

# **Managing and Enforcing Compliance with EU law: The Perspective of the EU Commission**

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## **Abstract**

Studies on EU policy-making generally disregard the key role played by the Commission as an enforcement agent responsible for the instigation and continuation of infringement cases. Furthermore, the Commission employs both amicable ('management') and coercive means ('enforcement') to induce compliance by member states, which are reflected in the different stages of the infringement proceeding.

In contrast to current research, this study incorporates the perspective of the Commission on non-compliance. Based on assumptions about the relation between the Commission and member states, it is assumed that different mechanisms drive the instigation of infringement proceedings and their escalation to later stages. Thus, it is predicted that conflict in the Council and member state low level of acceptance for EU policies increase the probability of instigating infringement cases. However, the same factors are expected to make escalations of infringements to ECJ referrals less likely, because the Commission dependence on the cooperation of member states. The hypotheses are tested using a dataset on the policy preferences of the Commission and 15 member states with regards to 18 EU directives. On the basis of multinomial logit and ordered logit regression analyses, I find evidence that there are differences between the effects on the instigation and the escalation of infringement cases.

## **Introduction**

The implementation process in the European Union is defined as the transmission of legislation adopted at the European level into the actions of member states (Mastenbroek, 2007). Member state governments are obliged to incorporate and apply the EU policies correctly and on time. Failure to comply with EU legislation could result into the instigation of infringement proceedings by the EU Commission, which consist of three formal consecutive stages: "letters of formal notice", "reasoned opinion" and "referral to the European Court of Justice (hereafter the ECJ)".

The infringement proceedings instigated by the Commission are one of the most commonly used indicators for non-compliance in quantitative research on the implementation of EU law (Mastenbroek, 2005; Kaeding, 2006). Most scholars focus on the instigation of either 'reasoned opinions' and/or 'referrals to the ECJ' by the Commission to represent implementation failures by member states (Thomson et al, 2007; Mbaye, 2001; Perkins and Neumeyer, 2007). Recently studies have also focused on the resolution of implementation problems by member state governments by looking at the probability that infringement cases will escalate from letters of formal notice to referrals to the ECJ (Jensen, 2007). However, the use of infringement proceedings as an

indicator for actual non-compliance by member states is generally questionable (Börzel, 2001). More precisely, infringement proceedings only cover cases of detected non-compliance, which rely extensively on the monitoring capacity and policy objectives of the Commission. Thus, infringement cases should be also viewed from the perspective of EU institutions, where the preferences and policy considerations of the enforcement agency are expected to play an important role in the decision to instigate and continue infringement proceedings (Börzel et al., 2005, 2007). In addition, research on supranational management and enforcement of EU law argues that infringement proceedings should be better viewed as a ‘management-enforcement ladder’, where the stages of infringement procedure combine both amicable and coercive mechanisms employed by the Commission to resolve implementation problems (Tallberg, 2003; Tallberg and Jonsson, 1998).

This study contributes to current research on supranational management and enforcement of EU law by incorporating the perspective of the EU Commission on the resolution of compliance problems (Tallberg, 2003; Tallberg and Jonsson, 1998). First, in contrast to previous research this article looks both into the instigation and the escalation of infringement proceedings to later stages by distinguishing between the decision by the Commission to open infringement cases in the first place, the probability that infringement cases will be resolved at ‘the management phase’ (‘letters of formal notice’ and ‘reasoned opinions’) or will end at the ‘enforcement phase’ of the infringement proceeding (‘referral to the ECJ’). On the basis of theories on the relation between the Commission and member states, it is expected that conflict between member states, member-state and Commission policy priorities will affect the propensity of the Commission to open and continue infringement cases. Second, it is expected that conflict in the Council and member state policy priorities have different effects on the instigation and escalation of infringement cases to referrals to the ECJ. While conflict in the Council and low acceptance for the EU laws are predicted to increase the likelihood of detecting implementation problems, it is expected that the same factors diminish the propensity of escalation of infringement cases from ‘management’ to ‘enforcement’ phases of the infringement procedure. Third, this article makes an empirical contribution to the management and enforcement literature by showing that differences exist not only between the instigation, management and enforcement phases of the infringement proceeding, but also within the management phase itself (between letters of formal notice and reasoned opinions).

Finally, this study takes into account that infringements are often caused by member states’ inability to implement EU laws. Thus, I account for capacity-related explanations by controlling for both the level of government effectiveness and policy complexity in the study on infringement cases.

## **Theory**

General theories on implementation suggest that the difference in most preferred policies between legislators and implementers is a necessary condition for the occurrence of compliance problems in local political settings (Pressman and Wildavsky, 1973; Torenvlied, 2000). Implementing agents are likely to deviate from the prescribed policies when these policies are not congruent with their own goals. Implementers, however,

choose to deviate under restrictions, such as their expected reputation loss and expected costs from policy deviations (Torenvlied, 2000). The application of different *ex-ante* and *ex-post* instruments for monitoring and sanctioning policy deviations by ‘oversight committees’ affects the likelihood of costs and reputation loss by the implementer (McCubbins et al, 1987, 1989). However, effective oversight requires the allocation of resources and, hence, incurs costs on enforcement agents. In other words, policy considerations and characteristics of the enforcement agents also have an influence on the resolution of implementation problems.

There are strong parallels between the Commission in the context of EU policy making and ‘oversight committees’ in national political settings. In the European context the Commission has extensive powers to issue warnings to member state governments with a questionable implementation record using informal and formal letters, and to pursue formal infringement proceedings before the ECJ in case of persistent non-compliance. The Commission even has the power to propose, before the ECJ, punitive fines to be issued against member states that violate the EU law (Pollack, 2003: 86). As a result, theories on EU policy implementation should incorporate the role of the Commission on compliance with EU policies.

#### *Infringement proceedings as a ‘management-enforcement ladder’*

The perspective of the Commission is taken into account in recent studies on supranational management and enforcement of EU laws (Tallberg, 2003; Jönsson and Tallberg, 1998). Management implies that compliance problems are addressed through amicable means, such as problem-solving strategies and dispute-settlement dialogues between the Commission and member state governments. Enforcement, by contrast, refers to deterrence by coercive means such as increasing the costs of member state non-compliance by credible threat of sanctions by the ECJ (Tallberg, 2003).

European scholars generally argue that the joint effect of management and enforcement strategies is represented in the infringement proceedings initiated by the Commission against member state governments (Tallberg, 2003; Börzel et al, 2005, 2007). Infringements are, thus, seen as a ‘management – enforcement ladder’, where the Commission progressively increases the costs of non-compliance with each consecutive stage of the infringement procedure (Jönsson and Tallberg, 1998; Tallberg, 2003). Formal notices and reasoned opinions represent a managerial approach to implementation problems as they give rise to formal and informal dialogues between the Commission and member states that aim at negotiated solutions to compliance problems (Börzel et al, 2005). During these stages the Commission informs itself about the reasons of non-compliant behavior by member states and provides an opportunity to member states to correct their behavior without involving the ECJ in the conflict. Provided that management strategies are not sufficient to induce compliant behavior by member states, the Commission resorts to more coercive approach by referring the member state to the ECJ. Court litigations increase the costs of non-compliance for member states as the threat of sanctions becomes imminent. Considering that the majority of court cases are won by the Commission, the probability of negotiating an implementation outcome that best suits the member state is non-existent once the government has been referred to the

ECJ (Jönsson and Tallberg, 1998). In addition, referral to the ECJ increases the probability of ‘reputation losses’ for member state governments, as persistent failure to conform to international agreements becomes known to the whole European community. However, both the Commission and member states share interest in avoiding costly and resource-consuming litigation and try to find some last-minute compromise in bilateral negotiations before the ‘referral stage’ (Börzel, 2001; Pollack, 2003).

### **Conditions for instigation and resolution of infringement cases**

Given that the Commission has full discretion on the decision whether to open and continue infringement proceedings to later stages, the perspective of the Commission plays an important role on whether infringement cases are resolved by more managerial approach or lead to referral to the ECJ. However, infringements are also the outcome of member states’ (persistent) failure to comply with their EU obligations. Thus, both the instigation and escalation of infringement cases revolve around the **characteristics of** and the relation between the Commission and member states (Jönsson and Tallberg, 1998).

The relation between the Commission and member states could be best seen from the lenses of more general theories on the dependency relation between ‘principals’ and ‘agents’. In the policy-making context, the principal is the legislator and the agent is the implementation agency. Theories on delegation identify two main principles that guide the behaviour of both legislators and implementers (Huber and Shipan, 2002). First, there is an asymmetry of information between legislators and implementers such that implementers have a better knowledge about the consequences of a policy, while legislators lack such information. Second, both legislators and implementers have specific policy objectives, which may or may not conform to the final policy outcome that is to be implemented. The interaction between these two principles is expected define the type and level of control that the legislator needs to exercise to accomplish his or her objectives.

In the European context, and particularly during the infringement proceedings, the principal-agent relation is more complex than standard principal-agent applications. First, the main actors consist of the enforcement body and a member-state government, rather than a national legislator and an implementation agency. Second, the Commission assumes different responsibilities in the decision-making and the implementation stages, which give rise to contrasting predictions on the instigation of infringement cases and the escalation of infringements from ‘management’ to ‘enforcement’ phases.

#### *Information asymmetry and conflict in the Council*

In the EU policy-making process both the Commission and member state governments assume different roles that create asymmetric information advantages, which shift between the two actors (Peters, 2000). During EU decision-making, the member states in the Council are the ‘principals’, while the Commission is the ‘agent’ responsible for drafting policy proposals and submitting them the Council for approval. Thus, the main goal of the Commission during the decision-making process is to secure agreement with its proposals, under the restriction that member states in the Council often have conflicting policy goals (Pollack, 2000)

As a result conflict in the Council influences the *information advantage* of the Commission, which the Commission consequently uses to both foster an agreement with its policy proposals and allocate resources to monitoring. More precisely, member states *signal* their policy preferences in an attempt to make the Commission attentive to their different policy objectives (Tallberg, 2000). As a result, the Commission has an incentive not to inform member states about the full implications of problematic policies (Jordan, 1999; Cini, 2003; Versluis, 2004). Member state's conflicting policy preferences, in addition, signal to the Commission the possibility of problems during national implementation that could lead to divergent implementation practices across the member states. As a result, conflict in the Council fosters increased vigilance by the Commission and consequently increases the probability that violations will be detected and infringement proceedings will be instigated (Zhelyazkova and Torenvlied, 2009).

**H1a:** Conflict in the Council of the EU has a positive effect on the probability that the Commission will open infringement proceedings against member state governments.

Once infringement cases have been instigated, the Commission assumes a different role: bring detected member states' deviation into compliance by increasing the pressure on member states' with each consecutive stage of the infringement procedure. However, the Commission again faces certain restrictions in its decision to escalate cases from management to enforcement phases of the infringement proceeding. More precisely, in the implementation stage the Commission and member states change roles: the Commission is the principal, while the member state governments are the agents charged with applying the EU policies into national settings. Thus, the information advantage shifts from the Commission to the member state governments (Peters, 2000). Member state governments have better knowledge about the application of EU policies in their national contexts than the Commission does. As a result, the Commission is in an 'invidious position' given its limited resources to enforce compliance as well as its dependence on the cooperation of member states in the decision-making process (Williams, 1994). As the information asymmetry shifts in favour of the member state governments, the Commission might prefer not to stir up trouble with non-compliant states in the implementation stage if such an action would endanger securing agreements for policy proposals in the subsequent decision-making stages (Snyder, 1993; Jordan, 1999). Thus, it is expected that the Commission will be unwilling to increase the costs on non-compliance by member states for policies adopted under high levels of conflict between the member state representatives in the Council. Future cooperation is less likely to happen when the Commission sues member states for non-compliance with highly controversial policies (Versluis, 2004; Steunenberg, 2007).

In other words, conflict between member states in the Council makes negotiated solutions to compliance problems (management phase) more desirable than coercive means such as referral to the ECJ (enforcement phase).

**H1b:** Conflict in the Council of the EU has a negative effect on the probability that infringement cases will escalate from 'management' to 'enforcement' phases of the infringement proceeding

### *Member-state policy acceptance*

In addition to the asymmetry of information, the level of acceptance of EU policies by implementers is the second factor that affects the principal-agent relation between the Commission and member states during the implementation process. Government support for the EU and societal attitudes within the member states influence the extent to which member states are willing to accept the EU policies. For instance, infringements are generally expected to occur as a result of negative political and ideological preferences of individual member state governments towards the EU (Mbaye, 2001; König and Luetgert, 2008). Thus, governments that generally disapprove of the EU influence on policy-making are expected to run into more compliance problems during implementation than pro-European governments. The reason is that anti-integrationist governments are likely to put less priority on the implementation of EU directives when they can instead allocate resources to more desirable policy objectives.

In addition, the perceived legitimacy of the EU and the Commission in particular by member state societies are also expected to affect the priorities governments put on the implementation of European directives (Mbaye, 2001). Thus, low levels of societal trust in the EU institutions could be an additional motivation for member state governments to choose to deviate from their EU policy obligations. Consequently, infringements are more likely to occur.

**H2a:** Anti-European government preferences and negative societal attitudes towards the EU and the Commission in particular have a positive effect on the probability that the Commission will open infringement proceedings against member state governments.

EU scholars generally predict a linear relationship between political and ideological preferences of governments and citizens and non-compliance by member states. Thus, negative government and societal attitudes towards the EU are expected to *always* increase the probability of instances of non-compliant behaviour by member states such as delays in transposition (Kaeding, 2006, 2008; Thomson et al, 2007; Toshkov, 2008).

In the case of infringement proceedings, however, different mechanisms are expected to drive the decision of the Commission to switch to enforcement strategies against non-compliance. Given the 'invidious position' of the Commission in the implementation stage, it is expected that it will be less willing to run the risk of offending anti-European member states by referring them to the ECJ (Börzel, 2001). In this case, a managerial means to compliance problems will be the preferred approach instead of employing coercive means and thus endangering the Commission's integrationist goals.

**H2b:** Anti-European government preferences and negative societal attitudes towards the EU have a negative effect on the probability that infringements will escalate from 'management' to 'enforcement' phases of infringement proceedings

### *Commission policy acceptance*

The level of policy acceptance of the principal is also likely to have an effect on the implementation process and in this case, on infringement proceeding. As already noted, in the EU implementation process the principal is the enforcement body in the face of the Commission. Just like member states, the Commission also prioritizes compliance with directives based on its policy preferences. Both monitoring and managing compliance problems come at a price and are highly sensitive to the limited resources available to the Commission (Jensen, 2007). For example, monitoring is a time consuming process that requires the mobilization of different sources of information. As a result, it is expected that when the Commission disagrees with the content of a directive it is less likely to allocate resources for managing and/or enforcing compliance.

This does not imply, however, that implementation problems are less likely to occur in cases of Commission disagreement with the outcome of the decision-making. It only means that the Commission will be less likely to open infringement proceedings against member states for directives that are not congruent with the Commission's policy preferences.

**H3:** Commission disagreement with the outcome of decision-making has a negative effect on the probability that the Commission will open and continue infringement proceedings against member state governments.

## **Research design**

### *Data and policy selection*

The hypotheses are tested using a dataset that was constructed on the basis of several sources. First, information on infringement proceedings was obtained by the *Annual Reports on Monitoring and Application of EU Law* published in the Commission databases. Based on these reports, we identified the stage of each infringement case and the member state against which it was issued. Second, data on the policy preferences of the Commission and the 15 member states were provided by the DEU dataset (Thomson et al, 2006). The selection of proposals in the DEU dataset was based on three criteria. First, the selected proposals had to be subject to either the co-decision or the consultation procedure, and the procedure should not have been changed after the Amsterdam Treaty came into force in 1999. Second, the selected proposals had to be discussed in the Council meetings between 1998 and 2001. Third, all selected proposals had to contain at least one controversial issue. A random sample would have led to the inclusion of issues with only marginal, technical importance, where member states would have taken similar positions (Thomson and Stokman, 2003; Thomson et al., 2007).

In this study I focus only on proposals for directives. This confines the analysis to a maximum of 26 directives, which cover a variety of policy areas, such as internal market (nine directives), economic and financial affairs (five directives), agriculture (three directives), transport (three directives), justice and home affairs (one directive),

employment (one directive), energy (one directive) and health (one directive). However, I did not include information on all 26 directives in the analysis of this study. For example, two directives dropped from the analysis, since they have been adopted relatively recently and infringement proceedings were still ongoing. In addition, I excluded all directives that did not contain any infringement cases against a member state (nine directives). For these directives, I could not be certain whether the absence of infringements means that there were no compliance problems, or formal notices were sent anonymously to member states<sup>1</sup>. In total I have information on 17 directives and 15 member states, which leads to 265 cases available for analysis<sup>2</sup>. Out of these 265 cases the Commission has instigated 179 infringements against member states.

#### *Dependent variable: measurement*

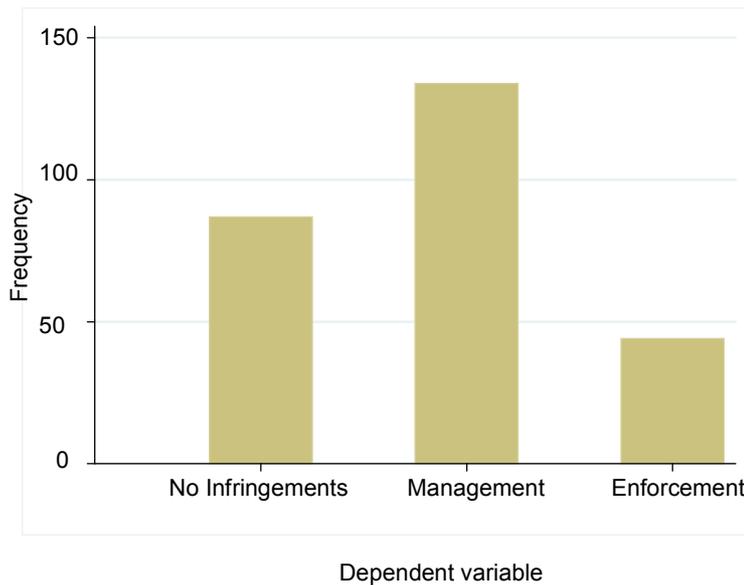
Because I want to distinguish between the instigation of infringement proceedings, managerial and enforcement strategies by the Commission, the dependent variable in this study consists of three categories. The first category includes those cases, in which the Commission did not instigate infringements against a member state regarding a particular directive (1 = “No infringements”). In the second category I included all cases which ended either in the stage of ‘letter of formal notice’ or ‘reasoned opinion’ (2 = “Management phase”). The third final category consists of the infringement cases that were referred to the ECJ (3 = “Enforcement phase”). Figure 1 illustrates the distribution of the three different categories of the dependent variable. The majority of cases ended in the ‘management phase’ (134 cases), followed by the category ‘no infringements’ (87 cases) and cases that ended at the “enforcement phase” (referral to the ECJ) (44 cases).

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<sup>1</sup> Moreover, based on the Commission database Euro-Lex members state did experience delays in the transposition of these 9 directives, which would mean that at least some member states should have received formal notices and/or reasoned opinions by the Commission.

<sup>2</sup>  $17 \times 15 = 255$ . The total number of cases is 265, however, since some member states received more than one letter of formal notice and reasoned opinion for particular directives.

Figure 1: Distribution of the dependent variable: Infringement category



*Independent variables: measurement*

The measure of conflict in the Council is on the directive-level and is based on data on the policy positions of member states' representatives in the Council of the EU regarding particular policy issues. These data were collected by Thomson et al (2006) through interviews with key informants (see Thomson et al., 2006 and Thomson et al., 2007 for a full discussion and illustration of the construction of issue scales). Based on the informants' reports, it is possible to construct a direct measure of conflict on the basis of distances between policy positions that member states took during the decision-making process.

In addition, this study employs policy polarization as a measure of conflict, which is based on the polarization index developed by Esteban and Ray (1994). I find this measure of conflict more appropriate than standard measures of spread in policy positions. More precisely, policy polarization, stresses both alienation between and identification within groups of member states: internally homogenous groups might be highly antagonistic towards each other, even if their level of alienation is moderate. Alienation is measured by taking the absolute distance between groups of member states that share a different policy position. Identification is a function of the relative group size  $\pi$ , and a 'polarization sensitivity' parameter  $\alpha$ , which is bounded between 0 and 1.6 to differentiate polarization from inequality (see Esteban and Ray, 1994). In the present study  $\alpha$  is set to 1.6. For the computation of relative group size  $\pi$  we differentiated between directives decided under unanimity and under QMV. For unanimity, I computed  $\pi$  as the proportion of member states supporting the same policy position relative to the total number of member states. For QMV, we computed  $\pi$  for each group as the aggregated member state Shapley Shubik Index (SSI) score (Shapley and Shubik, 1954; Thomson and Stokman, 2003).

Information on government support for the EU was obtained from the Manifesto dataset “Mapping policy preferences II...1990-2003”, which measures party preferences on the basis of statements made by national parties in their manifestos (Klingermann, 2006). I took the mean national party government position on the issue of support for EU integration as a measure. Alternative datasets that include government preferences towards EU integration are the “Party Policy in Modern Democracies” project (Benoit and Laver, 2006) and the Chapel Hill expert survey on party positions (Marks et al., 2006). However, the dataset by Benoit and Laver (2006) covers data on one time point only. The Chapel Hill expert survey also has limitations, since it does not contain information on Luxembourg. The manifesto dataset was chosen, because it covers all 15 member states and most government positions regarding EU integration except the most recent ones. The few missing party positions were imputed using the “Party Policy in Modern Democracies” project<sup>3</sup>.

The measure of societal distrust towards the Commission relies on information from 1999-2004 Eurobarometer data that reflects overall satisfaction of the EU citizens with the EU and the EU institutions (Mbaye, 2001; Kaeding, 2006). The question used in this study specifically asks whether EU citizens tend to trust or not the Commission. Based on the answers to this question I computed a *net distrust* score by subtracting the percentage responding “tend to trust” from the percentage responding “tend not to trust” the Commission (Eichenberg and Dalton, 1993 for a similar operationalization of societal support for EU integration)<sup>4</sup>. Thus, higher levels mean more distrust towards the Commission.

Both government support towards the EU and societal distrust towards the Commission are averaged for the years from the adoption of the directive until the end of the infringement procedure (or the deadline for the cases, in which no infringements occurred) (Toshkov, 2008).

Similar to the measure of conflict in the Council, information on the Commission’s disagreement with the outcome of decision-making is obtained from Thomson et al. (2006). It is measured at the level of the directive as the average distance between the Commission’s position on an issue and a policy outcome (Thomson et al., 2007; Zhelyazkova and Torenvlied, 2009).

### *Controls*

In this study I control for the level of conflict between the Commission and a member state. The variable is computed by taking the absolute value of the distance between a

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<sup>3</sup> I also computed an alternative measure for government support based on the Chapel Hill study. There were no substantive differences between the effects of the two measures.

<sup>4</sup> Studies employing the Eurobarometer data generally measure societal attitudes towards the EU with the question: “Do you see your country’s membership of the Union as a ‘good thing’?” (Mbaye, 2001; Kaeding, 2006; Eichenberg and Dalton, 1993). The measure employed here, however, specifically refers to societal attitudes towards the Commission and it is preferred for the purposes of this study. In addition, it is very highly correlated with the measure on EU support employed by other scholars.

member state' policy position and the policy position supported by the Commission. Thus, it is measured at the individual level<sup>5</sup>.

I also control for political and administrative capacity limitations that might cause the occurrence and escalation of infringement cases in addition to the factors described above. I employ a measure of government effectiveness that is based on the World Bank Governance Indicators (Kaufman et al, 2005). 'Government effectiveness' combines the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.

In addition, I control for directive-level 'capacity explanations' such as the complexity of a directive, which is measured by the number of recitals. Recitals precede the body of a directive and give the reasons behind the different provisions (Kaeding, 2006). A large number of recitals indicate that the directive has an extensive scope of requirements, as well as addressing a high number of important issues (Toshkov, 2008). Thus, recitals could be also seen as a measure of salience for the Commission to pursue compliance with a directive.

Table 1 provides information on the variables included in the analysis.

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<sup>5</sup> I checked for the possibility of collinearity between the independent variables by both inspecting the correlation matrix amongst the independent variables and checking the tolerance and variance inflation factors. No evidence for major concern were found.

Table 1: Descriptive statistics

	N	Mean	Minimum	Maximum	S.d.
<i>Dependent variable</i>					
Infringement category	265	1.74	1.00	3.00	.69
<i>Independent variables</i>					
Conflict in the Council (policy polarization)	265	11.31	.00	16.57	6.00
Government support towards the EU	265	3.33	-.19	9.91	2.13
Societal distrust towards the Commission	265	-23.21	-50.50	11.50	17.67
Commission disagreement with an EU policy	265	42.76	14.33	75.00	16.93
<i>Controls</i>					
Conflict b/n the Commission and a member state	263	35.86	.00	100.00	32.03
Government Effectiveness	265	1.72	.58	2.21	.42
Policy Complexity (N of recitals)	265	30.05	9.00	65.00	16.29

### *Design of analyses*

Because the dependent variable consists of three distinct categories different statistical approaches are possible. One approach is to apply ordered logistic regression (Long, 1997; Jensen, 2007). Infringement cases can be resolved at earlier or later stages and the Commission increases the pressure on member states' compliance with every subsequent stage of the infringement procedure. However, the conditions that lead to the instigation of infringement cases are expected to be different from those that lead to the escalation of infringements to later stages. These predictions defy some of the key assumptions of models with ordinal variables (Long, 1997; Long and Freese, 2003). An alternative approach would be to ignore the directional meaning of the dependent variable and employ multinomial logistic regression (Kaeding, 2006, 2008).

Having these considerations in mind, I divide the results section into two parts. I first run a multinomial logistic model to see whether there are differences between the categories of no instigation of infringement cases, infringements ending at the 'management phase' and infringements ending at the 'enforcement phase'. Subsequently, to account for the directional meaning of infringement proceedings, I also run ordered logistic analyses on the 179 infringement cases instigated by the Commission. Thus, in the second part of the analysis I focus on the escalation of infringement cases from

‘management’ to ‘enforcement’ stages, and disregard the instigation of infringements by the Commission (Jensen, 2007)<sup>6</sup>.

## Results

### *Instigation, management and enforcement phases of infringement proceedings*

Table 2 presents the results from the multinomial logistic model. The baseline category is the ‘management’ phase, to which the categories ‘no infringements’<sup>7</sup> and ‘enforcement’ are compared. It is important to note that we cannot derive any conclusions about the precise change in the predicted probability for any of the three outcomes of the dependent variable. The coefficients show, however, which outcome is more likely to occur relative to the baseline category due to an increase in the values of the relevant independent variable and whether the difference is significant.

The results in Table 2 show that conflict in the Council has a significant effect on the dependent variable: the infringement category at which a case is likely to end. As predicted, infringement cases are more likely to end up at the ‘management’ phase (letters of formal notice and reasoned opinions), than not being instigated at all. In other words, the Commission is more likely to open infringement cases due to an increase in the policy polarization measure. However, the coefficient of the polarization variable is only marginally significant (under  $p < .10$ ). On the other hand, I observe a larger difference between the likelihood of an infringement case ending at the ‘management’ phase and an infringement case ending at the ‘enforcement’ phase. Thus, an increase in the value of policy polarization in the Council of the EU decreases the likelihood that the Commission will refer a member state to the ECJ instead of trying to resolve implementation problems at earlier stages of the infringement procedure. This result is in line with Hypothesis 1b that the Commission is less likely to resort to coercive means when decisions were adopted under high levels of polarization in the Council

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<sup>6</sup> Thus, assuming that the costs and pressure on member states’ compliance increase with each subsequent stage of the infringement procedure, I distinguish between 3 categories: cases ending at the ‘letters formal notice’, ‘reasoned opinion’ and ‘referral to the ECJ’.

<sup>7</sup> A negative effect on the category ‘no infringements’ indicates an increase in the average probability that infringement cases will be instigated against the particular member state

Table 2: Multinomial logistic regression on the instigation and escalation of infringement cases

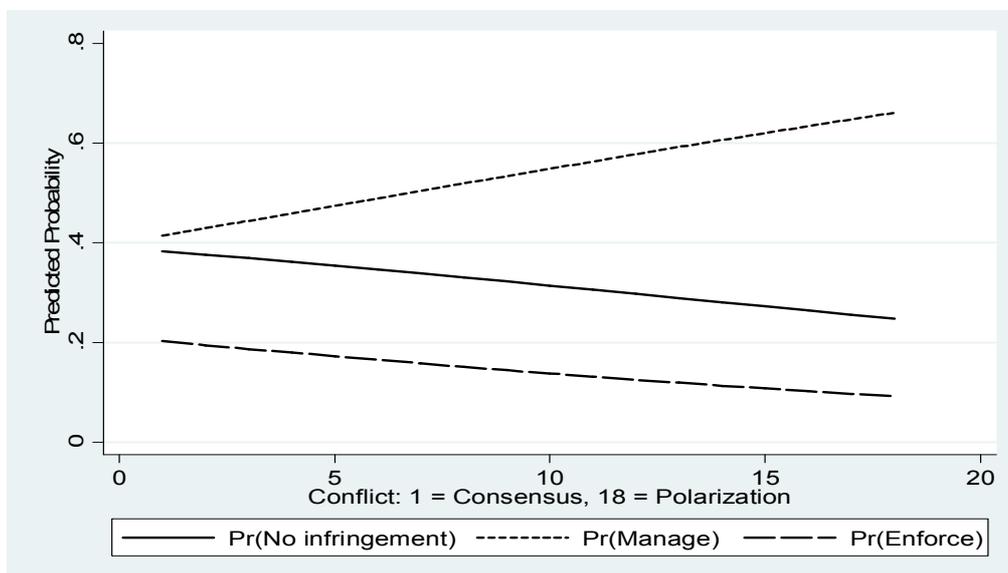
Variable	Outcomes	
	No infringements	Enforcement phase
	Coef (s.e.)	Coef (s.e.)
Conflict in the Council (policy polarization)	-.053* (.027)	-.074** (.036)
Government support for EU	.083 (.070)	.140 (.090)
Societal distrust towards the Commission	-.008 (.009)	-.018 (.012)
Commission disagreement with an EU policy	.019 (.016)	.035* (.018)
<b>Controls</b>		
Conflict b/n the Commission and a member state	.005 (.005)	-.019** (.007)
Government effectiveness	.694* (.408)	.455 (.479)
Policy Complexity (number of recitals)	-.025** (.013)	.035* (.018)
Log likelihood	-240.290	
Wald $\chi^2$	263.23***	
Pseudo R <sup>2</sup>	.095	
N	263	

The managerial stage is the comparison group; robust standard errors both at the member-state- and the directive-level, Wald  $\chi^2$  estimate for clustering in directives.

Figure 2 provides a visual representation of the change in the out-of-sample predicted probabilities<sup>8</sup> for each of the three categories due to an increase in the value of the polarization measure. The other independent variables are held constant at their means. Figure 2 confirms the result in Table 2 that there is a clear distinction between the ‘management’ phase relative to both the ‘no infringements’ category and the ‘enforcement’ phase. While there is almost no difference between the predicted probabilities for the outcomes ‘no infringements’ and ‘management’ when there is absolute consensus in the Council of the EU, the difference between these two categories increases as conflict in the Council escalates. The difference is even greater between the predicted probabilities for a case ending at the ‘management’ and the ‘enforcement’ phases. By contrast, there doesn’t seem to be a significant difference between the ‘no infringements’ category and ‘enforcement’ due to an increase in the level of conflict in the Council. In sum, I do find support for hypotheses 1a and 1b.

<sup>8</sup> Out-of-sample predictions are generated on simulated data, but are as informative as in-sample predictions (which are based on actual data). In addition, out-of-sample predictions are better for representation purposes, since they are less ‘noisy’ than actual data.

Figure 2: Out-of-sample predicted probabilities for the effect of conflict in the Council



Based on the results in Table 2, there are no significant differences between the categories ‘no infringements’ and ‘enforcement’ relative to the middle category ‘management’ due to changes in government support for EU integration and societal distrust towards the Commission. Commission disagreement with an EU policy does not significantly affect the outcomes of the dependent variable either.

With regards to the control variables there is no significant effect of conflict between the Commission and a member state on the likelihood that infringement cases will be instigated by the Commission. However, higher level of conflict between the Commission and a member state significantly decreases the likelihood of a case being resolved at the ‘enforcement’ of the infringement procedure.

I also find mixed evidence for ‘capacity-based explanations’. Government effectiveness has a marginally significant positive effect on the likelihood of instigating infringement cases. However, government effectiveness does not explain differences between the ‘management’ and ‘enforcement’ phases. The number of recitals in a directive has a significant effect on the dependent variable. Higher number of recitals increases the average probability that infringement cases will be instigated against member states. The likelihood that a case will end at the ‘enforcement’ phase also increases as a function of the number of recitals, but the coefficient is only marginally significant ( $p < .10$ ). This result supports previous findings that compliance problems often occur due to the policy complexity of directives (Kaeding, 2006, 2008; Toshkov, 2008).

*The escalation of infringement proceedings from earlier to later stages*

The results from the multinomial logistic model could be complemented with additional analyses on the escalation of infringement cases from earlier to later stages. Based on the fact that enforcement occurs only after more amicable means have failed, one should take into account the directional meaning of infringement proceedings, which was disregarded in the multinomial logistic model. In addition, ordered logistic regression could also help identify some of the reasons for the weak support I find in Table 2 regarding some of the predictions. Thus, instead of collapsing letters of formal notice and reasoned opinions into one category, the analysis shows the escalation of infringement cases from ‘letters of formal notice’ to ‘referrals to the ECJ’.

Table 3 presents two ordered logit models on the likelihood that infringement cases will escalate from earlier to later stages. Model 1 includes only the variables for the predicted effects, while the control variables are added in Model 2.

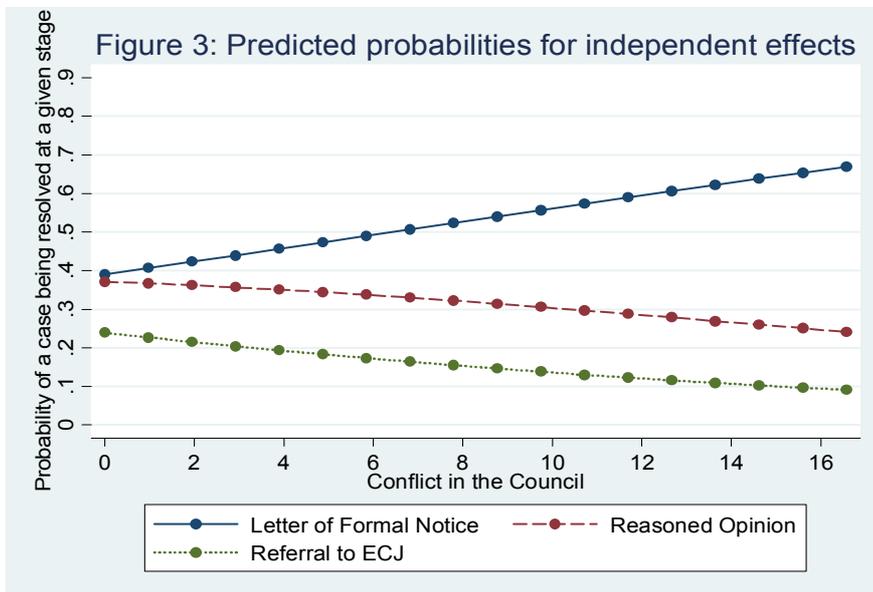
Table 3: Ordered logistic regression on the escalation of infringement cases to later stages

Variable	Model 1	Model 2
Conflict in the Council	-0.062** (.025)	-0.069** (.029)
Government support for the EU	.137 (.125)	.166 (.125)
Societal distrust towards the Commission	-.028*** (.010)	-.025** (.012)
Commission disagreement with a EU policy	.014 (.011)	.038*** (.012)
<b>Controls</b>		
Conflict b/n the Commission and a member state		-.014*** (.005)
Government effectiveness		-.105 (435)
Policy Complexity (number of recitals)		.040*** (.010)
Log likelihood	-179.320	-169.229
Wald $\chi^2$ †	23.96***	61.20***
Wald $\chi^2$ ††	18.07***	41.60***
Pseudo R <sup>2</sup> †	.058	.107
Pseudo R <sup>2</sup> ††	.055	.107
N	178	177

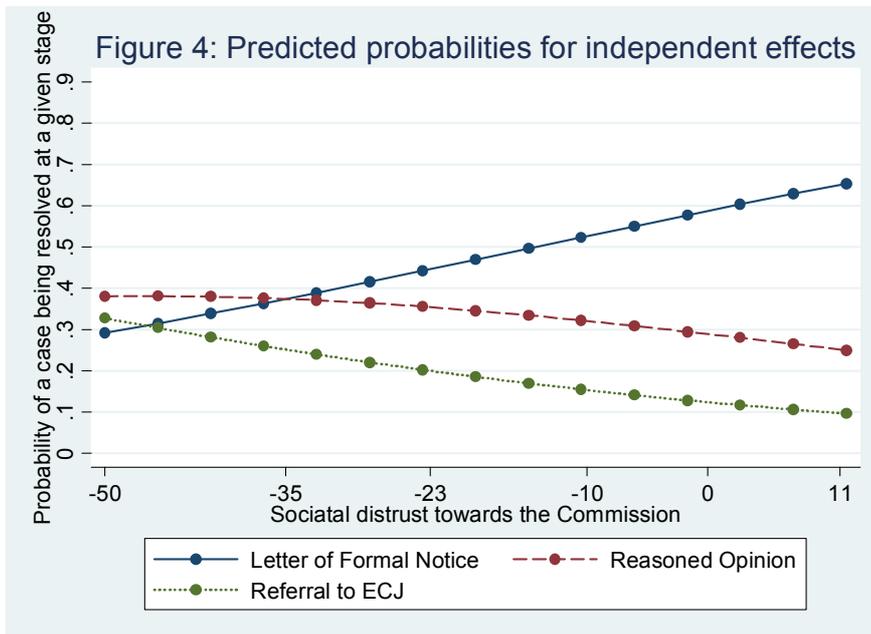
† = clusters in directives; †† = clusters in member states

Similar to the results in Table 2, conflict in the Council has a negative significant effect on the likelihood that infringement cases will escalate to Court referrals. In Figure

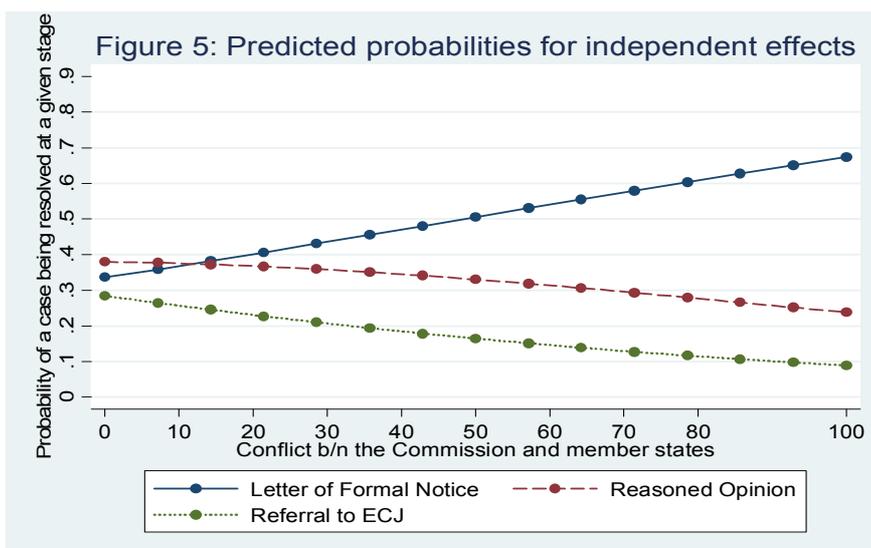
3, I explore the precise change in the predicted probability of an infringement case ending at each of the three possible infringement stages due to an increase in the values of the polarization measure. Figure 3 shows that the predicted probability of an infringement case ending with a ‘letter of formal notice’ increases from .39 to .68 as conflict in the Council increases from 0 to 16, while holding the other variables at their means. By contrast, the probability of an infringement case ending at the final stage “referral to the ECJ” decreases from .25 to .10 as the level of conflict in the Council (policy polarization) increases. It is interesting to note that the predicted probability of a case ending with ‘reasoned opinion’ also decreases as conflict in the Council escalates. Thus, difference exists not only between the ‘management’ and ‘enforcement’ phases of infringement proceedings, but there is also a difference within the ‘management’ phase: between letters of formal notice and reasoned opinions. It appears that conflict in the Council speeds up the resolution of infringements already at the stage of ‘letters of formal notice’.



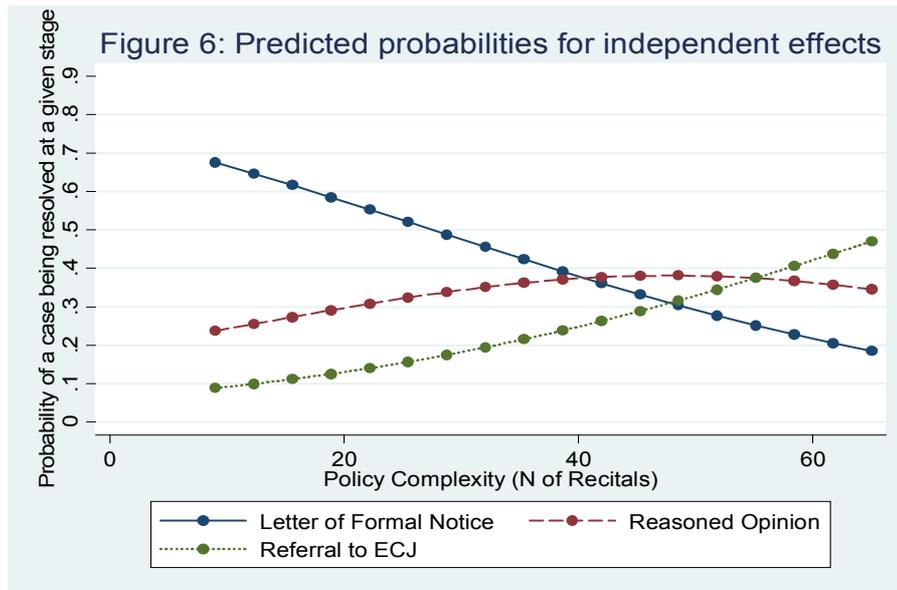
Government support for the EU doesn’t have a significant effect on the escalation of infringement cases. However, contrary to the results in Table 2, societal distrust towards the Commission has a significant negative effect on the dependent variable. Figure 4 shows that the predicted probability of a case being resolved with letters of formal notice increases from .29 to .65 as the level of societal distrust towards the Commission increases, when holding the other independent variable constant at their means. By contrast, the probability of a case reaching the final stage of infringement proceedings decreases from .33 to .10. Similar to the effect of conflict in the Council, the probability of a case ending at the stage of ‘reasoned opinion’ decreases as societal distrust towards the Commission goes up. The observation that the effects on letters of formal notice and reasoned opinions differ could be one of the explanations for the weak statistical evidence we find when we collapse the two infringement stages in one category.



Based on the results in Table 3, we again do not find support for the prediction that Commission disagreement with a policy decreases the probability of escalation of infringement cases to later stages. Conflict between the Commission and a member state does have a negative significant effect on the escalation of infringement cases. Holding the other independent variables constant, the predicted probability of a case ending at the ‘formal notice’ stage increase from .34 to .67 as the level of conflict between the Commission and a member state grows. The probability that the Commission will refer a member state to the ECJ decreases from .28 to .09 (see Figure 5).



Finally, I pay some attention to the effects of the capacity-based variables. Government effectiveness does not significantly affect the escalation of infringement cases to later stages. The number of recitals, however once again, has a significant effect on the dependent variable. An increase in the number of recitals from the minimum of 9 to the maximum of 65 decreases the probability that a case will be resolved at the formal notice stage from .68 to .18. On the other hand, the probability of referral to the ECJ increases from .09 to .47 as the number of recitals in a directive grows (see Figure 6).



## Conclusion and discussion

This study makes three main contributions to the field of EU policy implementation. First, I incorporated the perspective of the Commission in the study on non-compliance by member states. Scholars on EU implementation generally disregard the role of the enforcement body on the resolution of compliance problems. Second, this study contributes to the literature on supranational management and enforcement of EU legislation by viewing infringement proceedings as a ‘management-enforcement ladder’ (Tallberg, 2003). While scholars theoretically distinguish between management and enforcement phases of the infringement proceeding, little effort has been made to empirically test the factors that influence the escalation of infringement cases from management to enforcement phases. Finally, I made both a theoretical and an empirical distinction between the instigation of infringement cases and their continuation to ‘ECJ referrals’. More precisely, I arrived at contrasting predictions on the effects on the instigation and escalation of infringement cases. Drawing on theories on the principal-agent relation, it is expected that conflict between member states during decision-making and low level of member-state acceptance of EU legislation positively influence the likelihood that infringement cases will be opened by the Commission. By contrast, these

same factors are expected to discourage the Commission from increasing the pressure on member states to comply with EU laws. In addition, it was expected that the policy preferences of the enforcement body in the face of the Commission negatively influence the decision to instigate and continue infringement cases.

The first main finding of this study refers to the effect of conflict between member states. More precisely conflict in the Council, indeed, had a negative influence on the likelihood that the Commission will refer a member state to the ECJ once infringement proceedings had been opened. This finding was consistent with the results from both analyses employed in this study. Based on the analyses neither member-state nor Commission acceptance of a policy seem to influence infringement proceedings.

The second main finding relates to the measurement of the dependent variable. More precisely, the analysis on the escalation of infringements to later stages showed that differences exist not only between the management and enforcement phases of the infringement procedure, but also within the management phase itself. Thus, the effects on the resolution of infringements at the stage of 'reasoned opinion' are more similar to the effects on reaching ECJ referrals than to the effects on 'formal notices'. This finding contradicts theoretical accounts stating that reasoned opinions and formal notices belong to the same category.

Furthermore, there are interesting findings regarding differences between effects the instigation and escalation of infringement proceedings. On the one hand, the analysis suggests that capacity limitations are more important in predicting the instigation of implementation problems than preference-based explanations. On the other hand, the analyses on the escalation of infringement proceedings to later stages showed mixed results. Thus, societal distrust towards the Commission significantly influences the escalation of infringement cases from earlier to later stages of the infringement procedure. However, government support for the EU is not significant. With regards to the 'capacity' factors, policy complexity is found to positively influence the escalation of infringement cases to ECJ referrals, while government effectiveness does not seem to play a role on the decision of the Commission continue the infringement proceeding.

The findings of this study should be put into a proper perspective. For example, it was not possible to directly test the assumptions of the theoretical model. In other words, the negative effect of conflict in the Council on the escalation of infringement proceedings could also mean that compliance problems were resolved earlier before the litigation phase and not due to the Commission behavior. In addition, discussions over the implementation process between the Commission and member state governments are usually held behind closed doors, which impedes collecting information on the management and enforcement strategies employed by the Commissioners to induce compliant behavior by member states.

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