

The Rule of Law in the EU: What the Numbers Say



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This article examines the compliance record of the Member States of the European Union.² It analyses statistics on the so-called “infringement procedures” in order to find out whether there is any foundation for the claims that the EU is suffering from a “pathological” non-compliance.³ Our analysis leads us to the conclusion that such claims are exaggerated.

However, there are significant discrepancies among Member States. The record of the least compliant Member States is four times worse than that of the most compliant countries!

Moreover, when Member States persist in infringing EC law [i.e. despite Commission warnings and judgements by the European Court of Justice], they do it for a long time that, on average, exceeds a decade.

Yet, what is even more puzzling is that there are only so few infringements. Sanctions against non-compliant Member States hardly have any real deterrent effect. Despite the fact that some Member States are regularly hauled before the Court, the conclusion must be that there is indeed respect for the rule of law in the EU.

The problem

For the purposes of this article, compliance is defined to be conformity with the requirements of EC law. This is a narrow definition. It ignores the actual effects of the measures implemented by the Member States.⁴

The EU prides itself for being a Community “based on the rule of law”.⁵ But it is difficult, perhaps impossible, to measure the degree of compliance with the law. There is no benchmark for comparison. There are no other countries or regional blocs with similar depth and breadth of integration. Nor is there a theoretical standard of compliance.

A standard of perfect compliance is both unattainable and unreasonable. The Court of Justice itself has observed in one of its rulings imposing a penalty payment on a Member State that “it is particularly difficult for the *Member States* to achieve complete implementation of the Directive . . .” [Commission v Spain, C-278/01, paragraph 47] [emphasis added; please note use of plural by the Court]. Furthermore, EC law is not always clear and unambiguous. The rulings of the Court of Justice in favour of Member States suggest that they are occasionally correct in interpreting certain provisions of the

law differently from the European Commission.

Thus, the extent of compliance in the EU has to be measured differently. There are two alternative approaches adopted in this article.

The first is to compare the performance of Member States against each other. This is based on the assumption that Member States encounter the same degree of difficulty in fulfilling their obligations under EC law.

The second approach is to examine the record of Member States at different points in time by asking whether compliance is getting better or worse over time. This, however, has to take into account that more countries have become members and the number of EC laws has increased.

Identifying non-compliance

The typical measure of compliance is to identify its opposite; i.e. whether there is non-compliance. Non-compliance or, in the words of the Court, “failure of Member States to fulfil their obligations” is indicated by “infringement proceedings”. These are the proceedings normally initiated by the European Commission against Member States on the basis of Articles

226 and 228 (or Article 88 on state aid).

More broadly, the activity of the Court is a good but not perfect measure of the degree of integration in the EU and how correctly Member States apply EC rules. Since the inception of the ECSC, there have been close to 14,000 infringement cases brought before the Court. During the past decade or so the Court had to deliver about 300 judgements per year, dealing with infringements and interpretation of Member State obligations. The data of the past decade are more accurate of judicial activity in the EU concerning interpretation of EC law as they exclude staff cases.

However, counting infringement cases underestimates the true extent of compliance or non-compliance by Member States. There are at least three reasons for this underestimate. First, infringement cases record only instances where a potential violation of the law has come to the attention of the responsible authorities.

Second, the Commission chooses which cases to prosecute by prioritising infringements according to their gravity.⁶ Although this makes sense, given the fact that the Commission does not have unlimited resources, the number of proceedings initiated before the Court do not necessarily give an accurate picture of the situation in each Member State.⁷

Third, the degree of compliance of Member States is also revealed by proceedings in domestic courts. Some of these proceedings result in "references for preliminary ruling" as provided by Article 234. Preliminary rulings are, however, ignored for the purposes of this article because it is not

possible for us to determine whether the Member States concerned fulfilled or not their obligations.

With these qualifications in mind, we can now examine the statistics on infringements. Formally, no infringement occurs until the Court has made a declaration to that effect. Yet, it is possible to predict quite accurately the outcome of proceedings initiated by the Commission. Available statistics suggest that the views and positions of Member States are wrong in the overwhelming majority of cases. As shown in Table 1 below, Member States are wrong in more than 90% of all cases.

Yet, statistics also show that Member States do adjust their laws and policies in response to the preliminary observations and assessment of the Commission before a case ends up in Court (see Table 2).

During the past decade or so (1997-2005), only about 14% of all cases initiated with letters of formal notice have ended up in actual proceedings before the Court. This suggests Member States do adjust their positions and laws in response to inquiries, comments and/or warnings by the Commission.

Please note that the numbers in the second column in Table 1 and in the last column in Table 2, which ought to be identical, are closely correlated but do not coincide. Our inquiries at both the Commission and the Court have not really produced any satisfactory explanation for this discrepancy.

Also note that the data presented in all the tables below exclude the new Member States because until 2005 there had been no cases against them.

Table 1: Cases against Member States upheld by the Court of Justice

Year	Cases initiated against Member States	Judgements	Judgements finding infringement	Average duration (months)
2005	170	136	131 (96%)	21.3
2004	193	155	144 (93%)	20.2
2003	214	86	77 (90%)	24.7
2002	168	93	90 (97%)	24.3
2001	157	179	178 (99%)	23.1
2000	157	180	178 (99%)	23.9
1999	162	141	136 (96%)	23
1998	118	136	132 (97%)	21
1997	124	116	105 (91%)	..

Source: Court of Justice, Annual Reports

Table 2: Stages in the infringement procedure: Cases per year

Year	Letter of formal notice	Reasoned opinion	Referral to Court
2005	1055	561	165
2004	1182	453	202
2003	1552	533	215
2002	995	487	180
2001	1050	569	162
2000	1317	460	172
1999	1075	460	178
1998	1101	675	123
1997	1461	334	121
Total	10,788	4,532	1,518

Source: European Commission, Annual Reports on the Application of Community Law

Compliance over time

The performance of Member States over time has not deteriorated and may have actually improved, given the increase in legislation and the corresponding burden of compliance. We assume that each directive corresponds to one infringement possibility, even though it is clear that directives that impose multiple obligations on Member States can be infringed in multiple ways too.

The statistics from the Commission's Annual Reports on the Application of Community Law reveal that in 2005 there were 2600 directives that needed transposition. Over the then 15 Member States there were 39,000 "infringement possibilities" [= 2600 x 15] to be counted against 170 infringement cases, representing just 0.44%. Since the data for 2005 end in November of that year, we may also refer to 2004 figures to ensure that there is no aberration. In 2004 there were about 2450 directives that had to be transposed and applied by the then 15 Member States. That is equivalent to 36,750 infringement possibilities [= 2450 x 15]. In the same year, there were 193 infringement cases which represented 0.53% of all infringement possibilities.

In December 1998, there were 1450 directives to be transposed and applied. That was equivalent to 21,750 infringement possibilities [= 1450 x 15]. In the same year there were 118 infringement cases which represented 0.54% of all infringement possibilities.

Compliance performance has remained stable over the

period. The real situation is probably even better because directives have over the years become lengthier and more complicated.

For the same period (1998-2005), the Commission recorded a transposition deficit of 98.92% in 2005 for the EU25, 98.4% in 2004 for the EU15 against a deficit of 95.7% in 1998 for the EU15. Again the performance of the Member States improved.

Who does not comply?

Between 1953 and 2005 there were 2667 actions against Member States for failure to fulfil their obligations. The vast majority of these actions were based on Articles 88 (state aid), 226 and 228. Italy, France, Belgium, Greece and Germany together accounted for 63% of total cases.

This is however misleading since they include cases under the now lapsed ECSC Treaty and because four of these Member States have been in the ECSC and then the EEC/EC/EU since 1952, while other Member States joined later.

The corresponding data for the past decade (1997-2005) for the EU15, which eliminate the time differences in membership, reveal largely the same countries occupy-

ing the top positions year after year. Out of a total number of 1463 cases, the EU15 had an average of 97.5 cases per member (see Table 3). The top five countries had an average of 159 cases per member while the bottom five countries had an average of only 39 cases per member. This is a four-fold

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Table 3: Infringement cases opened against Member States

	2005-1997	Ranking of five highest	Rankin of five lowest
Austria	85		
Belgium	118	5	
Denmark	14		1
Finland	33		3
France	195	2	
Germany	120	4	
Greece	150	3	
Italy	211	1	
Ireland	91		
Luxembourg	112		
Netherlands	59		4
Portugal	84		
Spain	100		
Sweden	25		2
UK	65		5
Average per Member State	97.5 (all MS)	159 (top five)	39 (bottom five)

Source: Court of Justice, Annual Reports, authors' calculations

difference!

Tables 4 and 5 show the annual cases involving the top five and bottom five Member States in terms of infringements cases initiated against them. The tables also show the annual average number of cases of the two groups. The top five Member States have recorded an average of 18 cases for the period. The bottom five Member States have an average of just 4 cases during the same period. This is again a four-fold difference.

Perhaps more surprising is that the “worst-performing” Member States are those regarded to be the most “communaautaire”. The “best-performing” countries are those perceived to be the most eurosceptic!

Article 228

It is necessary and illuminating to examine what happens with Article 228 proceedings. The Commission initiates this kind of proceedings after, first, the Court has already declared a

Member State to be non-compliant and, second, the Member State, after a reasonable period of time, fails to comply with the previous judgement of the Court. In this case, the Commission normally asks the Court to impose fines.

Over the past decade (1997-2006) there have been twenty-two Article 228 cases. Three countries account for over 50% of all cases: France for 7, Germany for 4, Luxembourg for 3.

Nonetheless, these numbers have to be put in perspective. The Commission began petitioning the Court to impose fines for non-compliance in 1997. Since 1997 the Court has found that Member States failed to fulfil their obligations in 1171 cases. Yet only twenty-two cases went back to Court because Member States did not comply with the first judgement. This represents less than 2% of all cases finding infringement and barely 1.5% of all infringement cases.

However, the time length of the infringements of those twenty-two cases show something remarkable. Table 6 summarises the relevant time lengths of the cases in the Article

**Table 4: Infringement cases per Member State:
Five highest number of cases opened**

	2005	2004	2003	2002	2001	2000	1999	1998	1997
Belgium					13		13	22	19
France	11	23	22	22	20	25	35	22	15
Germany	13	14	18	16	13	12			20
Greece	18	27		17	15	18		17	
Italy	36	27	20	24	21	22	29	12	20
Ireland						14	13	10	
Luxembourg	19	14					14		
Netherlands						12			
Austria		14	20	15					
Portugal							13		15
Spain			28		15				
UK				15					
Average/year	19.4	19.8	21.6	18.2	16.2	17.2	19.5	16.6	17.8
Annual average for the whole period: 18.5									

Source: Court of Justice, Annual Reports, authors' calculations

**Table 5: Infringement cases per Member State:
Five lowest number of cases opened**

	2005	2004	2003	2002	2001	2000	1999	1998	1997
Austria					7				0
Belgium				8		5			
Denmark	3	2	3	2	2	0	1	1	0
Finland		8	6	1	3	4	0	1	0
Ireland		3		8					
Netherlands			9	5	5		1	3	
Portugal	7	7			7				
Spain	6								
Sweden	5	5	5	2	3	3	1	1	0
UK	7		8			4	6	1	1
Average/year	5.6	5	6.2	4.3	4.5	3.2	1.8	1.4	0.2
Annual average for the whole period: 3.6									

Source: Court of Justice, Annual Reports, authors' calculations

Table 6: Average time length of infringements (months)

Cases	A	B	C	D	E
Pending	108.5				
Judgements	139	228	89		
Removed from register	106			167	61

Notes:

A = Time from start of infringement to first judgement [Article 226]

B = Time from start of infringement to second judgement [Article 228]

C = Time from first [Article 226] to second judgement [Article 228]

D = Time from start of infringement to removal from register

E = Time from first judgement to removal from register

228 procedure. It takes on average seven years between the judgement establishing the infringement and the judgement imposing a fine for failure to take corrective measures to comply with the first judgement. Since, as shown in Table 1, the average duration of an Article 226 infringement case is about two years and assuming that it takes another year from the date of the Commission's first warning [letter of first notice] before cases go to Court, Member States have in reality ten years to correct failures but they don't.

Member States can also take corrective measures just before the Court imposes a fine so that the case is removed from the register. Nonetheless, it still takes Member States on average five years to take the necessary corrective measures. If the three years that a case goes

through the Article 226 procedure are added, Member States may manipulate the process to escape from punishment for a considerable period of time that on average runs up to eight years.

The conclusion must be that when a Member State does not want to comply with EC rules, it can escape punishment for about a decade. So the question that arises at this point is whether punishment is deterrent enough.

Does it pay to break EC law?⁸

It takes time for the Commission to detect an infringement, initiate proceedings before the Court and get a ruling finding that an infringement has indeed occurred. But even with an adverse ruling, the Member State concerned can still procrastinate. The Commission will then have to initiate new proceedings and request that the Court imposes a fine on that Member State for failing to comply with the previous ruling. It is after the second ruling that the Member State will start paying and actually feeling the "pain" of non-compliance. In the mean time, it could have "gained" up to nine years of ignoring its obligations. The Commission itself has observed

that "experience shows that Member States often comply only at a late stage, sometimes only at the very end of the Article 228 procedure."⁹

The possibility of sanctions against non-compliant Member States was introduced only by the Treaty of Maastricht and the first-ever fine was imposed in 2000. Until 2005 the policy of the Commission, which petitions the Court to impose fines, was to ask for a monetary penalty per day of non-compliance starting from the date of the judgement. This meant that irrespective of how long the infringement was, a Member State would pay only if it did not take corrective measures after the Court ruled against it.

Formally, the situation now is different. The Commission has recognised in its Communication on the Application of Article 228 of the EC Treaty [SEC (2005) 1658], that "from the point of view of the effectiveness of the sanction, it is important to fix amounts that are appropriate in order to ensure their deterrent effect. The imposition of purely symbolic sanctions would deprive this instrument, which is complementary to the infringement procedure, of its useful effect and detract from the ultimate objective of this procedure, which is to ensure full application of Community law." [paragraph 8]

The current policy of the Commission and of the Court is that Member States should pay both a penalty for each day they do not conform plus a lump-sum fine that corresponds to the length and severity of the infringement.

In its Communication mentioned above, the Commission defined a formula for calculating fines proportional to the length of the infringement, the gravity of the infringement and the size of the economy of the non-compliant Member State.¹⁰

The formula for daily penalties is as follows:

Daily penalty = € 600/day [basic amount] x seriousness of infringement [measured on a scale from 1 to 20] x duration of infringement [measured on a scale from 1 to 3] x n factor [that reflects ability to pay and varies between 0.36 for Malta

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and 25.40 for Germany].

The formula for the lump-sum is as follows:

Lump-sum = €200/day [basic amount] x seriousness [1-20] x n factor [0.36-25.40] x duration [number of days from Article 226 judgment].

At the same time, the Commission will seek that a minimum lump-sum is paid when the formula above results in too small fines. The level of the minimum lump-sums varies from €0.18 million for Malta to €12.7 million for Germany.

Although this is a development in the right direction, the absolute amounts are still not deterrent enough. The following example illustrates the problem. In July 2005, France suffered the largest penalty ever which broke new ground because it was the first case where the Court imposed both a lump-sum of €20 million and a daily fine of €320,000 [case C-304/02]. The infringement concerned failure to apply a 1991 directive in the area of fisheries. Assume that it takes France 60 days to implement corrective measures. The total fine will amount to a bit less than €40 million. The annual cost of its infringement will be less than €3 million over that 14-year period. Non-compliance may still be "cheap". This is partly because the lump-sum is calculated from the date of the Art. 226 judgment finding infringement rather than from the date the infringement actually started.

Of course, the real economic costs are likely to be much higher. There is the cost of the human resources, the risk of national courts awarding damages [provided EC law creates rights for individuals¹¹], and the cost of failing to reap the benefits of integration and common EC policies.

But to politicians an amount of €3 million per year may be a gamble worth taking. The length of legal proceedings in the EU provides a natural cover for non-conforming governments. Someone else bears the consequences. This weakens incentives to respect the rule of law.

It makes more sense to have a system that imposes sanctions the moment the Court finds that an infringement has occurred. This would require a change of rules to enable the Commission to propose fines already in Article 226 procedures.

Admittedly, as explained earlier, there are instances where there are justifiable differences of opinion between Member States and the Commission on the interpretation of EC law. It would be unfair and unreasonable for Member States to be penalised for breaking ambiguous laws. In such instances the Court would not have to impose any fine. But in other instances of clear and flagrant violations of well-established principles, fines would be very reasonable.

This is not an unusual approach. It is the normal practice of the Commission in policy areas where it has powers to impose fines such as in the field of anti-trust. It is also a practice that has been confirmed by the Courts.

The conundrum of non-compliance

Given that sanctions by the Court hardly have any serious deterrent effect, it is remarkable how compliant Member States have been. Yet, the numbers reveal another conundrum; that non-compliance is really a phenomenon that is confined to just a handful of Member States.

There is a growing literature that has attempted to resolve this conundrum.¹² The typical explanations proposed in the literature of why certain Member States tend to break the law more often than others are the following:

- Misfit between national political and administrative systems and the requirements of EC law;
- Pursuit of national objectives that diverge from EU objectives;
- Fragmented domestic political and administrative systems with high number of "veto" players (e.g. federal systems; ministries and other public authorities with overlapping responsibilities);
- Weak governments based on fragile coalitions;
- Culture of respect or non-respect for the rule of law;
- Inefficient public administration systems with low degree of professionalism.

There are two kinds of problem with these explanations. First, they do not fit the data. If decentralised systems are the cause of non-compliance, why do France, Luxembourg and Greece appear among the least-compliant countries? If the latter

want to pursue their own national objectives, why are they at the same time the most fervent supporters of European integration? If they have cultures that lack respect for the rule of law, why are Germany and Luxembourg in that group? If they suffer from weak coalition governments, why are France, Germany and Luxembourg included? How can France and Germany be persistently non-compliant when they have modern and very professional public administrations which, together with that of Italy, are very familiar with EU institutions and processes and know very well how to influence the generation of EC legislation? And

if France, Germany and Italy have a problem with compliance with legislation that does not promote their national interests, why don't they simply block it? It is only since 2004 that these three countries need one small country to form a blocking coalition!

The second problem is that behind their apparent scientific approach there is much "ad-hocery" and non-replicable classification. It is impossible to measure culture or the degree of professionalism of the civil service or the degree of coincidence between national and EU interests.

Another strand in the literature has attempted to explain the behaviour of only small subsets of Member States. Their results are richer and more reliable but like all case studies it is difficult to know how much their findings can be generalised.¹³ So far no theory has been able to explain the

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persistent presence of that handful of countries in the group of the least compliant. This deserves further research.

Conclusions

The EU does not appear to be suffering from serious non-compliance. The enlargement of the EU and the increase in the number of legal acts over time do not appear to have caused a deterioration of the level or degree of compliance.

Rather, non-compliance is a problem for certain Member States. Their performance is four times "worse" than that of the most compliant Member States. Also, they systematically



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under-perform year after year, again by a factor of four.

The EC policy on fines for failure to comply with a judgement of the Court appears not to have any serious deterrent effect. Given the low fines, it is remarkable that Member States comply at all.

However, when they decide not to comply they can escape punishment for up to a decade. For this reason, the EU should change its policy on fines to make them possible

already in Article 226 proceedings.

Existing theories on why some Member States do persistently worse than others are inadequate and incomplete.

NOTES

- ¹ Professor and Student Assistant, respectively, at the European Institute of Public Administration. We are grateful to Helen Oberg for statistical input and to Mihalis Kekelekis, Liisa Koskinen, Veronique Chappelart and Lora Borissova for comments on an earlier draft.
- ² A complementary article in last year's Eipascope examined the record of Member States in implementing directives and complying with regulations in various policy fields. See P. Nicolaidis and H. Oberg (2006), *The Compliance Problem in the European Union*, Eipascope, vol. 1-2006, pp. 13-19.
- ³ For a review of the studies that make this claim see T. Börzel (2001), *Non-compliance in the EU: Pathology or Statistical Artefact?* *Journal of European Public Policy*, vol. 8(5), pp. 803-824. Börzel concludes that non-compliance is more of a statistical artefact than anything more serious.
- ⁴ For a full discussion of the difference between legal compliance and the actual effect of national measures see E. Versluis (2007), *Even Rules, Uneven Practices: An Insight into the Black Box of EU Law in Action*, *West European Politics*, vol. 30(1), pp. 50-67.
- ⁵ European Commission, *European Governance*, COM (2001)428 final, 25 July 2001, p. 25.
- ⁶ European Commission, *European Governance*, COM (2001) 428 final, 25 July 2001, p. 26.
- ⁷ It has also been claimed that the Commission considers political issues, as well, in choosing which cases to prosecute. On this point see T. Börzel (2001), *Non-compliance in the EU: Pathology or Statistical Artefact?* *Journal of European Public Policy*, vol. 8(5), pp. 803-824 at p. 808.
- ⁸ The section elaborates the arguments first presented in P. Nicolaidis and H. Oberg (2006), *The Compliance Problem in the European Union*, Eipascope, vol. 1-2006, pp. 13-19.
- ⁹ Commission Communication on the Application of Article 228 of the EC Treaty [SEC (2005) 1658], paragraph 10(1).
- ¹⁰ The Court has endorsed the principles of this new policy, but of course it is free to deviate from any proposals the Commission makes.
- ¹¹ Individuals can indeed take action against public authorities and demand compensation for damages they have suffered due to non- or faulty implementation of EU rules. This principle has been established by the landmark rulings in the *Factortame*, C-213/89, and *Francovich*, C-6/90, cases.
- ¹² C. Harlow and R. Rawlings (2006), *Accountability and Law Enforcement*, *European Law Review*, vol. 31, pp. 447-475; G. Falkner, M. Hartlapp and O. Treib (2007), *Worlds of Compliance*, *European Journal of Political Research*, forthcoming; T. Börzel (2001), *Non-compliance in the EU: Pathology or Statistical Artefact?* *Journal of European Public Policy*, vol. 8(5), pp. 803-824; A. Héritier and C. Knill (2001), 'Differential Responses to European Policies: A Comparison', in: A. Héritier, D. Kerwer, C. Knill, D. Lehmkuhl and M. Teutsch (eds.), *Differential Europe. New Opportunities and Constraints for National Policy-Making*. Lanham: Rowman and Littlefield, pp. 257-94; H. Kassim (2003), 'Meeting the Demands of EU Membership: The Europeanization of National Administrative Systems', in: K. Featherstone and C. M. Radaelli (eds.), *The Politics of Europeanization*, Oxford: Oxford University Press; C. Knill (2001), *The Europeanization of National Administrations: Patterns of Institutional Change and Persistence*. Cambridge: Cambridge University Press; E. Mastenbroek (2003), *Surviving the deadline: Transposition of EU directives in the Netherlands*. *European Union Politics* 4(4), pp. 371-355; J. Tallberg (2002), *Paths to compliance: Enforcement, management and the European Union*, *International Organization*, vol. 56 (3), pp. 609-43; E. Versluis (2004), *Explaining Variations in Implementation of EU Directives*, *European Integration online Articles (EIoP)* 8.
- ¹³ See, for example, E. Versluis (2007), *Even Rules, Uneven Practices: An Insight into the Black Box of EU Law in Action*, forthcoming *West European Politics*, January, and references therein; C. Demmke (2001), *Towards Effective Environmental Regulation*, *Jean Monnet Working Article no. 5*, Harvard Law School.

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Continued on page 48.