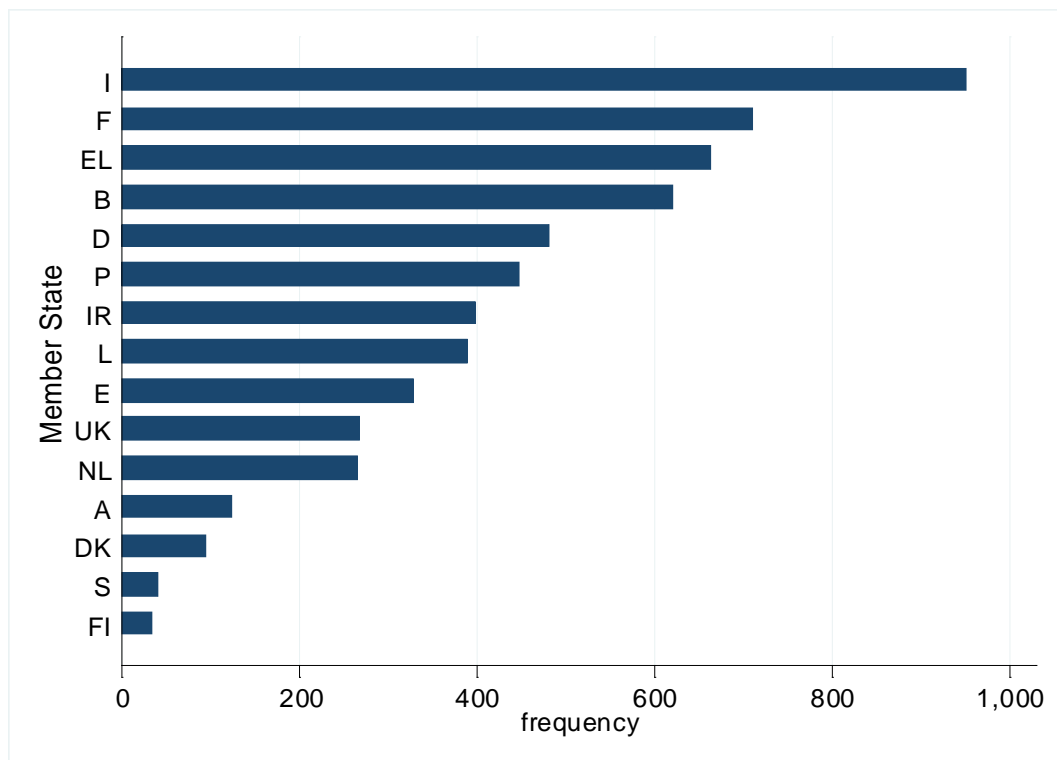
It is a commonly held assumption – both among policy makers and academics – that the EU is facing a growing compliance problem that is systematic and pathological. The negative assessment is backed by the increasing number of infringement proceedings, which the European Commission has opened against the member states over the years. As we can see in Figure 3, the number of infringement proceedings reaching the official stage has indeed increased over time. However, this is not too surprising as the number of member states that can violate EU law and the number of European legal acts that can be violated has increased as well.

Figure 3: Frequency of reasoned opinions sent per year



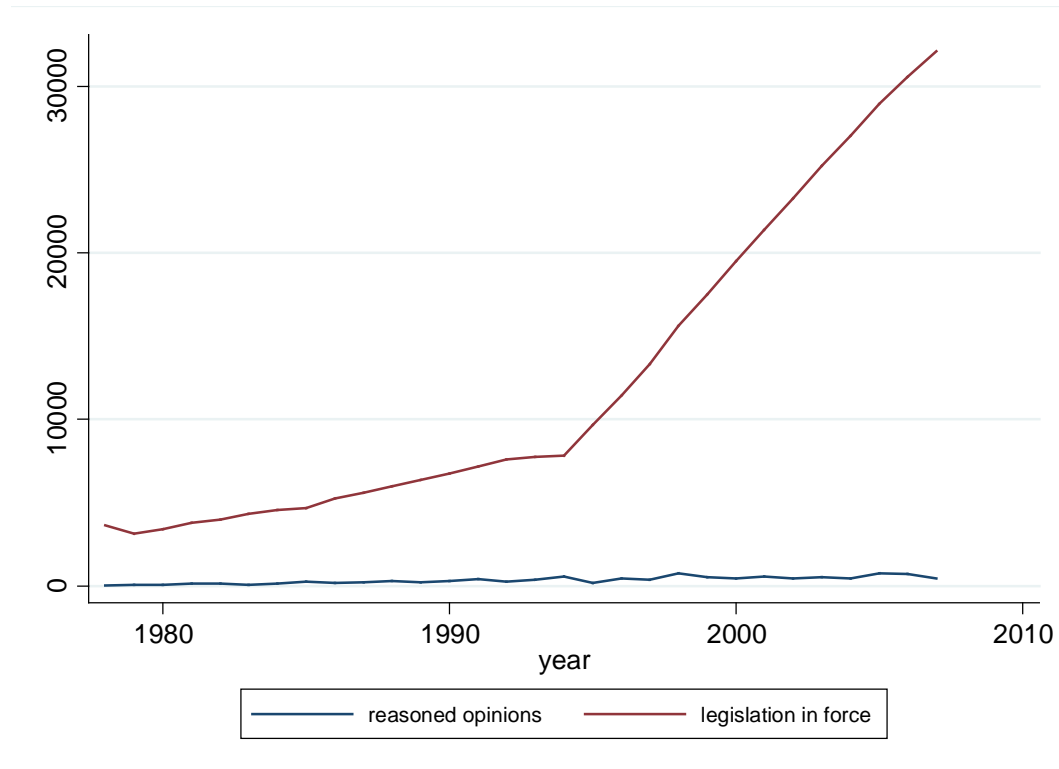
There is significant variation in the number of infringement proceedings across member states (see Figure 4). The EU 15 member states can be divided into three groups: leaders, laggards, and the middle-field. Of the EU 15, the three Scandinavian member states, Great Britain, and the Netherlands rarely violate EU law. The southern member states (including France) – with the exception of Spain – and Belgium seriously lag behind. The rest of the EU 15 constitutes the middle-field.

Figure 4: sum of infringement proceedings by member state



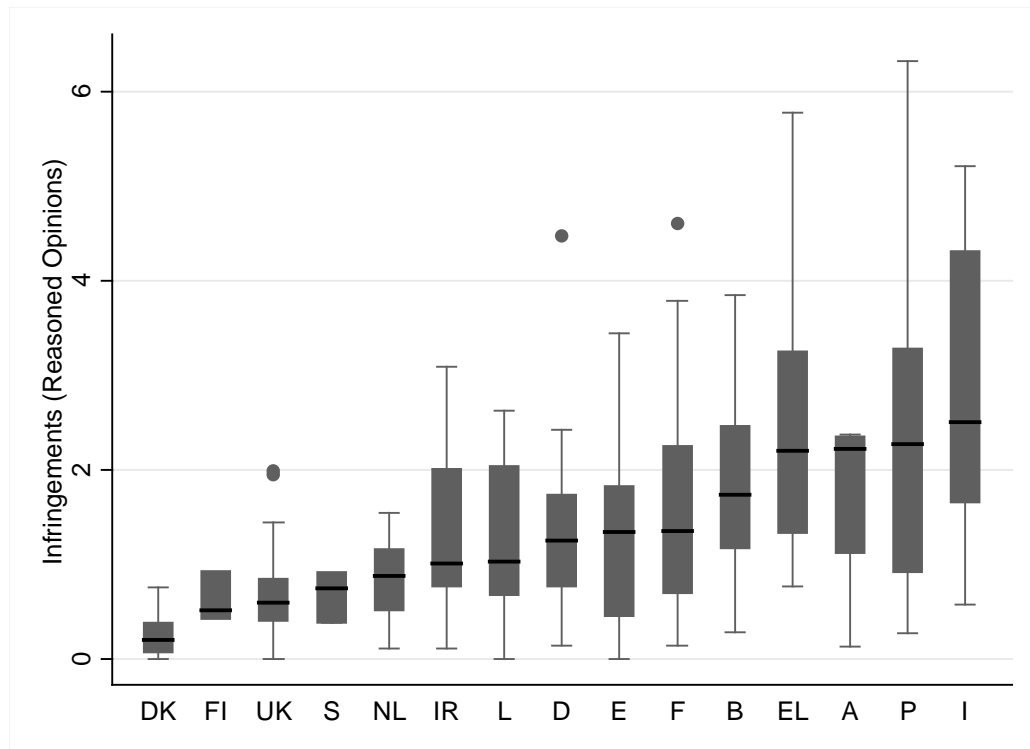
Of course, Figure 4 has to be read with a grain of salt as it includes all EU member states independent of their date of accession and the growing body of EU law. Between 1979 and 1999, the number of EU laws the member states can violate more than quadrupled (see Figure 5). And the member states increased from nine to 15.

Figure 5: annual reasoned opinions and legislation in force (directives and regulations)



The country ranking, however, only slightly changes when we control for the length of membership and the growing body of EU law. Figure 6 shows the country ranking for a relative variable which measures the number of reasoned opinions based on non-compliance with directives in relation to the number of directives in force in that specific year. Since the calculation is done on a year to year basis, the length of membership is irrelevant. The reason why we focus on directives rather than the entire body of EU law in this relative variable lies in the discrepancy between the share of directive-related infringement cases and the share of directives in the European legislative output. More than 78 per cent of all infringement cases of the database concern the correct and timely legal implementation and practical application of directives. In contrast, in the year 1999 the number of regulations in force had been nearly 10 times higher than the number of directives in force. Combining these two types of legislative acts would deflate the relative variable and lead to a loss of precision. While the ranking of the member states does not change substantially, it is notable that France has most infringement proceedings based on treaty articles, regulations and decisions, and, therefore, improves by four positions in the ranking based solely on directives.

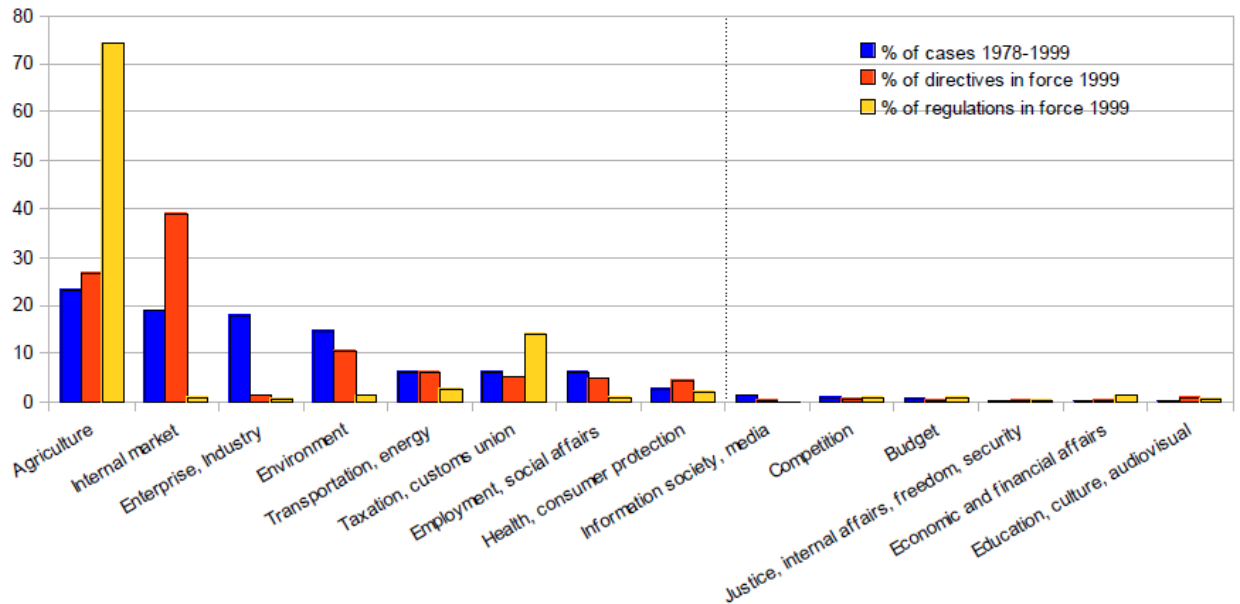
Figure 6: Annual Reasoned Opinions based on non-compliance with directives in percent of all directives in force in this year



The distribution across policy sectors also shows significant variation.¹⁰ In half of the policy sectors, we only find a handful of infringement proceedings. In the sectors internal market, environment, enterprise, industry, and agriculture, by contrast, member states commit large numbers of violate (cf. Figure 7). A more detailed analysis reveals that the non-compliance patterns by individual member states across the policy sectors are fairly constant, i.e., Italy is the compliance laggard in virtually all policy sectors (except for the field of social and employment policy in which Belgium had to face slightly more infringements) while the Scandinavian member states, Great Britain, and the Netherlands have consistently good compliance records.

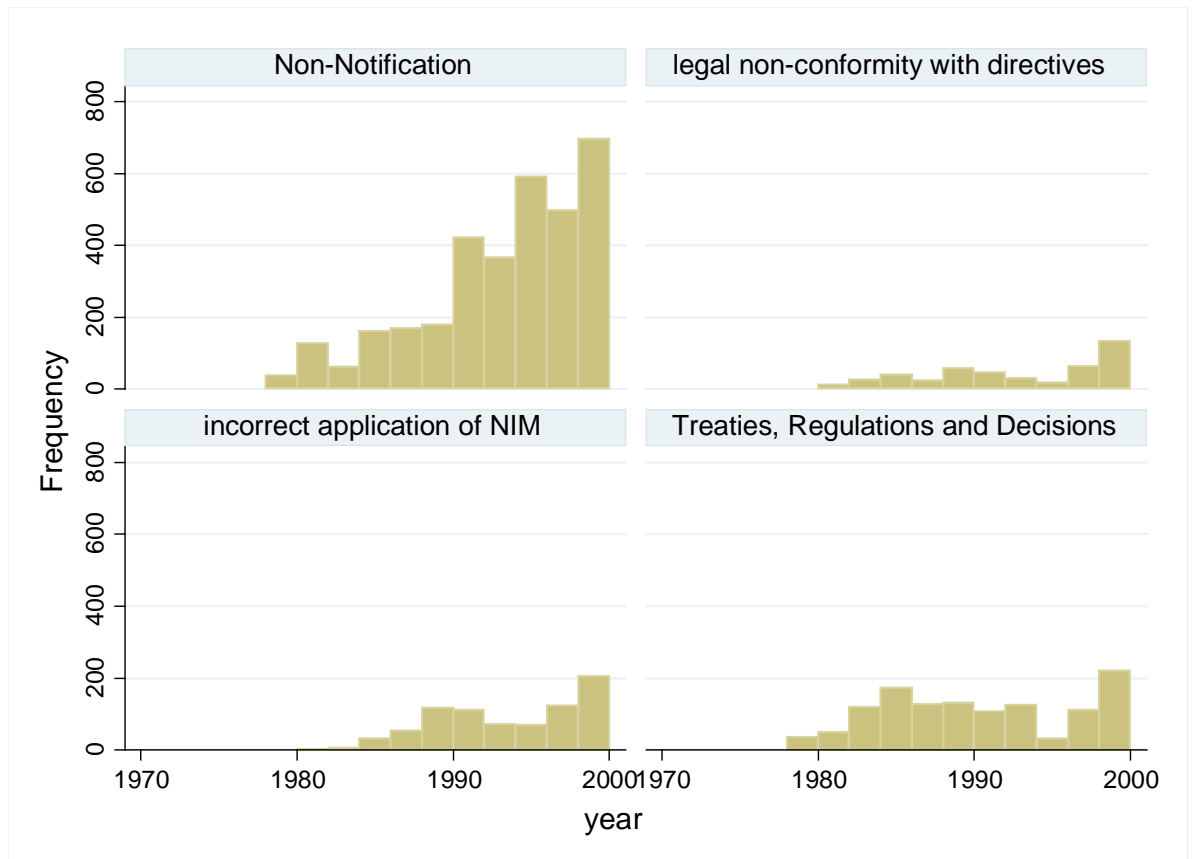
¹⁰ See our current project "Policy matters - but why? Explaining non-compliance with European law across sectors" BO 1831/6-1 http://www.polsoz.fu-berlin.de/polwiss/forschung/international/europa/forschung/laufende_dm_Forschungsprojekte/compliance_2/index.htm.

Figure 7: Percentage of infringement cases by sector in relation to the percentage of legal acts by sector



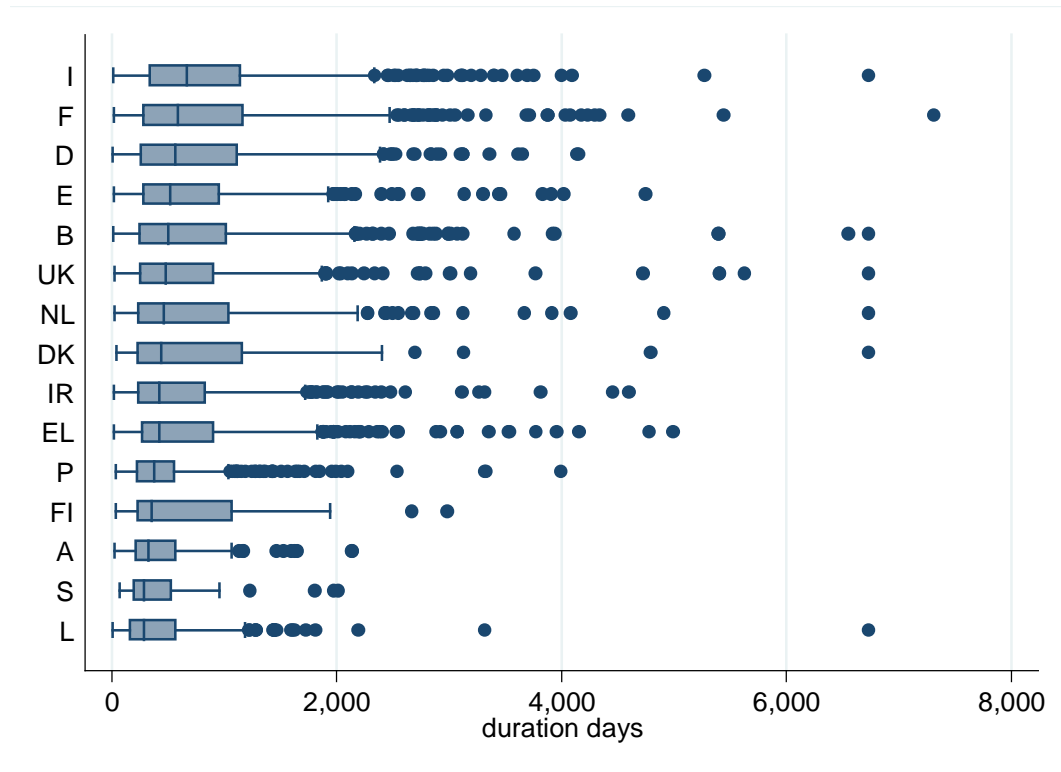
In addition to analyzing infringement proceedings across time, member states, and policy sectors, our data also allows us to analyze infringement proceedings across the type of violation (see Figure 8). The European Commission distinguishes between the non- or late notification of the transposition of EU directives, the legal non-conformity of national implementation measures implementing an EU directive, the incorrect application of national implementation measures (NIM), and the violation of treaty provisions, regulations, and decisions. As mentioned above, 57% of all infringement cases fall into the first category, i.e., infringement proceedings were opened by the European Commission for a member states failure to report on the transposition of an EU directive into national law. The remaining 43% of cases are distributed among the remaining three categories (2: 8%, 3: 14%, and 4: 21%). While categories 1-3 are concerned with EU directives, our data set also allows us to break the fourth category down into violations of treaty provisions, regulations, and decisions. In fact, our data includes information on the exact legal act – directive, treaty provision, regulation, or decision – that is at the center of an infringement proceeding.

Figure 8: Infringement proceedings per year by type of violation



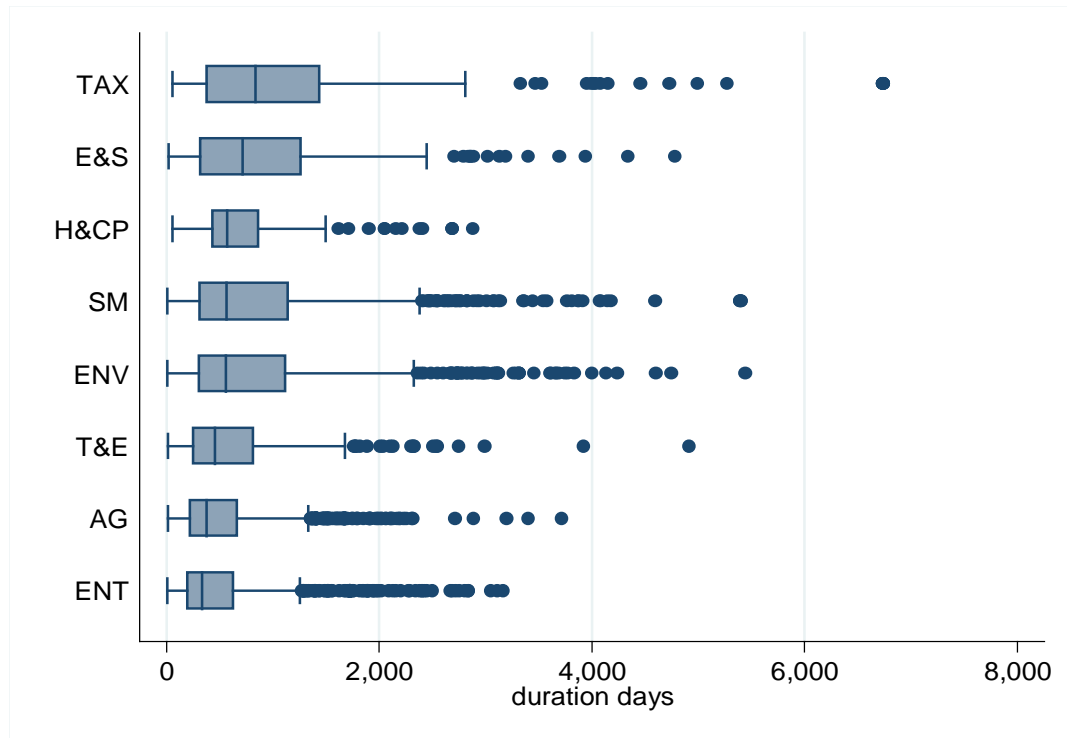
Finally, our data allows us to analyze the duration of infringement proceedings (Figure 9, cf. Börzel et al. 2012). Not only does our data include information on the number of stages that individual infringement proceedings pass through. They also show the date of when the proceedings reach a particular stage, such as the Reasoned Opinions, referrals to the ECJ, a withdrawal or the judgment by the ECJ.

Figure 9: duration of infringement proceedings by member states in days



There is also an interesting variation in the duration of infringement proceedings over different policy sectors (see Figure 10). It shows how difficult the tax policy harmonization can be and it seems that areas of positive integration are more contentious when it comes to implementation.

Figure 10: duration of infringement proceedings by policy sector in days¹¹



¹¹ TAX: tax policy; E&S: employment and social policy; H&CP: health and consumer protection policy; SM: single market policy; ENV: environmental policy; T&E: transport and energy policy; AG: agriculture policy; ENT: enterprise policy.

5. Conclusion

In this paper, we have made the case for infringement data as a proxy for non-compliance with EU law. It provided a closer look at what our data set has to offer in terms of number of cases, information on these cases, and variation across EU member states, policy sectors, time, types of violations, legal acts, duration and stages of the infringement proceedings. While compiling such a large data set is one thing, making use of it is another. With the help of a project funded by the Deutsche Forschungsgemeinschaft (DFG), we are currently in the process of updating the data.¹² One of the major challenges lying ahead of us and other EU compliance scholars is the generation of new theoretical ideas and the finding of ways to test them. While we have an extensive and rich data set on compliance as a dependent variable, it is far from obvious how we can find and compile data on interesting independent variables that can be matched and merged with our data. Depending on the focus of the research, a wide range of country-, rule- and policy sector-specific hypotheses are conceivable.

¹² Policy matters - but why? Explaining non-compliance with European law across sectors (BO 1831/6-1).

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