Compliance and enforcement of EU law: Who wins, who loses, and who settles

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Paper submitted to
the Ninth Annual Conference
on the Political Economy of International Organizations,
University of Utah, Salt Lake City, Utah
January 7-9, 2016

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1 Introduction

In the European Union (EU) domestic implementation of EU policies is problematic because member states often have incentives to avoid compliance. For a number of reasons, ranging from the more trivial (being outvoted, change in domestic governing parties) to the more subtle (free-riding), national authorities do not always have full compliance with the EU rules as an unconditional strategy.

At the same time, monitoring and enforcing compliance with EU law is costly, difficult, and inevitably strategic. The main tools the European Commission has at its disposal for enforcing compliance with EU law at the domestic level are the so-called 'infringement procedures' (IPs). The IPs are complex and rather opaque institutional mechanisms which consist of a 'management' or pre-litigation phase during which the member states and the Commission negotiate and, if no agreement is reached, of an 'adjudication' or litigation phase during which the European Court of Justice (ECJ) decides on the case. IPs have been under gradual transformation since the 2000s with some major institutional changes in their design and operation and the introduction of complementary dispute-settlement mechanisms like the EU Pilot and Solvit.

The pattern of empirical facts generated by the functioning of the infringement procedures is rather puzzling. This includes a very high settlement rate coupled with a very high win rate for the Commission for the cases that reach the European Court of Justice (ECJ) for adjudication. This is a puzzle from the point of view of a large Law & Economics literature, and in view of the Public Policy/Political Science scholarship which routinely uncovers significant problems with the practical application of the EU rules. Unfortunately, so far the relationship between settlement and win rates, and between negotiating and adjudicating compliance, could not have been studied in more detail since no systematic data was available on how these indicators vary across countries, sectors, case types, and over time.

In this paper I outline a game-theoretical model that tries to capture the strategic aspects of the EU compliance game. I also present new data on the functioning of the infringement procedures which for a first time brings together information on the initiation and progress of IPs *and* on the outcomes of the court cases if and when the ECJ gets involved for the 27 member states of the EU for the period 2003-2014. In the text, I focus on the over-time and cross-country variation in initiated IPs, settled cases, and win rates at court. The purposes of the paper are mostly exploratory, but the empirical analysis is informed by the theoretically-interesting problem about the relationship between settlement and adjudication in a multi-level system of governance.

I find that there is a negative (although not linear) relationship between the trial rates (the proportion of cases that receive an ECJ judgement from all letters of formal notice a country receives) and the win rates (the proportion of judgements favouring the member states) of individual countries. In short, the more cases a state settles, the more cases from the remaining ones the state wins. To come back to the title of the paper, those who settle win when they do not, and the others lose. I also offer a classification of the EU member states with regard to their IP behaviour based on the new data.

The negative relationship between trial rates and win rates at the country level is roughly in line with existing theoretical expectations that as the trial rates goes to zero, the win rates of both parties should approach 50%, but the pattern is more complex that can be accounted for by existing theoretical models. The data presented in the paper invites explanations of why and how the IPs work in supporting compliance in the EU.

2 Institutions and enforcement in the European Union

The EU possesses a complicated institutional machinery for monitoring and enforcing EU laws and policies. IPs play the main part, but in specific policy areas other enforcement mechanisms exist – for example in Economic and Monetary Union (EMU) or with regard to state aid. Furthermore, purely national legal procedures in which citizens sue for damages arising from the fact that the country has not applied EU law and the preliminary reference procedure in which the ECJ provides binding interpretations of EU law can also be regarded as part of the architecture for enforcement and compliance.

The set-up of the infringement procedures

Nevertheless, it is the IPs that attract the bulk of scholarly and expert attention because of their general scope and wide application (Börzel, 2001; Tallberg, 2002; Tallberg and Jonsson, 2005). IPs were part of the original treaties establishing the European Communities, but have been fundamentally changed with the Treaty of Maastricht which added the possibility of financial sanctions and with the Treaty of Lisbon which streamlined somewhat the procedures.

The IP based on article 258 of the Treaty on the Functioning of the European Union (TFEU, better known as the Treaty of Lisbon; formerly article 226) has several compulsory steps. First, if an infringement is suspected, the Commission gets into informal contact with the member state. Second,

if the informal contact does not resolve the issue, the Commission sends a letter of formal notice to the member state. Third, if compliance is still not achieved, the Commission sends a reasoned opinion in which it outlines its arguments why it believes the country has not complied and specifies actions to be taken. Fourth, if the member state refuses to comply, the case is brought to the ECJ which decides whether there is indeed a breach of EU law or not.

If the member state still does not do enough to comply with the original legislation that brought the IP and with the judgement of the Court, the Commission starts a second IP based on article 260 TFEU (former article 228). In this procedure, the Commission applies for financial sanctions (a lump sum and a periodic payment) for the offending member state. Before the Treaty of Lisbon, all steps described above needed to be undertaken with respect to the art. 260 IP as well, but after the changes introduced with the treaty, the Commission can apply directly to the Court side-stepping letters of formal notice and reasoned opinions.

IPs can be initiated for noncompliance with treaty provisions or with particular legal acts such as directives (which require legal transposition at the national level). In practice the three major sources of IPs are 1) non-communication of transposition measures, 2) incorrect transposition, 3) incorrect application (implementation). The first group of suspected infringements relate to the absence of reported national transposition measures within the specified deadlines (or reporting only irrelevant national measures - interview A). After the changes introduced with the Treaty of Lisbon, the Commission can apply directly for financial penalties with regard to non-notification. Together with improved data management systems, this implies that the detection and pursuit of non-communication infringements is almost automatic now with little scope for negotiation with the offending member state. It would seem that the streamlined non-notification IPs have contributed to the very low level of transposition deficit that almost all member states report (European Commission, 2010).

While the detection of non-transposition is relativity straightforward, the informational asymmetry between the Commission and the member states is much bigger when it come to *incorrect* or *insufficient* transposition and application. The Commission relies on two main sources of information on possible infringements: complaints and own investigations. The former accounts for the greater share of IPs. In principle, the Commission does not have its own investigative teams which can examine the situation on the ground in the various member states (but in some policy sectors like fisheries it does have its own inspectors, Interview A). But it can organize monitoring reports and can request information from the member states (which are

under no strict legal obligation to cooperate) (Smith, 2009).

Complaints remain the more often used source of IPs. They can come from a variety of sources - individual citizens, NGOs, interest groups, companies, other member states, petitions from the European Parliament (EP), and so on. After 2007 the Commission enters all received complaints into a special database and has taken the commitment to respond within one year either with the start of a formal IPs or with closing the case (Interview A). Again, the Commission is under no obligation to provide explanations or reasons why it decides to pursue or close a case and enjoys unconstrained discretion in handling the cases.

The conduct of infringement procedures

Having outlined the institutional set-up of the infringement procedures, let us briefly explore what empirical patterns their operation generate. In this we are rather constrained by the information made public by the EU institutions.

The overall number of formal IPs has gone down over the last few years. For example, in 2011 1,775 infringements were open, compared to 2,900 cases in 2009. This is despite the exponential increase in possible infringements because of the accession of 13 new member states since 2004 and the new legal acts adopted every year. One of the main explanations for this trend is the development of alternative dispute settlement procedures at the EU level, such as SOLVIT and EU Pilot. These mechanisms unload some pressure from the IPs as they provide fora for citizens and companies, on the one hand, and member states, on the other hand, to handle complaints about the implementation and application of EU laws and policies at the national level. The Commission mediates in these fora. And if they prove unsuccessful to resolve the differences between the parties, the Commission can initiate a formal IP. Solvit and the EU Pilot handle more than 1600 cases per year, so this can partially account for the downward trend in IPs since 2009 European Commission (2012).

As mentioned above, untimely legal transposition is increasingly rare which might also be interpreted as evidence that the enforcement mechanisms generally do their job. As of 2012, less than one percent of all EU directives were not transposed in the EU as a whole, and most individual member states met this target as well.

More interestingly, even when an IP starts, in more than 86 percent of the cases the case does not reach the ECJ but is closed at the stage of letter of formal notice or reasoned opinion, or after referral to the Court but before a judgement is delivered. In addition, in the cases on which the court decides, the Commission wins by far the greater amount: in 2011 it won 85 percent of

the 62 cases on which the court delivered a decision European Commission (2012).

Noncompliance with art. 258 decisions of the ECJ is rare but occurs occasionally, and over the last few years the Commission has not shied away from referring countries for an art. 260 judgement and requesting financial penalties to be paid.

There are systematic country and policy sector differences in what outcomes the IPs produce. Some countries, like Italy, Greece, in the past France, more recently Luxembourg, receive every year a disproportionately big share of all IPs. In terms of policy sectors, environment and more recently taxation account for the greatest amount of cases.

It is not straightforward to determine what do these aggregate statistics imply for the overall state of compliance with EU law. The cases which get adjudicated are not a representative selection of the all cases. In addition, the Commission is reluctant to reveal any information about the cases that get settled.

Academic research studying in detail compliance in individual cases usually finds deficiencies in implementation. But most of these studies are concentrated in a few policy sectors (such as social policy and environment), might be attracted to problematic cases in the first place, and often employ unclear standards of what constitutes compliance. Nevertheless, the gap between the official statistics on the state of compliance in the EU and the findings from academic research is quite substantive. This raises doubts about the actual state of enforcement of EU law and calls for re-examination of the functioning of the IPs as the main tools for ensuring enforcement and compliance.

3 Literature review

Compliance, transposition and implementation of EU laws and policies has attracted an already rather voluminous and growing literature. Recent reviews of this literature are available in Angelova, Dannwolf and Konig (2012); Toshkov (2010); Toshkov, Knoll and Wewerka (2010); Treib (2008) so below I will only rehearse the arguments put forward that have most direct relevant for the theoretical exploration presented in the next sections. In short, despite its wide coverage and methodological sophistication, the literature on EU compliance has missed the paradox of high resolution rates of IPs coupled with a high success rate for the Commission at the adjudication stage. On the other hand, the relationship between resolution and success rates has been a subject of intensive, if mostly theoretical, research in the field of

Laws and Economics. This literature has escaped so far the attention of EU scholars so I review it in some detail below.

Compliance in the EU

In a highly cited article Tallberg (2002) sets the general terms in which the IPs are discussed in the academic literature. He distinguishes between a management and an enforcement stage in the conduct of the IPs and argues that *'The EU compliance system reaches a high degree of effectiveness in combating violations by combining instruments of coercive enforcement with mechanisms of managerial problem solving'* (p.632). Despite its high impact, the article does not go as far as provide explanations of the more nuanced facts about the operation of the IPs like the resolution rates, success rates at court of the different parties, and the persistent cross-country differences.

In fact, Mendrinou (1996) tries to offer a more formalized theoretical account of the relationships between the Commission and the member states in the context of the IPs but she bases her approach in cooperative game theory which seems ill-suited to a situation in which cooperation cannot be taken for granted.

Steunenberg develops a series of formal models of implementation but they are focused on the domestic side of compliance and bracket the interactions between the member states and the Commission in enforcing EU legislation (Steunenberg, 2006, 2007; **?**). But in his article from 2010 Steunenberg (Steunenberg, 2010) explicitly looks into the role of the Commission and argues that its role can vary between a 'guardian of the treaties' and a silent witness of member states noncompliance depending on its preferences and the domestic preference configuration at the national level.

In a recent contribution König and Mäder (2014) consider EU compliance as a formal game and model the strategic interactions between the players. But their model assumes full information so that the state of compliance is perfectly observed by the enforcer - the Commission. Of course, imperfect information lies at the heart of enforcement - if compliance is observed without costs and error, enforcement becomes a rather trivial calculus of costs and benefits. It is precisely the asymmetric informational uncertainty that requires the enforcer and the member states to adopt more complex strategies.

In addition to the theoretical models discussed above, compliance in the EU through the prism of IPs has been extensively studied empirically. Scholars have found evidence for various cross-country and cross-sector patterns related to domestic veto players, administrative efficiency, political culture, bargaining power, and so on (Bergman, 2000; Börzel et al., 2010; Jensen,

2007; Knill and Tosun, 2009; Mbaye, 2001; Perkins and Neumayer, 2007). They have also tried to uncover determinants of compliance in particular cases looking into a wider array of potential causal factors, including preference heterogeneity, discretion, disagreements with the Commissions, country's incentive to deviate, and others (König and Mäder, 2014; Thomson, Torenvlied and Arregui, 2007). The success of this literature to provide explanations of compliance should be assessed with great care. Most of the proposed explanations are no more than inferences describing patterns in past data and cannot even in principle be considered as causal factors in the sense of things that can be manipulated to produce different results. Furthermore, much of the literature fails to uncover the mechanisms and logic of the process that generates the IP data so that the empirical investigations remain exploratory at best. Lastly, the literature has argued that specific relationships between 'independent' variables and compliance outcomes pass some test of statistical significance, but even in their totality these partial explanations cannot account for the broad patterns of EU enforcement which include the high resolution rate and the high Commission's success rate at adjudication.

While research on compliance and enforcement in the EU has certainly been voluminous and methodologically diverse and sophisticated, it has not incorporated the scholarship developed into the field of Law and Economics, or the positive study of law and the courts, that has addressed similar questions of enforcement, adjudication, and negotiated compliance. This literature has important insights to bring to the EU case, but, at the end, instead of providing a solution to the puzzle of EU enforcement, it provides sharper lenses through which to appreciate the peculiarity of the EU case.

An economic approach to the study of law and the courts

Is there a relationship between the share of cases going to trial and the success rates of the opposing parties? Is there a 'natural' rate towards which the success rate of plaintiffs converges? What can be inferred about law compliance and the judicial process from the observed patterns of trial and success rates? These questions have spurred a vigorous, and by now rather voluminous, scholarship operating at the border of Law and Economics. Most studies have focused on developing theoretical models of the litigation process, but there are a few empirical analyses, mostly of civil law cases, as well. Below I will briefly review the most important contributions of this literature.

In an early and highly cited (628 citations as of the time of writing according to Web of Science) contribution Priest and Klein (1984) suggested that the win rate for plaintiffs will tend towards 50 percent. Because cases with true quality far removed from the decision standard will settle, only those where the true quality is close to the decision standard will be adjudicated. The more general lesson from Priest and Klein's study is that the cases tried in court will not be representative of the population of all cases which includes dropped or voluntarily settled cases as well. In other words, one cannot infer the characteristics of the total caseload or evaluate the performance of the judicial system from the fraction of cases that go to court.

For the purposes of this paper, it is important to note that the Priest-Klein selection hypothesis (that the plaintiff's win rate will approach 50 percent) holds under the assumptions of equivalent stakes for both parties, costly trials, and symmetric information (both parties form noisy but centered on the true value estimates about the outcome of disputes). With differential stakes of the dispute to the plaintiff and the defendant, a larger share of wins will be observed in the set of litigated cases for the party with the greater stakes (p.25). Furthermore, the litigation rate will decline if defendants have bigger stakes than the plaintiff, and will increase in the opposite situation.

Waldfogel (1995) emphasized that the Priest-Klein model is not strategic and interpreted it to imply that *'higher trial rates induce plaintiff win rates at trial to be farther from 50 percent'* (p.230). At the same time, *'reductions in relative trial costs, as well as increases in uncertainty, will raise the fraction of cases litigated'*. Waldfogel argues that some relationship between trial rates and plaintiff win rates should hold in real data, although theory cannot specify the form of this relationship. (p.237). In his empirical study of federal civil cases, he finds that *'case types with low trial rates have plaintiff win rates at trial near 50 percent'* (p.244) offering support for the Priest-Klein conjecture. In fact, if one looks closely at the raw data there are some exceptions to that and some (admittedly very few) categories of cases exhibit the unexpected low trial rate-high success rate for one party pattern (e.g. commerce cases with 11.2 trial probability and 83.3 plaintiff win rate) or deportation with 10.3 trial rate and 11.8 plaintiff win rate). Nevertheless, Waldfogel concludes that in general, the higher the trial rate, the lower the plaintiff win rate (p.247) but does not explain why this should be the case.

In another effort to develop the Priest-Klein model, Hylton an Lin (2011) offer a formalization which leads them to conclude that *'the implications of the trial selection theory depend almost entirely on the 'censoring function' ... and the probability distribution of guilt'* (p.2). But under some very general conditions and an symmetric distribution of guilt, the 50 percent win rate

expectation is obtained.

The Priest-Klein model and hypothesis have not gone without their critiques. Shavell (1996) directly tackles them in his title which states that 'Any frequency of plaintiff victory at trial is possible'. But when we look into the details of Shavell's theoretical argument (which follows an asymmetric information model first introduced by Bebchuk (1984)), we find that he expects that *'those plaintiffs who go trial win less frequently than those who settle would have*' (!). In the EU context that would imply that the Commission would have won an even higher percentage of cases if more cases were tried.

Waldfogel (1998) sets to explicitly test the asymmetric information theory (Bebchuk, Shavell) versus the Priest-Klein conjecture which has divergent expectations at its core. He echoes Shavell by stating that *'The probability that the defendant loses at trial is unambiguous below the probability that the average defendant would lose at trial, if all filed cases were tried.*' (p.456). He finds more support for the Priest-Klein model and a *'a negative relationship between adjudication rates and plaintiff win rates... which is consistent with divergent expectations but not asymmetric information theories of litigation.'*

In a more recent contribution Friedman (2006) argues that when the costs of trial are low, the theoretical analysis results are contrary to th Priest-Klein conjecture. When trial cost is relatively low *'trials are more apt to come from the case with potential judgments at the extremes'* (p.114)

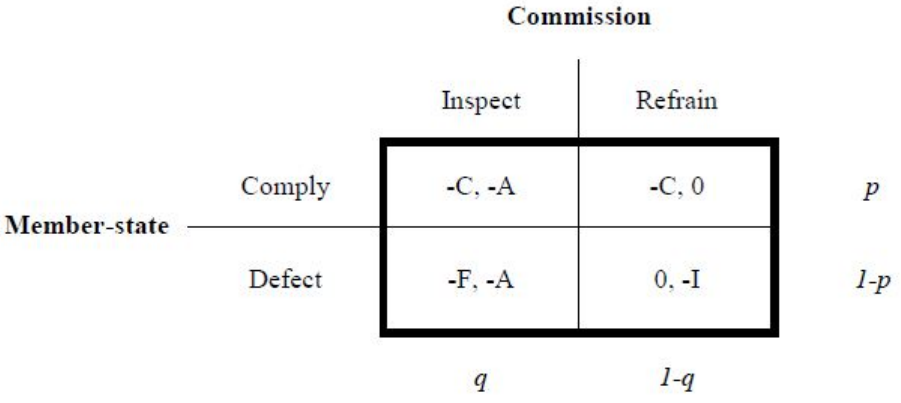
In sum, the Law and Economics literature has generated quite a sharp and at least partly empirically supported proposition that plaintiff success rates should tend towards 50 percent, *especially* when trial rates approach zero. If anything, alternative theoretical models suggest hypotheses which are even further away from the empirical reality of enforcement in the EU. Some factors that have been suggested that can account for variation in plaintiff success rate are differences in litigiousness (Eisenberg and Farber, 1997), asymmetric stakes to both parties, asymmetric information and others.

To capture the essential feature of EU enforcement, we would be better off modeling directly the situation rather than adapting a model developed for the rather different cases of civil litigation in the US. Since such a model is not available for the time being, we can only explore the empirical patterns of compliance and enforcement of EU law to see whether in broad terms the expectations of the Law & Economics literature are supported. The remaining parts of this paper will describe the data and offer such an exploratory analysis.

4 Enforcement in the EU: a strategic model

Compliance and inspection

This game models the general strategic features of the relationship between the Commission, as an enforcer of EU law, and the member states in the context of applying European legislation. The member states can choose to comply or not (defect) with a piece of legislation. The Commission can choose to inspect and pursue an infringement, or to refrain and do nothing. For the moment, we assume that the member states automatically get a penalty as soon as the Commission discovers and pursues the infringement. The member states payoff is greatest if it defects from compliance and goes undetected. This might be due to genuine opposition to the legislation, or to free-riding opportunities resulting from the implementation in a union of 27 members. Not all legislation creates incentives for noncompliance some of the rules are self-enforcing, but a lot of it does. However, if faced with a fine (penalty) for infringement, it would prefer to bear the costs of compliance (so F ¿ C ¿ 0). The Commissions payoff is greatest when the member state complies and the Commission refrains from inspection because inspection is costly in terms of administrative resources and the costs. Still, the Commission would prefer to bear these costs rather than refrain from inspection in the case that the member state defects from compliance.



C – costs of compliance; F – fine for detected non-compliance; A – administrative (inspection) costs; I – integration costs; F > C; I > A .

Figure 1: The compliance game

The game has no equilibrium in pure strategies: if the Commission re-

frains, the member state is better-off defecting and if the Commission inspects, the member state prefers to comply. But the Commission prefers to refrain if the member state complies and to inspect if it defects. The game, however, has equilibrium in mixed strategies . The Nash mixed-strategies equilibrium is for the member state to play *Comply* with probability p = (I - A)/I, and for the Commission to play *Inspect* with a probability q = C/F. Hence, the probability of compliance grows with increasing integration costs for the Commission and with decreasing administrative costs. The probability of inspection rises with compliance costs and declines with the size of the penalty. These comparative statics results can be translated directly into empirically-testable hypotheses. What is interesting to note is that the size of the penalty does not influence directly compliance levels it only affects the inspection rate and even more counter-intuitively, bigger sanctions for noncompliance result in less inspections carried out.

While the implications of the model are not tested directly in the remainder of this paper, the empirical analysis presented below explores the possible relationships between trial and settlement rates.

5 Data sources

Data on the functioning of the infringement procedures is scattered around several institutional databases managed by different institutions of the European Union. There is no single source that collects data on the initiation, progress and outcomes of IPs during both the 'management' and 'enforcement' (adjudication) stages. Integration of data between the sources is cumbersome with no indexes or variables that can be used as keys to link the information.

The Annual reports on national implementation of EU law compiled by the Secretariat General of the European Commission[1] provide information on the number of new infringement procedures started during the year, and sometimes distinguish between late transposition and other reasons for IPs for each member states and for various policy sectors. Older reports (before 2011) included also a breakdown of the number of IPs reaching each step of the process (letter of formal notice, reasoned opinion, court referral, etc.) The annual reports are based on extracts from an internal database for the management of IPs which is however not open to the public. Individual level (IP) information is not available.

[1]Available for the period since 1998 online at `http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm`

The calendar of recent Commission decisions on IPs[2] provides such individual level information including the country, the policy sector, and the legislative act concerned and the date and type of decision. Unfortunately, the database is not entirely reliable as the Commission is under no obligation to report on each step of every IP and in practice one can find many inconsistencies (for example, reasoned opinions for which no records of preceding letters of formal notice can be traced). In any case, this database also does not record the outcome of the IP once it has been examined by the European Court of Justice.

From the annual reports on the activities of the ECJ[3])one can get indirect information on the total number of IP filed to the court in a year (direct actions). There is also a disaggregation by country (new cases for actions for failure for member state to fulfil its obligations) and, importantly, data on the outcome of these proceedings (infringement declared/dismissed). But no case-level information is available.

The database of ECJ case law InfoCuria[4] contains case-level details including the dates of the courts proceedings, the texts of the opinions and judgements, and so on. While useful, this information is difficult to connect to the preceding IP because there is no common identifier that bridges the datasets of the Commission and the ECJ (like a case number).

The data presented below is compiled from all these sources. In particular, the number of IPs started (for late transposition and other reasons) each year per country come from the Annual reports of the Commission. The number of court cases decided in favour or against the member state comes from the Annual reports of the ECJ.

6 Descriptive analysis

Variation over time

Let us first focus on the variation over time. Table 1 summarizes the trends for the years between 2003 and 2014. Note that the numbers might differ from the ones discussed in the second section of this paper as the data source is different.

The table shows the total number of infringement procedures started in a year (IP), those related to late transposition (LT) and the rest (nLT),

[2]Available for the period since 2002 online at `http://ec.europa.eu/eu_law/infringements/infringements_decisions_en.htm`

[3]`http://curia.europa.eu/jcms/jcms/Jo2_11035/rapports-annuels`

[4]`http://curia.europa.eu/juris`

the number of court cases won by the member states (MSw) and by the Commission (MSl), the new cases registered at the ECJ during the year (ECJn), as well as the total number of cases on which the ECJ delivered a judgment during the year (ECJt). The last two columns show the percentage of cases that have had a judgment delivered from all IPs during the year (% tried) and the percentage of wins for the member states from the cases with a judgment by the ECJ (%MSwin).

As discussed above, Table 2 confirms that the total number of IPs per year has decreased after a peak in 2004. The decrease is evident in cases of suspected late transposition, but also for cases of incorrect and insufficient transposition and implementation. Correspondingly, the number of cases that reach the ECJ has also dropped and, to a lesser extent the nubmer of cases on which a judgment is delivered. The percentage of non-settled cases varies between 0.06 and 0.22 per year with some evidence for an increase in more recent years. The percentage of case that the member states win is altogether stable, hovering around a mean of 0.09, with the curious exception of 2013 when the member states won more than one-third of the adjudicated cases.

Over time (with each year as the unit of observation), the correlation between the trial rates and the percentage of member state wins is positive (0.56)

Table 1: Infringement outcomes per year 2003-2014

year	IP	LT	nLT	MSw	MSl	ECJn	ECJt	%tried	%MSwin
2003	2709	1166	1543	9	77	214	86	0.06	0.10
2004	2993	1519	1474	11	144	193	155	0.11	0.07
2005	2653	1066	1587	5	131	170	136	0.09	0.04
2006	2518	904	1614	8	103	193	111	0.07	0.07
2007	2658	1196	1462	16	127	212	143	0.10	0.11
2008	2225	816	1409	9	94	207	103	0.07	0.09
2009	1659	533	1126	10	133	142	143	0.13	0.07
2010	1274	840	434	12	83	128	95	0.22	0.13
2011	NA	1185	NA	9	72	73	81	NA	0.11
2012	696	447	249	5	47	57	52	0.21	0.10
2013	769	474	296	23	40	64	63	0.21	0.37
2014	876	572	314	4	40	54	44	0.14	0.09

Country-level variation

While the patterns over time are intriduing, in the rest of the paper I will focus on the varation between countries. Table 2 presents the main indicators of member state performance related to the infringement procedures.

Table 2: Infringement outcomes per country 2003-2014

country	IPs	IPs(nonLT)	ECJ	MSwins	%tried	%MS win
AT	744	352	67	2	0.19	0.03
BE	896	505	96	8	0.20	0.08
DE	1357	1046	83	14	0.08	0.17
DK	537	277	13	2	0.05	0.15
EL	1405	890	103	6	0.12	0.06
ES	1470	1143	120	10	0.10	0.08
FI	723	277	37	6	0.13	0.16
FR	1234	866	109	9	0.13	0.08
IE	835	509	47	4	0.09	0.09
IT	1783	1230	149	13	0.12	0.09
LU	601	191	93	3	0.49	0.03
NL	627	365	41	6	0.12	0.17
PT	951	403	71	6	0.18	0.08
SE	624	314	33	4	0.11	0.12
UK	1216	810	60	14	0.07	0.23
Mean EU-15	**1000**	**612**	**75**	**7**	**0. 14**	**0.11**
BG	386	194	1	0	0.01	0.50
CY	600	204	4	1	0.02	0.25
CZ	645	202	18	2	0.09	0.11
EE	392	113	3	0	0.03	0.00
HU	567	230	6	1	0.03	0.17
LT	290	133	3	0	0.02	0.00
LV	443	139	0	0	0.00	NA
MT	555	205	6	2	0.03	0.33
PL	761	446	30	3	0.07	0.10
RO	494	154	1	1	0.01	1.00
SK	444	171	6	2	0.04	0.33
SL	450	139	5	0	0.04	0.00
Mean EU-12	**502**	**194**	**7**	**1**	**0.03**	**0.21**

All data is for the period from 2003 until the end of 2014. The first column is the country abbreviation. The second columns lists the total number of IPs started against the country during the period (letters of formal notice

sent)¿ the third columns lists only IPs excluding those started for late transposition (non-notification of national transposition measures), thus it only includes the ones started on the basis of own investigations of complains for incorrect or incomplete transposition and for non-application. The fourth column (ECJ) lists the total number of cases for failure to fulfil its obligations on which the ECJ has ruled (thus excluding cases registered at the court but withdrawn before a judgement is delivered). The fifth column presents the total number of cases in which the court has dismissed the alleged infringement (thus the member state wins). The last two columns compute the percentage of cases that have reached the trial phase from all non-late transposition IPs started, and finally the percentage of member state wins from all cases on which a judgements has been delivered.

It should be noted that the court case results of the 'new' member states (the 12 countries that joined the EU in 2004 and 2007) are based on a very small number of observations which can account for the extreme win percentage scores (100% in the case of Romania based on one judgement and 0% in several of the other new member states). Latvia is yet to receive a judgement, so it has no corresponding number in the entry for win rate at court.

While the general picture of cross-country variation in infringement rates is well-known, the data in the table allows for some more nuanced observations which will be presented with the help of some bivariate plots.

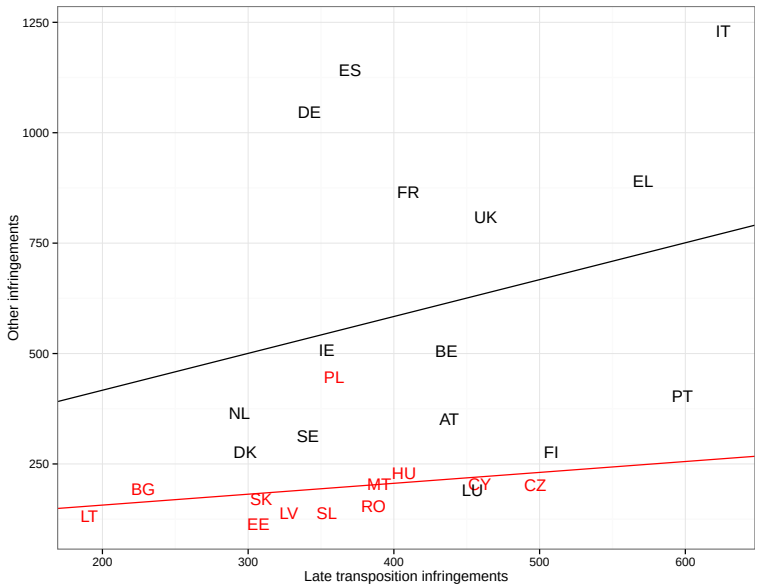


Figure 2: Types of infringement procedures 2003-2014

First, let us focus on the types of infringements. Figure 1 plots the number of IPs started for late transposition against the number of non-late transposition IPs. To guide the eye, two separate linear regression lines have been included - one for the old EU-15 member states, and one for the 12 new ones. It is clear from the figure that Italy has had the most IPs both for late transposition and for other reasons. The linear relationships between the two variables is rather weak. Some countries like Portugal have many IPs for non-notification of transposition measures but relatively few others. On the other hand, countries like Spain and Germany have average late transposition numbers but score highly on the other types of infringements. In general it seems that the number of 'other' infringements is moderately related to the size of the country (and the market), which should not come as a surprise since this category of infringements follows either Commission's own investigations or, more often, complaints by companies, NGOs or individual citizens. The new member states (in red) score better on both dimensions but there are differences within the group as well. While the Czech Republic has relatively many late transposition IPs and relatively few others, Poland (again, by far the biggest country from the new entrants) has an average number of late transposition IPs but relatively more others.

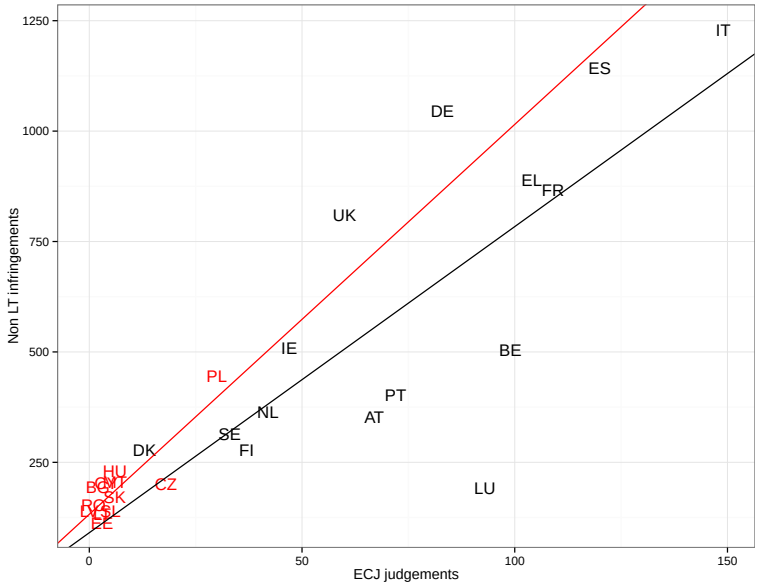


Figure 3: Infringement procedures and ECJ judgements 2003-2014

Second, let us explore the relationship between the number of infringements started and the trial rate. We focus only on non-late transposition

infringements as the enforcement process for the rest is rather straightforward and in a sense even trivial. The trial rate is defined as the number of cases on which the ECJ delivers judgement as a fraction of all letters of formal notice sent to the country. From Table 2 we can see that the average trial rate is 14% for the EU-15 and 0.03% for the EU-12. These are very high shares of settlement, especially given the fact that we have filtered out the late transposition infringements which should be the easiest to settle. In other words, the ECJ rules on less than 11% of all possible infringements - compliance for the rest is negotiated between the Commission and the member state concerned without and prior to the involvement of the court (of course, still in the shadow of the ECJ).

There is cross-country variation in the settlement rate. While Denmark settles 95% of its infringements before the court delivers a judgement, Luxembourg does so for only 51% and Belgium for 80% of their cases. Figure 2 plots the number of letters of formal notice versus the number of judgements for each country for the period 2003-2014. In general, there seems to be a positive linear relationship as evident from the two regressions lines (for old and new member states) - unsurprisingly, the more infringements started, the more judgements delivered.

What is important to note is the deviations from the linear fit. For example, Luxembourg, Belgium, Portugal and Austria get relatively more judgements given the number of infringements (hence, their settlement rate is low), while the UK, Germany, and Spain get relatively few judgements for the number of letters of formal notice they receive. For example, the UK and France have almost the same number of infringements started, but France has almost twice as many judgements. Germany has a similar number of judgements to Austria but almost three times as many IPs. For a similar number of IPs Austria has more than six times the number of judgements of Denmark. Apparently, cases involving Germany, the UK or Denmark are much more likely to be settled. The size of the country is not a sufficient explanation for this pattern, as both France and Italy are close to the linear fit. It seems that the number of judgements grows at an increasing rate with the number of IPs, so that the countries that have way more IPs than the rest also settle a higher proportion.

The **third** aspect of the data we turn to concerns the win rate at court. Again, there is substantial cross-country variation with the UK winning almost 1 in 4, while Austria wins 1 in 34 from the cases on which the ECJ delivers a judgement. Figure 3 plots the country totals. There seems to be a systematic relationships between the trial rate and the win rate. In general, countries that settle a higher proportion of their cases also win a higher proportion of the cases that go to court. A straight line (plotted) is a poor

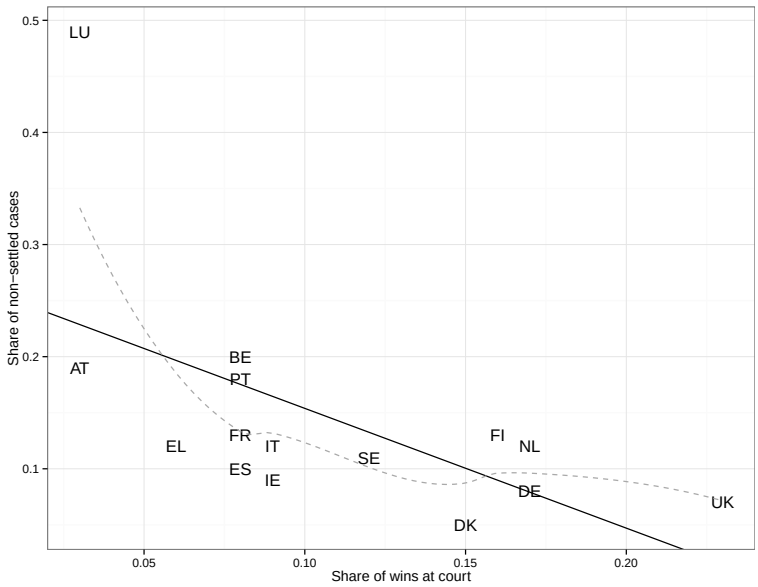


Figure 4: Trial rates and win rates at court 2003-2014, EU-15

fit to the data so the relationship is not linear, but the loess smoothed line (dashed) still indicates that win rates increase with declining trial rates.

In fact, if we log-transform both variables we can induce an almost linear relationship (see Figure 4). This can be interpreted in the following way: a percent increase in the win rate is (almost) linearly related to a percent increase in the trial rate. More concretely, a log-log regression shows that one percent increase in the win rate is related with a 0.67 percent decrease in the trial rates. (Denmark is the big outlier in this picture - it should have more wins given its very high settlement rate.) The relationship still holds if we include the late transportation infringements in the calculation in the settlement rate as well.

Curiously, a similar association - win rate increasing with settlement rates - can be detected in the sub-sample of new member states as well despite the very small number of observations (Figure 5).

Fourth, it is instructive to inspect the link between the win rates and the number of judgements countries get. Figure 6 shows the association, which appears to be rather weak. For example, Italy and Ireland have very similar win rates despite being on opposite poles with regard to the number of judgements they have. The UK and Austria are at opposite poles with a similar number of judgements, but staggeringly different win rates. Another country that stands out is Germany with many judgements but also a high win share.

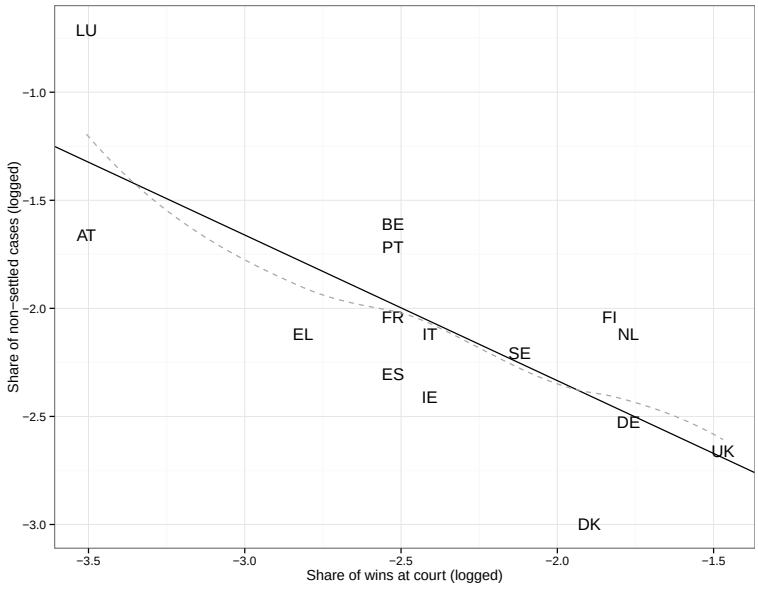


Figure 5: Log-transformed trial and win rates at court 2003-2014, EU-15

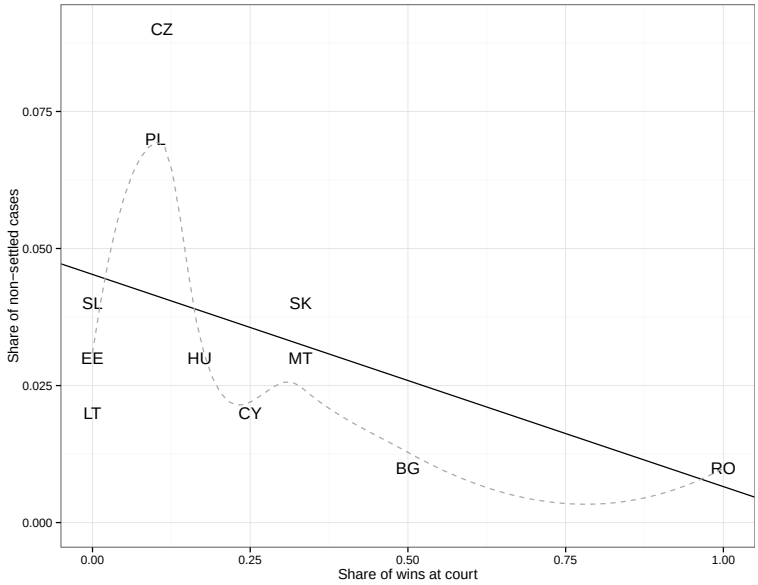


Figure 6: Trial rates and win rates at court 2003-2014, EU-12

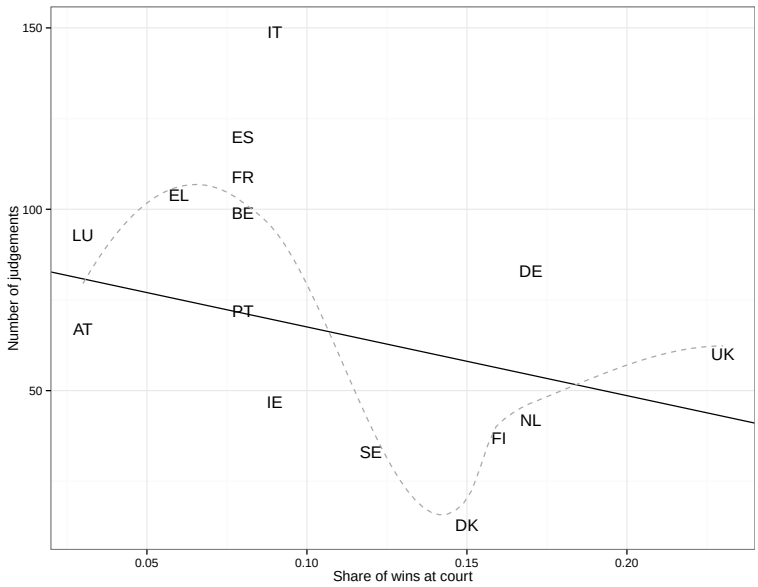


Figure 7: Trial rates and win rates at court 2003-2014, EU-12

To recap, countries differ in the total number of IPs they have started against, in the share of cases they pursue to trial, and in the share of winning judgements they get. We can inductively classify the (old) member states into several groups based on their performance with respect to these three indicators. The first group is composed of countries that receive a lower than average letters of formal notice (infringements started), settle relatively many of these cases before adjudication, and win a relatively high share of those that the ECJ decides on. Sweden, Denmark, Finland, and the Netherlands fit into this group. The second group also receives relatively few letters of formal notice but does not settle many of these, and it loses relatively many from the ones the ECJ adjudicates. The group comprises Austria, Belgium, Luxembourg, Portugal, and Ireland. The third group receives a higher number of letters of formal notice than average, settles a relatively high share from those, and wins a relatively high share from the remaining ones. The UK and Germany fit the pattern. Finally, the fourth group also has many IPs, settles a lot, but then still wins only a few. Spain, Italy, France and Greece fit here.

It is worth noting that several logically possible categories fail to describe any of the countries in the sample. All countries that have a higher than average IPs also settle more than average. There seems to be a ceiling of how many cases would go to court. We cannot say whether the ceiling is due to member state capacity limitations (a state cannot fight too many battles),

the nature of the cases initiated (if they are too many, probably a higher share would be unfounded), or the behaviour of the Commission (cannot fight too many battles). The classification brings the puzzle into focus. Furthermore, from the countries that receive relatively few IPs, those who settle win a higher share than average and those who do not, lose a higher share than average. There are no cases in which those who settle also lose a lot (with the possible exception of Ireland) and in which those who do not settle also win a lot. So there seems to be a ceiling on the wins as well (for the states with relatively few infringements) - you can either win a few from many trials, or win a higher proportion but from fewer trials (the rest you settle). In other words, the correlation between the number of IPs started and the eventual wins for the member states at court (0.81 for EU-15) is much stronger than the correlation between the number of judgements and the number of wins (0.52 for EU-15).

Again, we cannot say much about the reasons behind the sorting of the member states. It could be that some states are more pragmatic or risk-averse and settle cases they know they are going to lose while others decide to stay in the game, but it is hard to say something more about the puzzle given that no information about actual compliance is available for the cases that do not reach trial. Finally, let us note that the negative relationship between trial rates and win rates at court holds for both sub-sets of countries - those that start relatively few IPs and those that have relatively few. Hence, the link is more general than the (tentative) country classification.

7 Conclusion

This paper presented a new dataset on the functioning of EU enforcement over the last 12 years and explored the cross-country variation between trial rates and win rates. The exploratory analysis concluded that in the case of the EU a relationship exists between the two, and more generally between the number of IPs countries get, the proportion they settle, and the share of court cases they win. It is the task of future research to account for this pattern, especially in confluence with the fact that overall the Commission wins a very high number of the court case in absolute terms (even versus the best performing countries) and that the general settlement rate is very high in absolute terms (even for the least 'cooperative' member states). A successful theoretical model will have to imply all these patterns. But the prize will be insight into the state of compliance for the vast majority of cases that do never reach the ECJ although an infringement is suspected. Since the outcomes of these cases are unobservable, we have to form an inference about

them from the aspects of the process we can observe - namely systematic differences in settlement and win rates over time, policy sectors, case types, and countries.

Some preliminary theoretical implications can be already drawn. First, it does not appear likely that if the Commission settles less cases, the proportion of its wins at court will go down - if the over-time and cross-country evidence can be trusted to derive this sort of extrapolation, the data implies that the Commission would win an even higher percentage. Second, the fact that countries having similar numbers of IPs and judgements can have rather different win rates suggests that the quality of national legal representation (and domestic IP management more generally) matters, or at least that some countries are much more successful in filtering (and settling) cases with high potential for win at court from the rest. Third, the fact that both the number of 'wins' and non-settled cases seem to reach 'ceilings' (as suggested by the non-linear nature of the observed relationships and the country classification) imply that administrative capacity limits to process IPs exist and that these need to be included in a future theoretical model of compliance in the EU.

Finally, let us note the compliance performance of the new member states as reflected in the new dataset. They appear to be two times less likely to start an IP (three time less likely for the case of other than late transposition infringements), more than four time more likely to settle, and alsmot twice as likely to win if tried. It will be interesting to observe whether the pattern will hold once more data becomes available on how they comply with and enforce EU law.

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