# Infringements for Sale?

# Non-Compliance as Trade Policy

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***Abstract***

For the last 20 years, the European Commission has vehemently argued that a substantive and growing deficit in compliance with European legislation by European Union member states substantially undermines one of the cornerstones of the European project, i.e., the free movement of goods and services. Not only given the Commission's concerns, but also many rulings of the European Court of Justice and the shared understanding of politicians, bureaucrats, business leaders, and academics that European legal harmonization and standardization is an effort to advance the Single European Market and Economic and Monetary Union, it is surprising that studies of compliance with European law have ignored the notion of infringements as intra-European trade policy so far. Drawing on a dataset comprising all the cases opened by the Commission against member states for violations of European law, this paper tests the theoretical argument that opportunistic European governments 'sell' non-compliance to domestic industries that demand protection from intra-European competitors. I analyze whether European legal acts are infringed on in an effort to stem import penetration. The empirical findings show that opportunistic governments deliberately employ infringements as barriers to trade.

***Keywords:*** European Union, compliance, trade policy, public choice

# Infringements for Sale? Non-Compliance as Trade Policy

**Italy – trailers for agricultural tractors**

The Commission has decided to take Italy to the Court of Justice because of its national highway code regulations on agricultural trailers, which state that fixtures for coupling trailers to tractors must comply with national technical rules. As a result, the majority of trailers manufactured in other Member States are not accepted. The rules in force thus constitute an obstacle to the free movement of goods under the terms of Articles 28 to 30 of the EC Treaty.[1]

**Germany – garlic-based food supplements**

The Commission has sent a reasoned opinion to Germany concerning the national authorities' practice of always regarding capsule-type products containing dried garlic as medicines, and thus subject to particularly bureaucratic marketing authorization procedures, whereas the products concerned are more properly to be regarded as food products. In the Commission's view, such a practice is incompatible with the principle of the free movement of goods.[2]

Ever since the publication of its first annual report on the national implementation of European law in 1984, the European Commission has constantly and vehemently complained about a substantive and growing deficit in compliance with European legislation. It argues that by infringing on European legislation, European Union (EU) member states not just fail to live up to their legal obligations, but that national regulations on such diverse issues as agricultural

and motorcycle trailers, cash registers, and the labeling of foodstuff (Italy), garlic-based food supplements and pesticides (Germany), polyethylene waste-water pipes (Portugal), motor vehicle transfer licenses (Finland), fire extinguishers, bleach, and bicycle racks (Spain), or orthopedic equipment and alarm systems (Belgium) substantially undermines one of the fundamental principles of the European project, i.e., the free movement of goods and services. Given the European Commission's concerns, it is surprising that studies of compliance with European law have ignored the notion of infringements as obfuscated intra-European protectionism and failed to analyze whether, why, and when EU governments (mis)use trade policy tools, which are – mainly, but not exclusively, due to Articles 28 and 30 of the Treaty Establishing the European Community (ECT)[3] – no longer at their legal disposal.

Drawing on a unique dataset, which comprises all the cases opened by the Commission against member states for violating European law between 1978 and 2007, this paper tests the theoretical argument that the opportunistic governments of EU member states sell non-compliance to domestic industries that demand protection from intra-European competitors. The empirical findings show that European governments deliberately employ infringements as barriers to trade. When they infringe on European law, they do so for their own domestic political gain.

This paper is structured as follows. First, I present an overview over the existing research on compliance with European law. In particular, I highlight how the existing literature conceptualizes the influence of interests and institutions on the compliance behavior and compliance records of EU member states. Following this literature review, I revisit interests and institutions. Developing a public choice argument of non-compliance, I present a different perspective on interests and institutions that accounts for the political economy of infringements

and brings domestic politics (back) into the study of international compliance. I argue that – depending on how much access domestic political institutions provide to special interests – opportunistic governments provide domestic industries with protectionist infringements on EU law in a quest to maximize their own political support function. In the subsequent part of this paper, I present empirical findings, which support my theoretical claims about interests, institutions, and infringements on European legislation. The paper ends with a brief summary of the main arguments and findings and discusses opportunities for the future study of compliance with international law in the EU and beyond.

## Enforcing and Managing Compliance

What explains why member states of the EU violate European law? To answer this question, I first take a look at the existing literature on the topic before developing my own theoretical argument. In particular, I focus on the question of how and which interests and institutions are key to understanding compliance and non-compliance in the EU.

Most approaches to the study of compliance fall into one of two camps – the one, which highlights enforcement and points to the role of the monitoring, sanctioning, and adjudication mechanisms of international regimes and organizations as means to reducing the net-benefits of infringements, and the other, which assumes that most violations of international law are not deliberate acts of defiance, but caused by incapacity and domestic institutional constrains. While some authors also make constructivists arguments, stressing legitimacy, socialization, and norm internalization through processes of social learning and persuasion (cf. Gibson and Caldeira 1996, Finnemore and Sikkink 1998, Checkel 2001 among others), and some recent studies of

compliance in the EU highlight variation across policies and characteristics of individual legal acts (Lampinen and Uusikylä 1998, Treutlein 2007, Haverland et al. 2008, Steunenberg and Kaeding 2009, Börzel et al. 2008), it is the first two theoretical traditions that dominate the compliance literature. Therefore, I focus on these approaches before contrasting them with the public choice approach that is developed in this paper.

## Enforcement

As supporters of the enforcement approach assume that states deliberately choose to violate international norms and rules because of the costs of compliance, they argue that non-compliance can best be prevented by increasing its costs (Martin 1992, Downs et al. 1996, Dorn and Fulton 1997). Increasing external constraints by establishing institutionalized monitoring and sanctioning mechanisms is believed to alter the strategic cost-benefit calculations of states as the probability of detection and punishment affects the anticipated costs of non-compliance (Martin 1992, Fearon 1998). However, especially powerful states can use their political, economic, and even military influence to significantly mitigate the extent to which they are affected and sensitive to compliance costs (Garrett et al. 1998, Horne and Cutlip 2002). This follows from Keohane and Nye's (1977) argument that states are more sensitive to reputational and imposed material costs if they have less political or economic power and are more dependent on the future goodwill and cooperation of others. Powerful states, in contrast, can afford to be more resistant to external pressures as they have more alternatives to cooperation with a particular partner and can more easily afford reputational or material damages.

Hence, less powerful EU member states are less likely to infringe on EU legal acts as they are more sensitive to external constraints composed of material and immaterial sanctions (similar

Martin 1992). A small and less powerful state cannot rely on its share of votes in the Council of Ministers and the importance of its domestic market for other member states. Hence, the reputation as a ‘good citizen’ of the EU and efficient and reliable partner is all the more important to smaller, weaker member states wanting to shape European policies. In contrast, high political and economic weight allows the larger member states to be openly obstinate with respect to compliance with European law. Even if they losses reputation vis-à-vis the European Commission or the other member states due to excessive non-compliance, their political and economic power safeguards influence in EU negotiations, and their interests are usually accommodated (Thomson et al. 2006).

A similar line of reasoning applies to material sanctions for norm violations. Relatively small and poor member states are less able to bear the costs of the judicial procedure before the European Court of Justice and are also more threatened by eventual financial sanctions. Hence, there should be a negative relation between the power of a state and its compliance record. More powerful states infringe on international and European laws more often than weaker states since the former are less sensitive to the costs imposed by material and ideational sanctions.

However, powerful states can also deploy their power at the decision-making stage that antecedes (enforced) compliance as political and economic weight is closely related to the ability to shape international legal acts (Giuliani 2003, Fearon 1998, Thomson et al. 2006). Spatially speaking, a powerful EU member state should be able to negotiate decision-making outcomes that are particularly close to its respective bliss points, and the smaller the distance, the smaller the cost of compliance. As a consequence, member states that have a stronger influence on the making of European law and shape legal acts according to their preferences need to invest less into compliance and, therefore, be more willing to comply.

## Management

Unlike the enforcement approach, the management school of thought assumes that states do not deliberately violate international law. However, even if states are willing to comply, they can still be prevented from doing as they can lack the necessary capacity that enables states to comply (Chayes and Chayes 1993, Chayes et al. 1998, Young 1992, Jacobsen and Weiss Brown 1995, Haas 1998).[4] However, the concept of state capacity is not uniformly specified in the literature and its operationalization differs significantly. On the one hand, resource-centered approaches define capacity as a state's ability to act, i.e., the sum of its financial, military, and human resources (Przeworski 1990, Haas 1998, Simmons 1998), but also the ability to pool and coordinate these resources and to mobilize and channel them into the compliance process, particularly if they are dispersed among various bureaucratic agencies and levels of government (Mbaye 2001, Linos 2007, Egeberg 1999). Neo-institutionalist approaches, on the other hand, argue that the domestic institutional structure influences the degree of a state's capacity to act and its autonomy to make decisions. For instance, veto players can prevent the implementation of international rules by reducing the room for the necessary changes to the status quo (Alesina and Rosenthal 1995, Tsebelis 2002, Linos 2007, Putnam 1988, Haverland 2000).

Of course, when it comes to the implementation of European legal acts, both forms of capacity are necessary for the production of new, as well as for the adaptation of preexisting, domestic laws and their correct application. Based on these considerations, followers of the management school of thought argue that the lower European governments' resource endowment and autonomy is, the more difficult it becomes for a member state to comply with European legal acts.

## Interests and Institutions

All in all, supporters of the enforcement approach to compliance with EU law follow Keohane's (1984: 99) lead and wonder "why governments, seeking to promote their own interests, ever comply with the rules of international regimes when they view these rules as in conflict with [what they perceive as their] self-interest." They claim that member states infringe on European law if European legislation is not congruent with preexisting domestic legislation and/or the kind of European legislation that was not adopted, but preferred to the adopted legislation by the infringing member state. In other words, if member states of the EU do not get the European legislation they want, the cost of transposing, implementing, and enforcing EU law will outweigh the benefits of non-compliance. Of course, whether member states find themselves confronted with 'convenient' laws and policy 'misfit'[5] or not is a function of the power that they can bring to the table at the bargaining stage, i.e., *within* the institutions of the EU – especially the Council of Ministers and the European Parliament. At the enforcement stage, it depends on member states' power *vis-à-vis* the institutions of the EU – especially the European Commission and the European Court of Justice – whether these supranational institutions can sway the outcome of member states' cost-benefit calculations towards a positive net-benefit of compliance. Running the risk of oversimplification, the enforcement approach tells us that we need to look at the policy preferences of policy-seeking governments and member states' respective power within and vis-à-vis the institutions of the EU to explain and predict non-compliance by EU member states.

With its focus on involuntary non-compliance, the management approach virtually ignores preferences. EU scholars working in the management tradition, simply assume that the member

states of the EU are interested in complying with European law. As a consequence, these scholars try to identify the factors that constrain the behavior of the member states' pro-compliance governments. In particular, they look at how – broadly defined – domestic political and bureaucratic institutions affect the compliance records of EU member states (cf. Giuliani 2003, Hille and Knill 2006, Börzel et al. 2011).

## The Public Choice of Compliance

While not disputing the fact that the institutions of the EU and their enforcement activities affect the behavior of EU member states, that European governments have policy preferences and engage in cost-benefit calculations when it comes to compliance, or that domestic intuitions can constrain these governments in their efforts to comply with European legislation, I argue that it is worthwhile to take a second look at interests and institutions. What and whose interests go into governments' cost-benefit calculations? How are domestic institutions connected to member states' compliance records? I answer these questions within a public choice framework that explicitly accounts for the political economy of infringements and brings domestic political institution and politics (back) into the study of international compliance. In this context, I conceptualize infringements on Articles 28 and 30 ECT and other European laws as the obfuscated intra-European trade policy of opportunistic EU governments that provide this form of protectionism to domestic industries for political gain.

## Interests Revisited

Drawing on insights from endogenous trade theory[6] and the broader literature on the political economy of redistributive politics, I assume that policy decisions – such as the implementation of European law – are centralized in the hands of an office-seeking, survival-maximizing government that can be influenced by organized interest groups (Olson 1965, Persson and Tabellini 2002, Mueller 2003). Assuming that governments seek to maximize political support and following the pioneering work of Stigler (1971) and Peltzman (1976), I argue that, first, the welfare that special interest groups derive from protectionist violations of EU law and, second, the deadweight loss that is imposed on society by such a policy are the crucial arguments entering the political support function of incumbents, who are primarily interested in winning the next election and less worried about repercussions later on in their careers. With respect to the argument on non-compliance as obfuscated intra-European protection, the assumption that governments' time horizons rarely extend beyond the next election cycle (Alesina and Tabellini 2007) implies that myopic governments opt for infringements on European law if doing so delivers political results in the short-term and irrespective of long-term consequences for economic competitiveness and welfare.

Within the literature on the politico-economic determinants of trade policies, the protection-for-sale model by Grossman and Helpman (1994) has gained particular prominence. It derives much of its beauty from the "relatively simple structure that yields clear-cut empirical predictions, and has been applied in a number of subsequent theoretical analyses" (Goldberg and Maggi 1999: 1135). Piggybacking on this model, I assume that politicians depend on monetary and non-monetary campaign contributions in order to succeed in upcoming elections. Organized interest groups can provide these contributions, and it is this ability that gives them a favored

position in the eyes of governments (Grossman and Helpman 1994). In exchange for contributions, governments act as the suppliers of such policies as non-compliance with European legislation, which protects domestic industries in distress (not only) from intra-European competition.

More specifically, when deciding on whether to adopt, implement, and enforce European legislation or to initiate and enact new domestic legislation that violates EU law, politicians weight the costs and benefits of such actions for society as a whole and are also exposed to lobbying from special interests. Given that the objective of politicians lies in the maximization of total contributions from lobby groups and aggregate social welfare as the means to staying in power, lobbying can be understood as a two-stage process. First, each organized interest group confronts the government with a contribution schedule, which translates each potential policy a government might chose into contributions from the interest group to the government. On the basis of these contribution schedules or menus, the government then decides at the second stage on an actual policy vector and collects the contributions from each of the lobbying groups. The equilibrium of such a common agency problem[7] is "a set of contribution schedules such that each lobby's schedule maximizes the aggregate utility of the lobby's members, taking as given the schedules of the other lobby groups" (Grossman and Helpman 1994: 836). Herein, the lobbies are aware that politicians ultimately set the policy according to their own welfare concerns.

Given the influence of organized interest groups on domestic politicians and policy-making and the plausible assumption that rational forward-looking actors use all available information to forecast the outcome of the collective choice processes, which generates European legislation, and the future implication of European legislation, on can expect interest group to try to and succeed at influencing of EU decision-making processes in awareness of the (domestic) impact

of EU law. In fact, the available data on non-compliance in the EU indicates that most member states of the EU comply with most European legislation most of the time (cf. Börzel 2001, but also the empirical section of this paper), which could indicate that most interest groups are happy with EU law and its implementation.

However, forward-looking decisions are almost always characterized by considerable uncertainty. The relations between policy formation as far back as the negotiations of the Treaty Establishing the European Coal and Steel Community and the Treaty of Rome in the 1950s and policy outcomes today are complex to say the least, and when "information is incomplete […] dynamic feedbacks due to political uncertainty about the future significantly complicate the effects of current policy on outcomes" (Drazen 2000: 39). As the context, in which decisions on European legislation are made, tends to be one of great uncertainty about future outcomes, welfare repercussions and the distributional effects of European law are not fully predictable. Hence, lobbying coalitions form and dissolve and the demand for protection varies over time as the (economic) context changes.

While European legislation affects the ability of governments "to protect particular sectoral interests, [it does] not affect politicians' weighting of campaign contributions relative to general voter dissatisfaction" (Grossman and Helpman 1994: 834). The fact that Articles 28 and 30 ECT and other European laws constrain the legal use of barriers to intra-European trade does not mean that governments fall deaf to the lure of campaign contributions from organized interest groups that ask for the supply of protection even if this means violating EU legislation.[8] But, who are these interest groups? Based on a simple model of sectoral trade policy preferences (Hiscox 2002), it is safe to assume that they are groups of import-competing producers, which experience a loss of competitiveness. Faced with tough intra-European competition, they demand

for restrictions to one of the EU's core principles, i.e. free trade (Anderson and Baldwin 1987). These assumptions about the demand for protection are complemented by empirical findings on the supply. For instance, already Marvel and Ray (1983) found that protection is usually given to politically important industries and industries facing strong import penetration of the domestic market. That protection is indeed for sale has also been corroborated by several more recent studies testing the endogenous trade policy argument (cf. Goldberg and Maggi 1999, Gawande and Bandyopadhyay 2000, Eicher and Osang 2002, and others).

In summary, the chain of argument above not only explains how the interests of EU member state governments and infringements on European law are causally connected, but also where these interests come from. Violations of European legislation do not occur because policy-seeking governments are disgruntled by the misfit of EU laws and the price tag that comes with transposing, implementing, and enforcing them, but are the consequence of the political cost-benefit calculations of office-seeking, reelection-minded governments, which are jointly maximizing campaign contributions and votes such that the marginal increase in contributions from rent-seeking organized interests is equal to the loss in votes due to the deadweight welfare losses created by protection via non-compliance. Import-competing industries are demanding protection from their governments as the suppliers of regulation, governments, in view of their political support functions, decide upon the level of protection within certain bounds, and the European Commission and European Court of Justice prosecute and penalize the provision of protection as violations of European law.

*Hypothesis 1:* Governments of EU member states that face more intense import penetration provide – *ceteris paribus* – more protection, i.e., infringe more frequently on European legislation (in particular on Articles 28 and 30 ECT).

## Institutions Revisited

Hypothesis 1 predicts a positive relation between import penetration and non-compliance as a consequence of governments' efforts at maximizing their political support functions. However, what do these functions look like? Are they the same across all EU member states? I claim that there is variation and that it depends on domestic political institution how responsive governments are to campaign contributions relative to general voter dissatisfaction. This is in line with Kono's (2006: 382) argument that institutions change "politicians' relative responsiveness to mass public and interest-group pressures." How responsive governments are to the demands for protection of import-competing industries is a function of the access to politicians that domestic political institutions grant organized special interests. In essence, domestic institutions condition the causal effect of import penetration on violations of EU law.

That domestic institutions can have such an intervening effect should not come as a surprise. For instance, Persson and Tabellini (2005) found in their analyses of constitutional rules on various aspects of macroeconomic policy: presidential and majoritarian systems have smaller government outlays, welfare state spending, and budget deficits than proportional representation systems, countries with proportional representation are more prone than presidential and majoritarian systems to political business cycles-style[9] welfare state expansion before elections, and while virtually all countries increase government spending in times of economic downturn, countries with proportional representation fail to reverse their spending patterns when economies

have recovered. Bernhard and Leblang (1999) highlighted the influence of political institutions on exchange-rate arrangements. Last, but certainly not least, many scholars have followed the lead of Rogowski (1987) and investigated the link between institutions and trade policy. Among these, Ehrlich (2007) demonstrated that the number of electoral districts and parties in government, party discipline, bicameralism, and presidentialism affect tariff rates by determining the number of access points for lobbyists.

These findings and those of many similar and related studies provide insights into the question of what kind of domestic political institutions are more open to special interests than others. Not drawing the strict and somewhat artificial line between veto players and access points (cf. Ehrlich 2007), I argue that the different characteristics of domestic political institutions can be generalized and subsumed under a more broadly defined veto player concept that defines veto players as both veto points in the traditional Tsebelis (2002) way and access points for special interests. In democratic political systems, constitutional rules on elections, parliamentary chambers, etc. affect the number of veto players, which can be responsive to the policy demands of organized interest groups and hamper policy change.

Political decentralization or proportional representation, for instance, correlates with a higher number of veto players that can be accessed by interest groups and use their political influence to advance their own political interests by providing suboptimal policies – like protection – in exchange for campaign contributions (Perotti and Kontopoulos 2002). However, the larger number of veto players under proportional representation can not only help to bring about new domestic legislation that violates EU law by being responsive to special interests and, therefore, protecting import-competing industries from intra-European competition. It can also generate policy gridlock (Treisman 2000, Franzese 2002), thereby making changes to existing

protectionist policies, i.e., rectifying instances of non-compliance, and the adoption, implementation, and enforcement of new European legislation less likely.[10]

Agreeing with North (2005: 30) that "we have made some progress" when it comes to seeing, feeling, touching, and measuring institutions and understanding the ways in which they affect policy outcomes (cf. North 1990), I argue that domestic political institutions do not only have the direct effect on non-compliance that the existing EU compliance ascribes to them, but – and perhaps even more importantly – have a conditional effect by conditioning the responsiveness of the politicians of EU member states to calls for protection and non-compliance with European law. Member states with may veto players provide organized interest groups with multiple access points for their protectionist agenda. As a consequence, I hypothesize that the positive effect of import penetration on protection increases with the number of veto players.

*Hypothesis 2a:* EU member states with more veto players infringe – *ceteris paribus* –more frequently on European legislation.

*Hypothesis 2b:* The 'positive' effect of import penetration on governments' provision of protection, i.e., member states more frequent infringements on European legislation (in particular on Articles 28 and 30 ECT) in the face of increasing import penetration, increases with the increasing number of veto players of EU member states.

Rephrasing hypothesis 2b, I argue that, while we can expect to observe that all member states of the EU infringe more frequently on EU law when their domestic industries are faced with strong competition from foreign intra-European competitors, member states with many veto players should do so more often than their counterparts with few veto players. In other words,

conditional on the number of veto players, more import penetration comes with (a lot) more non-compliance.

In sum, while the impact of interests and institutions on compliance in the EU has been studied for years, the above paragraphs offer a new take on interests, institutions, and infringements on European law. Instead of focusing on the institutions of the EU and their enforcement activities, I look at the direct and conditional effects of domestic political institutions. Instead of making strong, almost structuralist ('all member state want to comply') assumptions about the interests of European governments or assuming that policy-seeking governments make compliance dependent on the overlap between their preferred legislation and the actual European legislation, I suggest that the governments of the EU member states are primarily interested in their political survival and, therefore, trade protectionist infringements for campaign contributions. This line of argument does not only highlight how public choice theory can be fruitful for the study of compliance in the EU, but bring domestic political institutions and politics (back) into the study of infringements on European law.

## Data and Findings

In this part of the paper, I put my hypotheses about special interests, domestic political institutions, and compliance with European law to the test. Before presenting the empirical findings, I provide information on my data and the operationalization of the relevant variables.

Empirical studies on compliance with EU law face the challenge of measuring their response variable. Many scholars have developed their own assessment criteria and collected the empirical information in laborious case studies (Falkner et al. 2005, Finnemore and Sikkink

1998). In this paper, I draw on statistical data, which the European Commission provides in its Annual Reports on National Implementation of EU Law.[11] These reports contain detailed information on the legal action the Commission brought against the member states. Article 226 ECT entitles the Commission to open infringement proceedings against member states suspected to violate European law. In principle, member states can violate European law in three different ways. They can fail to notify the European Commission of the national measures taken in order to transpose it into national legislation in due time (notification failure), they can incorrectly or incompletely transpose it (incorrect transposition), or they can fail to implement and enforce it once it has been transposed (incorrect implementation).[12]

Regardless of the type of violation at stake, European infringement proceedings consist of multiple stages. The first two of these stages, suspected infringements (complaints, petitions, etc.) and Formal Letters, are considered unofficial and treated largely as confidential. The official infringement procedure starts when the European Commission issues a Reasoned Opinion and ends with a ruling of the European Court of Justice (ECJ). If a member state refuses to comply with the court ruling, the Commission can open new proceedings (Article 228 ECT). These Article 228 ECT proceedings consist of the same stages as Article 226 ECT proceedings, but the ECJ has the right to impose financial penalties (Tallberg 2002).

For my analysis, I look exclusively at cases in which the European Commission sent at least a Reasoned Opinion[13] to an EU 15 member states (with the exception of Luxembourg)[14] in the years 1978 to 2007. My dataset contains more than 10,000 individual infringement cases (almost 1000 of which are about violations of Articles 28 and 30 ECT), which are classified by infringement number, member state, policy, legal basis (CELEX number), type of infringement,

and stage reached in the infringement proceedings. There is substantial variation between and within member states and over time (figure 1).[15]

*--- Figure 1 about here ---*

My two main covariates are interests and institutions or *Import Penetration* and *Veto Players*. Import penetration is defined as the proportion of a country's domestic consumption accounted for by imported goods. The higher import penetration is, the stronger is the competition for domestic import-competing industries and the more likely it is that these industries organize and turn to the government in hope for protection. Import penetration is measured in percent. The data come from the OECD. While there are alternative indicators for domestic political institutions, I use the veto player or political constraints index by Witold Henisz (2002), which is based on a simple spatial model of political interaction among independent government branches with veto power, in table 1 below.[16] To test my hypothesis 2b of the conditional effect of import penetration and veto players on compliance, I interact the two respective covariates.

All other covariates are controls, which are used in many EU compliance studies to test enforcement, management, or constructivist arguments. First, I incorporate two power indicators into my analysis. These indicators account for different aspects of power – economic size and EU-specific political power. Gross domestic product (*GDP*) in trillion constant 1995 US$ is a proxy for economic power (Martin 1992, Moravcsik 1998, Steinberg 2002). It influences the sensitivity towards material costs of financial penalties or the withholding of EU subsidies. The data come from the World Bank. Direct EU-specific political power is measured as the

proportion of times when a member state is pivotal (and can, thus, turn a losing into a winning coalition) under qualified majority voting in the Council of Ministers (*Shapley Shubik Index*) (Shapley and Shubik 1954, Rodden 2002). Other power sources, such as military capabilities or population size are either irrelevant or captured by both *GDP* and the *Shapley Shubik Index*. Second, to test for the influence of capacity on compliance, I include two indicators. *GDP per Capita* in thousand constant 1995 US$ is a general measure for the resources on which a state can draw to ensure compliance (Brautigam 1996). The data come from the Word Bank. Whether a state has the capacity to mobilize these resources is captured by an index of *Bureaucratic Efficiency* and professionalism of the public service based on work by Auer and her colleagues (Mbaye 2001, Auer et al. 1996).[17] Finally, I use opinion poll survey data to capture the effects of support for the *Rule of Law* and the EU (*EU Support*). Gibson and Caldeira's (1992) data measure the extent of support for the rule of law (in %) on the basis of agreement with the following statements: "it is not necessary to obey a law which I consider unfair", "sometimes it is better to ignore a law and to directly solve problems instead of awaiting legal solution," and "if I do not agree with a rule, it is okay to violate it as long as I pay attention to not being discovered."[18] Data on public support for the EU (in %) are available from Eurobarometer surveys.

In table 1, I report the central findings of my empirical tests of the effects of import penetration and veto players on non-compliance.[19] I discuss the findings in turn, referring to the models 1 to 3. All three models comprise the three covariates that are central to the theoretical argument of this paper, i.e., the indicators for interests, institutions, and the interaction effect between the two. In models 2 and 3, I also include the control variables discussed above. While

models 1 and 2 look only at infringements of Articles 28 and 30 ECT, I test the effect of my covariates on all infringements on European law in model 3.[20]

The empirical findings provide clear and strong support to my three hypotheses. The coefficients of *Import Penetration*, *Veto Players*, and the interaction effect have the expected algebraic sign, i.e., they are positive, and are significant in all three models. This shows that there really is a positive interaction effect between special interests and domestic political institutions with respect to compliance with EU law. Import penetration goes hand in hand with particularly many instances of protectionist non-compliance when domestic institutions are responsive to the policy demands of organized special interests. While EU member states with industries suffering from strong import-competition and many veto players infringe most frequently on European legislation, member states that have healthy industries and political institutions that make it difficult for special interests to be heard are the European poster children with respect to compliance and support for the European principle of free movement of goods and services.

*--- Table 1 about here ---*

While I find strong empirical support for my own interests and institutions hypotheses, none of the other theoretical approaches – enforcement, management, and constructivism – are supported by the data. Especially in model 3, none of the control variables are significant. However, this is not too surprising. With respect to enforcement, I already discussed in the theoretical section of this paper that power can cut both ways. That is, while the large EU member states can bring their political and economic weight to bear during the decision-making process to receive the European legislation they want, they can use the same weight to be

obstinate in the face of enforcement pressure. If any of the control variables affects compliance at all, member states with efficient bureaucracy might be able to cope and comply better with European law than member states that lack such efficiency. This is one of the more frequently reported finding in EU compliance studies that do not control for special interests and the responsiveness of politicians to these interests. The fact that there is some fairly robust evidence that domestic bureaucracies matter when it comes to transposing and implementing European legislation seems to provide at least tentative support to the management approach's capacity argument (cf. Mbaye 2001, Hille and Knill 2006, Börzel et al. 2011).

## Conclusion and Outlook

The empirical analysis supports my theoretical argument that non-compliance with European law can be understood and analyzed as obfuscated intra-European trade policy. I show that survival-maximizing European governments deliberately employ infringements for their own political gain. When domestic industries are under severe import-competition and the political institutions are 'right,' i.e., provide lobbyists with access to politicians and make politicians responsive to the demands of organized interests, the governments of EU member states (mis)use trade policy tools, which are no longer at their legal disposal, in an effort to maximize their political support function, thereby violating Articles 28 and 30 ECT and other EU laws. What is more, the public choice-inspired argument about the interests of domestic industries and opportunistic politicians, domestic political institutions, and violations of European legal acts, fares much better than traditional enforcement and management approaches to compliance when put to the empirical test. Of course, given the success of recent applications

of politico-economic thought to the study of various issues in international relations, it might not be too surprising that assuming office-seeking politicians and establishing exactly how domestic institutions affect political support functions can improve our understanding of infringements on EU law and give us a more detailed and more realistic picture of the compliance process than theoretical arguments that assume policy-seeking governments that only respond to international enforcement pressure or member states with uniform and stable preferences towards compliance. However, not only has public choice theory not been used to study infringements on EU law before, but this paper and its findings also encourage us to (continue to) take domestic political institutions and politics serious in the context of international compliance.

Despite the strong empirical findings, there still are many opportunities for future research along the lines of this paper on the political economy of protectionist non-compliance in Europe. First, it would be interesting to expand the sample not only in time, but to collect data for the enlarged EU and at the industry level. On the one hand, this would allow us to analyze whether the domestic political process in the transition countries of Central and Eastern Europe follow the same politico-economic logic as in the long established Western democracies of the EU 15. Also, insights from such an expanded analysis would allow us to predict future levels of non-compliance in the EU, i.e., whether the new member states will increase the level of intra-European protection or not. On the other hand, data at the industry level could give us a better understanding of whether some organized interests are better equipped to use the access to politicians that the domestic political institutions provide or why governments are more responsive to the demands for protection by some industries than others. Second, the collection of more and more fine-grained data could also allow us to capture multi-level and spatial/network effects and to address the issue of endogeneity. Do member states succeed at

protecting their domestic industries via non-compliance with European legislation, do infringements on Articles 28 and 30 ECT actually undermine and divert trade in the EU (on a large scale, and how do the economic consequences of illegal barriers to intra-EU trade feed back into the domestic policy process? Finally, it might be worth going beyond Europe and to place the empirical evidence from the EU in the broader context of violations of international law and commitments. After all, the principle of free trade and compliance problems are not unique to the EU. Studying non-compliance as trade policy in the World Trade Organization and the ever increasing number of bilateral and multilateral trade agreements cannot only provide us with a better understanding of non-compliance itself and the domestic interests and institutions behind it, but the ways to address and reduce (the incentives for member states to commit) violations of international commitments.

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# Figure 1

## Infringements across Member States and Time, 1989-99

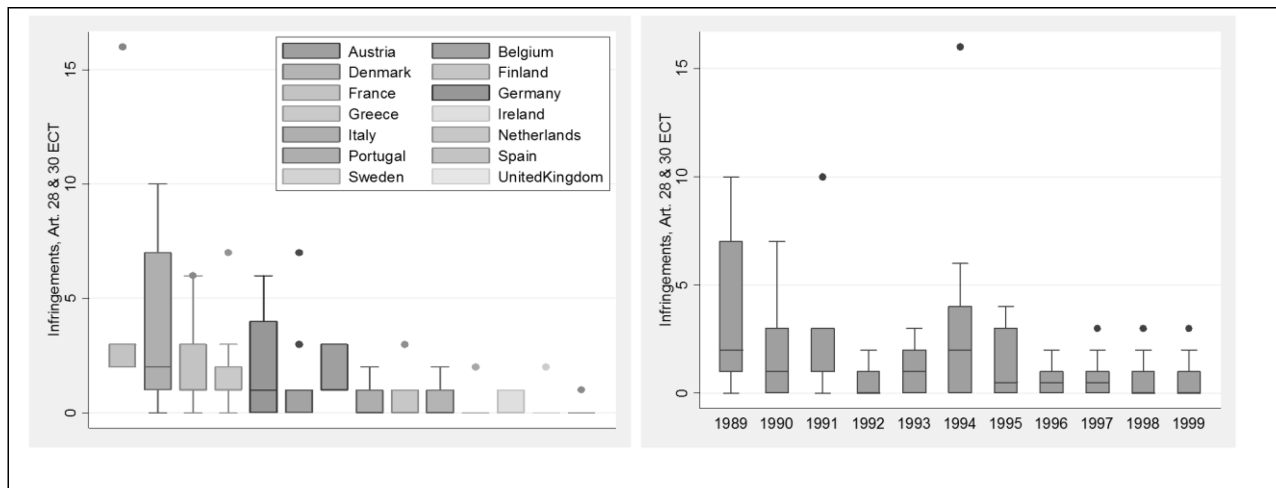

**Table 1**

**Infringements on EU Law, 1978-2007**

| | | (1) | (2) | (3) |
|---|---|---|---|---|
| | | Infringements on Articles 28 and 30 ECT Negative binomial | | All Infringements OLS |
| | *Expectations:* | | | |
| Import Penetration | + | 17.420*** | 13.873*** | 1.584* |
| | | (5.040) | (5.338) | (0.762) |
| Veto Players | + | 6.221** | 6.478*** | 1.157** |
| | | (2.832) | (0.962) | (0.516) |
| Import * Veto Players | + | 22.693*** | 18.217*** | 2.570* |
| | | (6.812) | (5.562) | (1.257) |
| *Controls*: | | | | |
| GDP | + | | -0.000 | -0.000 |
| | | | (0.000) | (0.000) |
| Shapley Shubik Index | +/- | | 0.192 | 0.035 |
| | | | (0.150) | (0.039) |
| GDP per Capita | - | | 0.000*** | 0.000 |
| | | | (0.000) | (0.000) |
| Bureaucratic Efficiency | - | | -1.066** | -0.120 |
| | | | (0.420) | (0.084) |
| Rule of Law | - | | -0.023 | -0.012 |
| | | | (0.019) | (0.012) |
| EU Support | - | | 0.021** | 0.006 |
| | | | (0.009) | (0.004) |
| Constant | | 4.990*** | 3.300** | 1.422** |
| | | (1.594) | (1.499) | (0.478) |
| Observations (country years) | | 224 | 198 | 198 |

Dependent variables are Reasoned Opinions (per legal act in force). Negative binomial and OLS regressions with two-tailed t-tests. Robust (Hubert/White) standard errors with clustering on member states in parentheses. *** = p 0.01, ** = $p < 0.05$, * = $p < 0.1$.

## Notes

[1] European Commission. April 28, 2003. Internal Market: Commission Protects the Free Movement of Goods and Services in France, Italy and the Netherlands. *RAPID Press Release* IP/03/581.

[2] European Commission. February 13, 2003. Free Movement of Goods: the Commission Takes Action against Five Member States. *RAPID Press Release* IP/03/225.

[3] *Article 28 ECT:* Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States; *Article 30 ECT:* The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

[4] The management school specifies additional factors that can explain involuntary or inadvertent non-compliance. In particular, these factors comprise the precision of norms and implementation timetables (Chayes and Chayes 1993).

[5] cf. Bohne 2006 for a discussion of different conceptualization of 'misfit' in EU compliance studies.

[6] Cf. Hillman (1989) for an early overview over the literature on endogenous trade policy and protection.

[7] A common agency problem describes a situation in which "several principals simultaneously and independently attempt to influence a common agent" (Bernheim and Whinston 1986: 923). Here, the government is the agent that is lobbied by a variety of special interests.

[8] Together with the aforementioned issue of uncertainty/incomplete information and contextual changes over time, this provides an additional answer to the wider problem of endogeneity in compliance with international law (Simmons and Hopkins 2005), which manifests itself in the question of why countries do not comply with legislation they agreed to in the first place. More narrowly, it points out why the management approach's assumption of a unwavering interest in compliance on the side of member state governments and non-compliance as an unintended and inevitable consequence of capacity constraints, ambiguous norms, and overambitious implementation timetables is too strong, if not naïve (cf. also Chayes and Chayes 1993 versus Downs et al. 1996).

[9] cf. Alesina et al. 1997, Nordhaus 1975, Hibbs 1977, Rogoff and Siebert 1988, and others on political business cycles.

[10] It is only this last aspect of domestic political institutions that supporters of the management approach to compliance takes into consideration (Haverland 2000, Linos 2007, Egeberg 1999). By blocking the implementation of European legislation, veto players make governments infringe on the legislation that governments want to comply with, creating the problem of involuntary non-compliance. However, when it comes to violations of the Articles 28 and 30 ECT and the principle of free intra-EU trade, member states typically do not fail to transpose and apply new EU legislation, but infringe on European law by enacting new or resuming old protectionist policies.

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[11] Even though this is the most commonly used data in empirical work on non-compliance in the EU (cf. Mbaye 2001, Linos 2007, Perkins and Neumayer 2007, and many others), using the European Commission's infringement data as a measure for non-compliance with European law is not without problems. There are good reasons to question whether the Commission's data qualify as a valid and reliable source of compliance failure. First, for reasons of limited resources, the Commission is not capable of detecting and legally pursuing all instances of non-compliance with European law. The Commission's data might therefore only cover the tip of the non-compliance iceberg in the EU (Falkner et al. 2005). Moreover, the infringement sample could be seriously biased since the Commission depends heavily on the member states reporting back on their implementation activities, on costly and time-consuming consultancy reports, and on information from citizens, interest groups, and companies. Yet, there is no indication that the limited detection of non-compliance systematically biases the Commission's infringement data towards certain member states (Börzel et al. 2011).

[12] Most infringements on Articles 28 and 30 ECT fall into the third category.

[13] I rely on Reasoned Opinions for two reasons. First, Reasoned Opinions is the first stage of the infringement proceedings for which comprehensive data is available. The Commission considers information on complaints and Formal Letters as confidential and only provides limited data on those cases. Second, Reasoned Opinions concern the more serious cases of non-compliance as they refer to issues that could not be solved through informal negotiations at the previous, unofficial stages. To check the robustness of my model, I also estimated models with ECJ Referrals and ECJ Rulings as response variables. Comparisons of the estimated coefficients between the models revealed no substantial differences.

[14] The EU 15 member states are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. I had to exclude Luxembourg from my analyses due to too many missing values on the covariates of interest.

[15] Figure 1exclusively displays data for infringements on Articles 28 and 30 ECT. Similar patterns and levels of compliance and variation in compliance can be found for all infringement cases. The box-and-whisker plots depict the lowest and largest number of Reasoned Opinions per year or member state, the lower and upper quartile, and the median for each of the EU 15 countries and the years 1989 to 1999. The individual box plots are sorted from left to right by the average number of infringements per member state or year.

[16] I also estimated models with alternative veto player indices by Tsebelis (2002) and Kaufmann et al. (2008) and indicators for specific aspects of EU member states' political institutional makeup (e.g., proportional representation, number of electoral districts, average size of electoral districts, number of parties in government, coalition governments, bicameralism, federalism, and presidentialism). The choice of covariates does not affect the overall finding of this paper.

[17] This index consists of three components of bureaucratic efficiency: performance related pay for civil servants, lack of permanent tenure, and public advertising of open positions. It highly correlates with measures of corruption, e.g., the Corruption Perception Index of Transparency International (Herzfeld and Weiss 2003). Other potential indicators of government capacity – such as bureaucratic quality from the World Bank governance indicators (Kaufmann et al. 2008) – are not used as they lack sufficient variance for comparative studies of the EU member states.

[18] Alternative covariates that are used in the literature include the rule of law indicator from World Bank governance indicators (Kaufmann et al. 2008). Using this indicator instead of the Gibson and Caldeira leads to virtually identical results.

[19] All regression results were generated using the statistics software package Stata/MP 10.1. I tested for first- and higher order autocorrelation. None was found. Problems of heteroscedasticity were counteracted by the use of robust standard errors with clustering on member states. As to unobserved country heterogeneity, I decided against a fixed effect specification, which impedes the inclusion of time-invariant covariates and disregards the cross-country information in the data (cf. Plümper et al. 2005).

[20] I also estimated separate models for failures to transpose and implement European legislation, which produced virtually identical results for both types of non-compliance.