

LAW AND ORDER IN THE EUROPEAN UNION:
THE COMPARATIVE POLITICS OF COMPLIANCE

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LAW AND ORDER IN THE EUROPEAN UNION:
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Why do some member states of the European Union comply with EU law more than others? The dissertation answers this question by unpacking the “black box” of the liberal democratic state and testing three alternative hypotheses. The chief reason why some states violate law beyond the nation-state more than others is a function of the degree to which a country’s legal tradition codifies social and economic reality. As more of social and economic reality is codified into national law, the more likely a state will commit an infraction of European Union law.

This argument is tested through the rigorous application of both qualitative and quantitative methods against two chief alternative explanations. Using a dataset of over 1,200 violations of the Treaty of the European Communities and its associated regulations, the statistical analysis shows that levels of codification, measured by a country’s regulatory quality, is the primary explanatory factor for both why some EU member states violate the Treaty more than others and why the ECJ is more likely to settle these legal disputes when they occur. Furthermore, even though the United Kingdom and the Federal Republic of Germany have very different legal traditions and parliamentary systems, comparing the process of compliance in each of these countries in the area of the free movement of goods shows that the degree to which basic principles of law are codified determines why they have similar proportions of infringements settled by the European Court of Justice.

These findings have important implications for how we understand compliance with international law and the role domestic institutions play in the compliance process, both for the member states of the European Union and for all other states in the international system. While compliance with international law can be a normatively beneficial activity at times, it can also lead to a diminishing role for national parliaments in governing society. Most importantly, the rich diversity that democratic governance produces as it codifies social reality can be lost as international institutions homogenize national legal systems in hopes of achieving other policy goals.

BIOGRAPHICAL SKETCH

Scott Nicholas Siegel grew up in Green Bay, Wisconsin, where he was born in 1976. He attended the University of Chicago between 1995 and 1999. He wrote his bachelor's thesis under the supervision of Professors Charles Lipson and Michael Geyer and graduated with honors from the Department of Political Science in the College in June of 1999. Scott was employed by a prestigious New York law firm for one year in Frankfurt, Germany, before enrolling in the Cornell Ph.D. program in the fall of 2000 in the Department of Government in Ithaca, New York.

Based on a life of constant travel and living in Europe, Scott focused early on a research topic related to political and economic events taking place within the European Union. At the same time, his interest in the politics and history of law, as well as international relations, led to him to the study of compliance with international law. Throughout the first half of the research program, he developed and taught courses related to the EU at both Cornell and Syracuse Universities. In early fall of 2003, he was awarded a Master of Arts and then left the United States to work and live in Germany for approximately three years. For more than a year, Scott was based in Bremen, Germany, where he collected much empirical data while being hosted by the Graduate School of Social Sciences at the University of Bremen. Between 2005 and the summer of 2006, Scott resided and wrote his dissertation in Berlin, Germany, while a guest researcher at the Wissenschaftszentrum Berlin. He is now assistant professor of political science in the Department of National Security Affairs at the Naval Postgraduate School in Monterey, California.

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Most of my gratitude must be directed to my parents, Barbara and Charles Siegel. Since I was a small child, my mother instilled in me a love for my Swabian heritage through numerous trips to small castles throughout the Black Forest. It was through her love that I forged my deep personal and intellectual interest in all things European. Throughout my life, my father has provided unwavering emotional and, when it was unfortunately necessary, financial support. During very trying circumstances, my father served as that proverbial rock I held on to as he helped me weather the various storms that affected our lives. They both provided the foundation for a life filled with constant learning, arguing and, at times, thinking. I would also like to acknowledge my brother, Mark, who overcome so many obstacles in his life that they became so commonplace that I often forget to tell him how much an inspiration is for me. Finally, despite often being thousands of miles away for long periods of time, I know my sister, Crystal, understands just how close I hold her to my heart.

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During the dissertation stage of my graduate career, I benefited from the financial and infrastructural support of many. The Department of Government awarded me the necessary grants to attend workshops in quantitative and qualitative methods in Ann Arbor, MI, and Phoenix, AZ, respectively. The Mario Einaudi Institute for European Studies gave me a summer research grant in 2002 so that I could begin to chart my course of research. A visiting fellowship from the Graduate School of Social Sciences from the fall of 2003 to 2004 at the University of Bremen helped me to lay the initial groundwork for my thesis. I would like to thank the faculty and students at the GSSS as well as at the Institut für Interkulturelle und Internationale Studien in Bremen for welcoming me so warmly and providing me with the richness of resources I needed to conduct my work. I am also very grateful for the opportunity that Michael Zürn and the Princess zu Löwenstein gave me to be a guest researcher at the Wissenschaftszentrum Berlin in the field of Transnational Conflict and Institutions between 2005 and 2006. While the length of my term may have stretched the concept of “guest” to its logical limits, the hospitality I was shown by Professor Dr. Zürn and the rest of staff and researchers at the WZB never ceased as I benefited from an extremely rich intellectual environment. I owe both the great progress I made towards

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Finally, most people who dissertate comment on what a lonely process it can be. I never had that disadvantage. From when I first arrived in Ithaca in 2000 until I departed from Berlin in 2006, I knew I was forging new friendships that would last a lifetime. I learned so much from these individuals, spending countless hours laughing and crying with them as we drank our coffees in the Olin Library cafe or bottomless Pilsners in the bars of Prenzlauer Berg. In no particular order, I must acknowledge the unending friendship and kindness of Andrew Phillips, Stephanie Hofmann, Robert Abramovitch, Thomas Raven, Stephen Watts, Emmanuel Teitelbaum, Michelle Renee Smith, Ulrich Krotz, Martin Binder, Andreas Obermaier, Sebastian Jobelius, and Michael Cowden. Special thanks must be directed towards Stephanie and Martin not only for their translation assistance (sometimes from French and German), but also, to Michelle, for filling my time in Berlin with so much joy, making it a dream come true. I would also like express by gratitude to Gavin Hurley for allowing me to lodge at his apartment on the Thames while I conducted my research in London.

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CHAPTER 1

DEMOCRATIC RULE UNDER INTERNATIONAL LAW?

I. Introduction

In the wake of the September 11, 2001 terrorist attacks on the United States, the member states of the European Union quickly, and perhaps hastily, sought to intensify European cooperation in response to a credible and extremely dangerous new threat to their citizens' security. Discussions began among European security leaders as early as September 20 of that year to develop new ways of combating terrorism.¹ At the center of this new and "true European law-enforcement area" is the European Arrest Warrant.²

At its core, the European Arrest Warrant required national legislation to be adopted and implemented that would remove all formal extradition procedures among EU member states. Instead, national judicial authorities would automatically "mutually recognize" the judicial authority and decisions of other member states. Any special protections in favor of a state's own citizens, as well as the principle of double criminal liability, were abolished.³

An important test of the viability of this recent addition to the European judicial and legal order occurred in July 2005. Momoun Darkazanli, a citizen of both Germany and Syria, was indicted by Spanish prosecutor Balthasar Garzon for funding terrorist activities and being a key member of the Al-Qaeda terrorist network. German authorities arrested Darkazanli in Hamburg and prepared to extradite him to Spain

¹ Press Release, Extraordinary Council Meeting, September 20, 2001, C/01/327.

² Council Framework Decision 2002/584/JHA, June 13, 2002. The decision also established a common definition of terrorism and periods of punishment.

³ The principle of double criminal liability states that authorities can extradite a person to another jurisdiction only for a criminal offense that is also an offense in the executing state.

under the new European Arrest Warrant Law adopted by the Bundestag in October 2004.

Soon after the arrest, however, the German Federal Constitutional Court (Bundesverfassungsgericht) ruled that Darkazanli's extradition and the national legislation that authorized it were fundamentally unconstitutional. The Basic Law of Germany (Grundgesetz) does not permit the extradition of German citizens.⁴ Also, the national law implementing the European Arrest Warrant did not provide sufficient redress to the courts available to every German citizen under the constitution.⁵ Until the law is redrafted and takes into account the rights to which every German citizen is entitled, the law implementing the European Arrest Warrant Law is null and void. Darkazanli was subsequently released from custody. Until this new law is redrafted correctly and implemented, Germany is not in compliance with European Union law. In this case, the national courts were the sole protectors of two important constitutional norms in the Federal Republic.

II. Liberal Democracies, Sovereignty, and Compliance

This case and many others like it raise fundamental questions related to state sovereignty, the democratic rule of law, and the impact of international law. Among them one is central: When and why do liberal democratic states comply with international law? How do liberal democracies adjust to the demands of international law? In response to new global security threats or economic challenges, states are creating a set of common rules and practices. As the European Arrest Warrant illustrates, some countries are even willing to cede elements of state sovereignty to realize security or economic gains. Yet the example also illustrates that there are limits

⁴ Article 16, §2.

⁵ Article 19, §4.

to the willingness of liberal democratic states to comply with these agreements. Liberal governments increasingly struggle with the fundamental political paradox of adhering to their obligations under international law while remaining democratically accountable to their national electorates, citizens, and constitutions. Compliance with international law is one area in which we can determine how governments balance these conflicting demands. How do states balance their national sovereignty, guaranteed by democratic institutions, with the need to provide the collective goods produced by international cooperation?

For some scholars, the notion that liberal states still possess national sovereignty is passé and irrelevant (Fowler and Bunck 1995; Schreuer 1993). Instead, sovereignty has become fundamentally “disaggregated” or shared across multiple levels and types of governance. According to this perspective, governance now takes place through both vertical and horizontal networks that link the governing units of the liberal state—national judiciaries, legislators, and state administrations—across national boundaries (Slaughter 2004). Horizontal networks connect similarly situated agencies and officials who share information and develop new solutions for extremely complex problems at the national level. Vertical networks exist to perform functions that states can no longer accomplish on their own, “borrowing the coercive power of domestic governments (21).” These networks are built to develop common policies and improve compliance as well as increase the scope, nature and quality of international cooperation.

The history of European integration, some argue, is the epitome of this process of networked governance and shared sovereignty. For example, the establishment of the European legal order and the supremacy of EU law over national law involved the implicit cooperation of national and EU judges, often ignoring the opposition of the legislative and executive branches of their own governments (Alter 1998; Alter 2001;

Burley and Mattli 1993). The “quiet revolution” (Weiler 1994) that took place in the EU created a new polity in which governance essentially operates through multiple networked levels of governance (Hooghe and Marks 2001). As a result, state institutional power, and state sovereignty more generally, is couched within a set of networked relations that have dissolved the boundaries between the foreign and the domestic. Sovereignty in the European Union no longer resembles the classic Westphalian model in which coercive institutional power is hierarchically organized within states situated in an anarchic environment. Rather, power is structured according to a third, liberal ordering principle that falls somewhere between anarchy and hierarchy or, as one scholar calls it, “negarchy” (Deudney 1995).

Horizontal networks of information exchange and vertical networks of shared coercive powers should improve levels of compliance among parties to agreements. For example, in the European Union, private individuals can exercise claims against their own national governments in national courts seeking the enforcement of their rights and privileges under EU law. The European Union can also improve state capacity. According to the managerial theory of compliance (Chayes and Chayes 1995), most cases of non-compliance are the consequence of a lack of capacity, not a lack of will. Weak states, not strong democracies, are the true obstacle to compliance. By assisting states through the spread of information, technologies, and financial aid, the compliance process is essentially cooperative and based on persuasion (Raustiala 2002). Since non-compliance is the result of shortfalls in bureaucratic capacity, international institutions strive to strengthen them, not override them. The portrait of compliance painted, therefore, is an optimistic and unproblematic one for national sovereignty.

Yet there are reasons to be more suspicious of international law and its consequences for liberal democratic governance, American or European. Jeremy

Rabkin fundamentally questions the notion that sovereignty can be “disaggregated” across multiple levels of governance, as, for example, it may be in the European Union (Rabkin 2005). Based on both classical liberal theory and early modern theories of sovereignty, Rabkin argues that the legitimacy, if not survival, of liberal democratic governments depends on the consent of the governed, enshrined in national constitutions. International law, then, consists of nothing more than law among such sovereigns. It cannot nor should not challenge the democratic state’s ability to govern itself, as mistakenly or harmful as it may be for its own citizens.

Following Locke and the Federalist Papers, Rabkin argues that parliaments are the ultimate source of sovereignty in the liberal state. Parliament is the fundamental representative of the national community based on a national social contract and cannot delegate or share its powers with a foreign entity. When or if it does, the government has in effect been dissolved. “Sovereignty . . . is not just about restraining ambition but, more fundamentally, about securing loyalty. As a doctrine, it implies some clarity about the conditions under which people will obey or should obey” (Rabkin 2005, 68). When that social contract is threatened by international rulings that lack the consent of domestic legislatures, liberal democratic states should not and, perhaps, do not comply. If the European Union really is a “postmodern” polity, as both perspectives here claim, then international law in the European context does not help liberal democratic governments govern, but actually threatens their capacity to do so.⁶

A third perspective suggests that international law neither transforms sovereignty nor threatens liberal democratic rule. In fact, international law has had only relatively benign effects on state sovereignty. According to Jack Goldsmith and Eric Posner, international law, whether customary or treaty based, is simply the result

⁶ There are good reasons to doubt whether the EU exercises the degree of coercive power and supranational governance that both Rabkin and Slaughter claim. See Conant (2002).

of states' seeking to advance their rational self-interest through cooperation (Goldsmith and Posner 2005). States, as unitary political actors, make common rules to advance particular policy goals that enhance the general welfare of their citizens. States will therefore comply with the rules they make only when it serves their interests do so. "State preferences for compliance with international law . . . depend on what citizens and leaders are willing to pay in terms of the other things that they care about, such as security and economic growth. We think that citizens and leaders care about these latter goods more intensely than they do about international compliance . . . and that citizens and leaders are willing to forgo international law compliance when such compliance comes at the cost of these other goods" (9).⁷ A state may comply with a treaty because non-compliance would harm its reputation or because it fears retaliation. In either case, states are complying with international law only because it may jeopardize the material gains of cooperation.

With such contrasting visions of international law, how do you begin to assess which is more accurate? Are liberal democratic states, particularly those belonging to the EU, living in a "postmodern" order in which sovereignty is disaggregated? Or are the rules and regulations they developed in the EU merely a reflection of state interests? If so, then whose interests are being served? Perhaps the European Union fundamentally threatens liberal democratic rule. If it does, can legislatures control the degree to which international law violates national sovereignty or even push it back? Or, as in the case of the European Arrest Warrant, must national courts serve as final guardians of basic social contracts?

The only way to answer these questions is to open the black box of the liberal state. In order to determine whether international law is benign, supportive, or even

⁷ The authors' thesis is consistent with either the neoinstitutionalist or intergovernmentalist account of European integration. See Garrett (1995); Moravcsik (1998).

harmful to democratic sovereignty, the actual process of complying with international law among these states must be examined. International Relations, to a large extent, are about how national governments must constantly try to balance the pressures and incentives of the international system with the benefits and costs of particular strategies at the domestic level. Moreover, the methods by which governments deal with these pressures vary with institutional democratic arrangements, which differ from country to country. To determine whether compliance with international law is a threat to democratic sovereignty, one must first examine empirically why states fail to comply with international law. Essentially three visions or perspectives currently exist to analyze the politics of compliance: the parliamentary accountability hypothesis, the institutional “misfit” hypothesis, and the politics-of-self-interest hypothesis.

The First Vision of Non-Compliance: Levels of Codification

The first vision of non-compliance suggests that states violate international law when the underlying norms regulating their national economies conflict with the legal or policy demands of an international norm. A type of ideological hegemony exists that assists state regulators in determining what objects are and how market activities involving such objects are permitted to take place. When these norms are challenged by EU law, government will delay compliance until the European Court of Justice issues a definitive ruling. In short, this hypothesis suggests non-compliance is a product of the degree of fit between national policy traditions and the norms and practices that lie behind an international rule. Non-compliance is independent of the interests either of the state as a whole or of groups within a country. Rather, the difficulty states face adapting to international rules results from entrenched normative structures that shape how the economy is to be structured and how policies are to be implemented.

The misfit hypothesis proposes that the difficulties states face in complying with international law stems from incongruity between domestic methods and policy traditions with the content and demands of international rules. The institutional “misfit” hypothesis, several important permutations of which can be found in the scholarly literature, has served as one of the core theoretical frameworks used to understand compliance.⁸

The first attempt to define ‘misfit’ is located in the work of Francesco Duina (Duina 1997a; Duina and Blithe 1999). In his studies of the equal pay directive, he found that policy legacies shaped the difficulty states had when adapting this directive, irrespective of the interests in favor or opposed to it and the time necessary to approve of corresponding legislation. Duina’s study was followed by an additional study by Knill and Lenschow (1998), according to which national administrative traditions would predict the relative difficulty states met with in adopting particular directives. Only three of eight cases were, however, consistent with their hypothesis (Knill 1998). Haverland conducted an additional study of the goodness-of-fit hypothesis and concluded that the number of veto players was responsible for quick adaptation of a packaging directive in the UK, despite a high level of misfit (Haverland 2000). Further research in the area of EU social policy concluded that there was little empirical support for the goodness-of-fit approach (Falkner et al. 2005).

In response to these disappointing empirical findings, subsequent researchers in the historical or sociological institutionalist mode revised the concept of goodness of fit in several ways. First, Knill and Lenschow (1998) stipulated that implementation

⁸ In reference to compliance, the authors using the misfit framework usually operationalize non-compliance in terms of the difficulty and time necessary to implement an EU directive. In the case of EU law, if a state has not implemented a directive on time or correctly, or has even incorrectly implemented a directive, it legally represents a case of non-compliance. However, in order to have substantive meaning, non-compliance should be termed as state behavior that fails to conform to international rules. Nevertheless, the traditional policymaking practices and their content are still a reason for states’ refusing to comply.

difficulties depend on the degree to which national regulatory patterns were embedded or institutionalized and on the policy context, or the degree of support from both domestic and supranational actors. However, several key studies using the misfit approach claimed that goodness of fit served only as a necessary condition for adaptation difficulties. The relative success national governments have had in adapting to directives was also affected by veto points, political and organizational cultures, and the ability of policymakers to learn through the redefinition of their interests (Green Cowles, Caporaso, and Risse 2001). H eritier et al. (2001) similarly argues that the differential impact of European policies is conditioned by the policy context and that goodness of fit is only a necessary condition. Finally, B rzel (2003) argued that initial resistance to the adaptation of EU directives depended first on whether there was significant distance between what EU law demanded and the national status quo, while subsequent compliance problems were shaped by whether sufficient domestic or external pressures existed to force the state to change the national status quo (B rzel and Risse 2003).

Attempts made in the goodness-of-fit literature to explain non-compliance in the European environment and, therefore, the differential impact of European policies, suffer from at least three important shortcomings. First, and most importantly, empirical reality has failed to bear out their claims. The misfit hypothesis is often not only not sufficient to explain non-compliance by EU member states, it also is not necessary. Mastenbroek and Kaeding's (2006) review of the scholarly literature shows that adaptation problems observed in the studies they surveyed result from varying state preferences and interests in maintaining the status quo, not the institutional structure of the status quo itself. Secondly, despite mixed empirical results, the case selection methodology used in these studies makes it logically impossible to reject the hypothesis that goodness of fit does not matter. All of the studies mentioned above

selected cases in which misfit was expected and did exist (Börzel 2002; Green Cowles, Caporaso, and Risse 2001).

Finally, and most importantly, the meaning of “goodness of fit” changes depending upon the study. First, Duina (1997a, 1999) specifies misfit as the combination of the national organization of interest groups and policy legacies (Duina 1997a; Duina and Blithe 1999). Knill and Lenschow (1998) specify their independent variables as regulatory style and structure. Börzel (2003) employs policy instruments, policy standards, and the “problem-solving approach” as her explanatory variables of choice. While some overlap exists in each of these categories, one can argue that they are also quite distinct from each other. Interest groups and policy legacies are different policy standards and instruments. In addition, these variables are so broad in scope that they include practically everything a government does. Besides the organization of interest groups, regulatory style and policy instruments, there is little left at the national level that could have some import.

In order to rescue the goodness-of-fit hypothesis, one must both employ methodological rigor and be more theoretically specific. This dissertation advances the study of compliance in the EU first by employing a combination of methods, both qualitative and quantitative. By statistically analyzing a database of over 1200 infringements, we can test alternative explanations against each other. Second, the cases selected for qualitative analysis include infringements of EU law in which states both did and did not have difficulty in transforming the legislative status quo, once they were notified that such infringements took place.

Most importantly, both the quantitative and qualitative analyses specified precisely why states have problems adapting to supranational legal demands. All such problems can be traced back to the degree to which the national economy is regulated or codified. While there are a variety of legal traditions among the now 27 member

states of the European Union, I argue that these traditions can be arrayed along a dimension according to how much the state codifies market objects and practices. The extent to which national legal systems predefine what objects are, how they are to be traded, and under what conditions is the primary reason some members states violate EU law more than others do. In short, the more rigorously the state regulates the national economy, the more likely it is that the state will confront the European Commission and refuse to change the national status quo until the ECJ issues a ruling.

National legal systems vary in the extent to which they prescribe the role of the state to codify market activities. Beginning with the Code Napoleon, civil code systems, in their effort to predefine the space in which market activity is allowed to take place, affect the likelihood that states will comply easily. The European Commission is charged with completing the single market and removing barriers to the free flow of goods and services. These barriers exist as a result of the varying legal traditions states use when drafting legislation. In a civil code system, the nature of a specific item and the appropriate means by which this product or service may be exchanged in the national economy are all predefined. Since all market behavior and products must be pre-approved by the state, regulatory or legal obstacles to the flow of goods and services are more likely to originate elsewhere. While policy traditions or regulatory styles and the interest group constellations are important, the norms associated with particular legal traditions set the stage for the emergence of groups and underlie the reasons they use to defend the legislative status quo. However, even in cases in which there are powerful interest groups actually supporting the removal of the status quo in order to reap the benefits of a market that includes now twenty-five nations and over 300 million people, national government officials refused to comply until the European Court of Justice issued a decisive ruling in the matter.

The misfit argument challenges the notion that the European Union is now a seamless web in which sovereignty has become disaggregated. Still, the method and procedures by which states exercise their control and authority over their respective territories are not so easily bypassed. Although dense networks of cooperation exist between bureaucratic officials in Brussels and their counterparts in national capitals, the traditional means by which the state regulates the economy continues to be essential. Interviews conducted with officials within the halls of the European Commission and member state governments reveal intense forms of communication and cooperation. There is no shortage of information; there are no obstacles to knowledge sharing. Yet, no amount of deliberation could effectively persuade a national bureaucrat to change the status quo in a given member state if the Commission's demands conflicted with norms and principles embedded within the legal tradition of that state. Even though there is a dense network of professionals, especially legal ones, across the European Union, their deliberations are conducted with almost no public scrutiny, and non-compliance still occurs in the EU.

The Politics of Self-Interest

An alternative vision sees non-compliance with international law as a process of deliberation, a mere function of the state's interest in complying. The first alternative vision of compliance, the politics-of-self-interest hypothesis, posits that states comply with rules that are beneficial and refuse to comply with those that are harmful. Self-interest can be operationalized in two basic ways. Either the rule imposes significant costs on the nation-state as a whole or threatens the interests of particular groups in power. These domestic groups could include political parties, powerful interest groups, or even federal states. No matter what its source, this hypothesis suggests that non-compliance results from direct voluntary behavior on the

part of specific material interests that perceive an international rule as a challenge to those interests. Under this scenario, states will refuse to comply with an international institution's demands until the threat of sanctions becomes significantly credible.

The politics-of-self-interest hypothesis directly tests the view of such scholars as Jack Goldsmith and Eric Posner (Goldsmith and Posner 2005). Compliance with an international rule is a consequence of a government's calculation that doing so is beneficial. The benefits may be short or long term. In the short term, the rule could require the removal of non-tariff barriers in other countries that prevent the free flow of goods and services from one's country to another. The long-term benefits can include reform of the national economy, extended trade relations, and securing the gains of future cooperation. According to the realist theory of international relations, the most powerful states in the international system are creating the rules and, thus, benefit from complying. If true, it is then expected that the smaller states that belong to an international regime will comply least often. Only the exercise of sanctions or their threatened use will force a state to comply.

In the past thirty years, however, the use of sanctions to punish states for refusing to comply is quite rare.⁹ The European Union is a highly legalized regime, in which the member states have formally accepted the rule of EU law and European legal supremacy (Alter 2001). Still, infringements of European law occur. Rather than resulting from a state's relative position in the international system or its overall interest in complying, non-compliance can result from the actions of powerful domestic actors with access to the state apparatus who work to preserve the status quo. In other cases, national governments have complied with costly EU laws to overcome

⁹ As discussed in Chapter 4, the use of Article 228, or the application of sanctions, has occurred only three times in the history of the EU.

domestic opposition to policy programs that otherwise went without support. In short, domestic politics explains relative rates of compliance with international law.

Rather than assuming that states want to maintain the status quo, the politics-of-self-interest hypothesis argues that powerful domestic groups can either block or foster the transformation of the legislative status quo. The relative fit between EU law and the domestic status quo, and the degree to which institutions must adapt in a new environment, are conditions determined by the interests of either the political parties in power or the groups that support them. The goodness-of-fit hypothesis ignores the possibility that there are domestic actors who actually want to change the domestic status quo. National governments do not choose how to interact with international institutions based on the status of domestic institutions; the policies and regulations associated with new international relationships are sustained only insofar as they are in the interests of powerful domestic actors. Prominent examples include making significant changes to policies associated with the welfare state (Falkner et al. 2005; Treib 2003).

In short, the politics-of-self-interest hypothesis conceptualizes institutions, or at least components of them, as highly malleable. Based on rational institutionalism, when the right constellation of domestic political interests is in place and a particular EU directive or law requires changes of which they approve, initial opposition to the Commission's legal demands can dissipate overnight as the result of either a new election or the creation of a new parliamentary coalition. Change in the status quo, according to rational institutional approaches such as that of George Tsebelis (2002), is determined by the number of actors who must give their consent to such changes and the range of policy preferences among them (Tsebelis 1999; Tsebelis 2002). Whether compliance with EU demands results from political developments at the EU level, in which strong states determine the policy outcome, or from politics at home,

analyzing compliance by weighing the costs and benefits represents a key alternative to the goodness-of-fit model.

The Parliamentary Accountability Hypothesis and the Process of Compliance

Parliamentary democracy operates to ensure that the government's policies reflect the preferences of its citizens. Elections and electoral systems are the primary means by which governments are held to account. Given the high costs associated with constant monitoring and participation on the part of the individual citizen, however, citizens delegate representatives with the objective of carrying out their interests. In turn, representatives become principals, and the government acts as the agent tasked with executing the elected majority's preferences. No agent is, however, a perfect substitute for the will of the representatives or its citizens. As a result, parliaments possess various mechanisms to monitor the actions of the agent, to limit its powers, and even to sanction it when it exceeds the majority's mandate.

The tools and strengths of these mechanisms vary across democracies, especially among the member states of the European Union. The ability of governments to pursue their objectives independently of parliamentary control and supervision is strong in some countries and relatively weak in others. The formation of parliamentary committees is one such example. Committees allow legislatures to hold their governments to account by requiring them to report their activities, share information, and question their motivations for particular policies. In addition, when legislation must be passed, parliamentary democracies vary in the extent to which governments are able to push through their policy goals. As participation by officials not in the executive government increases, legislatures can more easily control the extent to which national executives pursue objectives antithetical to the will of the parliamentary majority or the even the nation as a whole.

The mechanisms that parliaments possess to control the national executive, it is argued, can affect the likelihood that international law will challenge liberal democratic rule and threaten state sovereignty. While national executives are traditionally understood as having a great deal of autonomy from domestic parliaments in the conduct of foreign affairs, it is important to recognize that the extent to which these constraints exist varies significantly across democracies. The relative autonomy that national executives are given to conduct foreign affairs affects their ability both to negotiate international agreements and to honor the commitments they make as a result. Controlling for the preferences of both the national executive and the state as a whole, the likelihood that disputes will arise between the domestic status quo and international law, and the ability to settle those disputes, will depend on the degree of autonomy national executives exercise vis-à-vis their national parliaments.

The parliamentary hypothesis of compliance directly tests Rabkin's expressed fear of the impact of international law on liberal democracies. If national executives are able to make changes to the national status quo independently of parliamentary participation and national legislation is being transformed without democratic oversight, then international law poses a serious threat to majority rule in contemporary democracies. This hypothesis also assumes that conflict over compliance with international law is independent of the substance of the infringement. Parliaments oppose compliance not because an individual parliamentarian's interests are being challenged, but because they are being excluded from the process of complying and therefore perceive that their own sovereignty as well as the state's is under threat.

Each of the perspectives introduced above takes the role of domestic politics seriously. They also match up well with the three different visions of international law discussed earlier. The parliamentary accountability hypothesis takes seriously the

threat that international law could usurp democratic sovereignty. In order to determine whether such a threat exists, I test whether increased levels of parliamentary involvement exacerbate the difficulties of complying with international law. If national executives are able to act relatively independently of their national parliaments in matters related to the EU or foreign affairs more generally, then the process of compliance should be easier, but in this circumstance it threatens the legislative status quo most seriously. If Anne-Marie Slaughter's view of international law is correct, then difficulties with compliance arise from the lack of shared networks of governance. The absence of these networks may be due to the absence of underlying norms about how economic space should be regulated. Finally, if Jack Goldsmith and Eric Posner are correct, then non-compliance occurs merely as a function of a state's interests. States will simply refuse to comply until the state's future gains or current reputation as a poor partner in the business of international cooperation is credibly threatened. Each of these hypotheses has been explored in a variety of international contexts and policy arenas, both inside and outside the European Union. For the first time, I test each of these hypotheses together to determine which has more explanatory power, which most accurately captures the process of compliance, and whether the causal mechanisms posited by each theory works as predicted.

III. Compliance, Democracy, and the Rule of EU Law

The European Union serves as an excellent laboratory in which to test these various theories of compliance. Although the EU represents one of the most institutionalized systems of supranational governance in the world, the European Commission, the European Court of Justice, and other supranational institutions do not govern through a monopoly on the exercise of the legitimate use of force. There is

no European Leviathan. Rather, governance is carried out primarily through the rule of law. Compliance with EU law serves therefore as a general indicator of the effectiveness with which international governance occurs within the borders of the EU. However, in order to test these theories, I move beyond the systemic theories of compliance presented above and unpack the liberal democratic state into its component parts.

Although the hypotheses generated and tested here are intended to be transferable to other institutional or regime contexts, some legal features that are unique to the European Union deserve mentioning. First, in contrast to other treaty arrangements, the EU possesses an independent court and executive organization responsible for enforcing EU law. These two agencies, and not the member states, are tasked with issuing final, authoritative interpretations of the EC Treaties. Later in the EU's history, the Commission was awarded the power to financially penalize member states who failed to change their policies after a ruling by the ECJ. In addition, through a series of well-known rulings passed down by the ECJ, European law gained legal supremacy over national law (Alter 2001; Weiler 1994).

Because of the legal supremacy EU law enjoys and the tools that the European Commission has available to it, compliance with the EC Treaties by their signatories is exemplary. There are rarely cases of outright non-compliance. When problems of non-compliance do occur, strong transnational ties of communication between national and European bureaucrats can result in quick solutions to these problems, sometimes within six months. As a result, compared with the record of other regional economic regimes, compliance with law beyond the nation-state is quite common. However, violations of EU law seem to occur regularly among the member states, despite this legal supremacy. The number of violations committed each year just in the area of the EC Treaties and associated regulations demonstrates that the principles of EU law

have not yet been fully integrated into national legal orders. Second, some states have had greater difficulty implementing EU law more than others have had, as illustrated by the cross-national variation in the number of infringements committed each year by the member states. Third, when those infringements do occur, some member states have greater difficulty than others do in coming to an agreement with the Commission over the proper course of action. The reasons for each of these developments are not unique to the European Union and its member states. These reasons are reduced to the three hypotheses presented above that will be tested below.

The following chapters unpack and explore the relationship between liberal democratic rule and compliance with international law. In chapter 2, I explain why the concept of compliance must be disaggregated into two equally important components: the procedural and substantive dimensions. While the substantive dimension refers to the likelihood an infringement will occur, the procedural dimension refers to the politics of settling those violations. I then present three different hypotheses to explain how the nature of domestic governance can affect the settlement process. One hypothesis argues that the ability of an EU member state to settle its violations of EU law varies according to the degree of national autonomy the executive possesses. The second hypothesis, based on the historical institutionalist perspective in comparative politics, suggests that compliance difficulties are based on the relative “fit” between national and international regulatory traditions. The third and final view of compliance argues that a state will comply if it is in the self-interest of particular political actors in power.

With a theory of compliance specific to liberal democratic states, subsequent chapters look to patterns of compliance in the EU and test the arguments presented here against the empirical record. First, chapter 3 discusses the compliance regime in the European Union, the relationship between EU and national law as it developed

through supranational litigation. It also describes how national parliaments in two member states, the Federal Republic of Germany and the United Kingdom, monitor and supervise the national executive, both in general and in relation to EU affairs. We find that neither the politics-of-self-interest hypothesis nor the parliamentary scrutiny hypothesis can explain the origin of these infringements or why some infringements are referred to the ECJ more often than others are. Chapter 4 then compares compliance records among 15 EU member states and uses advanced statistical methods to determine if the politics of settling an infringement are different from the causes of a violation. Levels of codification, measured in terms of regulatory quality, explain why states violate EU law, why some violate EU more often than others, and why some states have greater difficulty settling infringements of EU law than others do.

In chapters 5 and 6, I further test the three visions of compliance outlined above using qualitative evidence in the Federal Republic of Germany and the United Kingdom. In each country-case chapter, violations of EU law that were settled by the European Court of Justice are compared with those that were not. By tracing the process of settling an infringement from start to finish, the origin of an infringement is identified. The next step consists of determining, first, who is responsible for the arguments governments use to refuse or comply with the Commission's legal demands and, then, how the status quo is eventually transformed. The goal is to dismiss the null hypothesis, which is that the reason an infringement is settled by the ECJ is not independent of the nature of the infringement itself. In other words, the procedural dimension is of little importance when explaining the variation in settlement practices.

Germany and the United Kingdom are selected because they produce similar compliance patterns, despite many dissimilar factors and interests. For example, German state identity has become deeply embedded in the process of European

integration. It has always been at the center of the European project. Therefore, non-compliance should run counter to the state's basic interests in the EU. In contrast, the United Kingdom has always had an "awkward" relationship with the EU, occasionally leading to moments of outright hostility. As a result, it should demonstrate much more reluctance when complying with EU law.

The answer lies in how the economy is regulated or codified in each country. While national bureaucrats in Germany rely on a specific set of regulatory norms based on maintaining social order to govern the economy, the UK generally prefers market-based solutions to regulate the economy in close cooperation with affected interest groups. However, each legal tradition specifies specific principles by which the national economy is to be regulated. The only difference that separates the two is that those principles are codified into national law in the Federal Republic, but not in the United Kingdom. Instead, British non-compliance is the result of disputes taking place among market actors and settled by national judges. Despite other differences, they produce similar records of the percentage of infringements settled by the European Court of Justice.

Chapter 7 concludes by summarizing my findings for not only Germany and the UK, but also for other member states of the European Union. I provide a short tour of the problem of compliance among the remaining member states, reviewing the problems they face complying with EU law and the mechanisms employed to solve them. The limits of this approach for the EU context are presented. Avenues for further research are discussed. Finally, I close by assessing the impact EU law has on member states in terms of transforming their national legal orders. Unless particular aspects of the EU compliance process are addressed, the problem of the democratic deficit will only worsen. Opposition to European integration by the general population based on the lack of democratic accountability will accordingly only increase, as

witnessed by the rejection of the EU constitution in referenda held in France and the Netherlands. The process of compliance must be made more democratic before the national sovereignty unique to liberal democracies is entirely trumped by a supranational legal order. Although all of Europe is now under the legal supervision of the Commission and European Court of Justice, national parliamentary supervision is missing. Although a new *ius commune* is uniting the member states of the EU, that common law is not only independent of democratic consent, but also homogenizing a legally diverse Europe.

CHAPTER 2

COMPLIANCE AS A TWO-LEVEL PROCESS

I. Introduction: The Empirical Puzzle

The European Union possesses an extensive series of procedures to deal with infringements of EU law.¹⁰ When the member states of the European Union are suspected of violating EU law, the European Commission initiates a series of informal and then formal mechanisms of dispute resolution. The Commission, as the “guardian of the treaties,” relies on complaints made by either private individuals, such as firms, or its own investigations to determine whether violations exist.¹¹ If informal talks between the Commission and a member state fail to bring about a consensus, the Commission will start formal infringement procedures under Article 226 of the EC Treaty. If the Commission and the member state still fail to arrive at a common interpretation of the law and its application, the case can be referred to the European Court of Justice for settlement and a legal judgment will be imposed on the actors. If the member state loses the case before the ECJ and still refuses to comply, the Commission can begin infringement procedures once again, which could ultimately lead to financial penalties in the most severe cases.

The basic procedures summarized above represent one of the most powerful and institutionalized systems of supranational governance on the planet. The delegation of these substantive powers to non-democratic international institutions has been the subject of much theoretical and empirical research, especially in regards to the European Union.¹² Some scholars argue that supranational institutions are

¹⁰ For an extensive legal analysis of these procedures, see Ibañez (1999)

¹¹ Much less frequently, under Article 227 of the EC Treaty, other states can notify the Commission of possible violations committed by another.

¹² See Pollack (2005) for a comprehensive review of the EU literature and respective theoretical debates therein.

delegated this authority in order to realize the gains of European cooperation. According to Jonas Tallberg, the member states of the European Union willfully delegated such powers of “enforcement” and “management” to the ECJ and Commission (Tallberg 2002). In so doing, the member states comply with EU law practically 100% of the time.

A closer look at the distribution of infringements across time and among the member states shows, however, that a great deal of variation is not readily explained.¹³ Focusing solely on member state violations of the Treaty of the European Community and the regulations associated with it, known as “hard law,” it is possible to observe significant differences over time and across countries, as well as different rates of change among the member states. For example, figure 2.1 traces the number of treaty infringements recorded by the European Commission between 1978 and 2002 for fifteen member states. France and Italy lead this group, while the Nordic countries of Finland and Sweden comply most often. Ignoring Finland, Sweden, and Austria because they have been members only since 1995, a very diverse set of countries—Denmark, Portugal and the Netherlands—violate EU law least often.

The total number of infringements of the EC Treaty also decreases substantially over time (see figure 2.2). This may reflect the gradual acceptance of EU law. Yet, as figure 2.3 shows, the rate of decline in the number of infringements for each member state differs substantially across member states. While France and Italy have continued to violate EC Treaties frequently during the last quarter-century, the number of violations Germany and other member states commit had declined substantially by the mid-1990s. What is most significant, however, is that some countries refuse more often than others to settle their violations of EU law until the

¹³ The data I have accumulated refers to information available for only 15 member states of the European Union, beginning in 1978. They include: Austria, Germany, Sweden, Finland, Denmark, the Netherlands, Belgium, Luxembourg, Italy, Greece, Spain, Portugal, Ireland, and the United Kingdom.

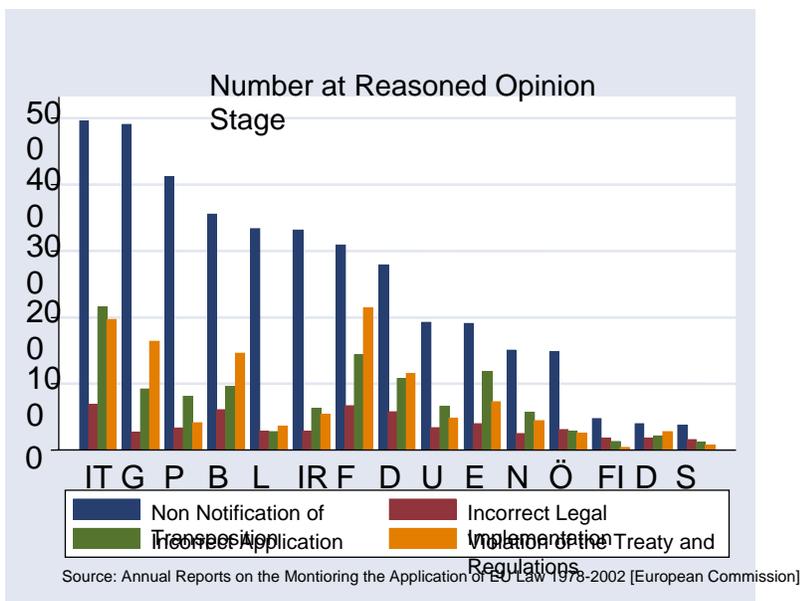


FIGURE 2.1: EU Infringements by Type of Law

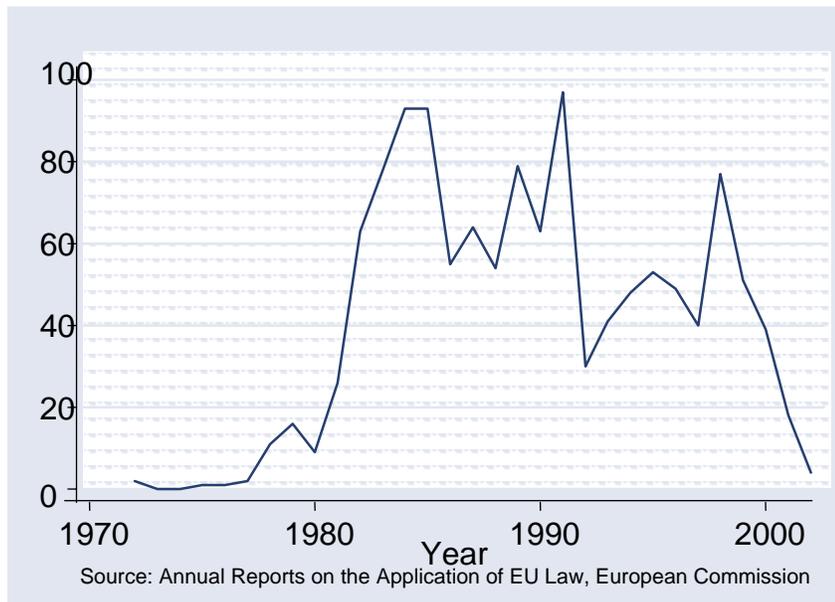


FIGURE 2.2: Total EC Treaty Violations, 1975-2002

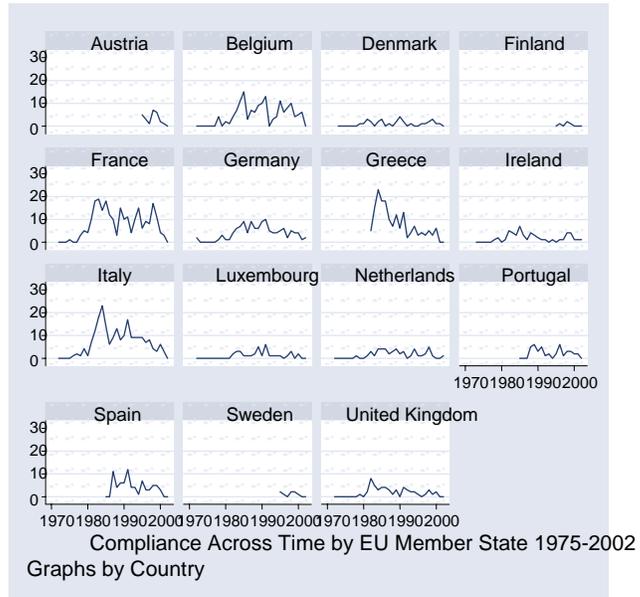


FIGURE 2.3: Total Treaty Violations by Member State from 1978-2002

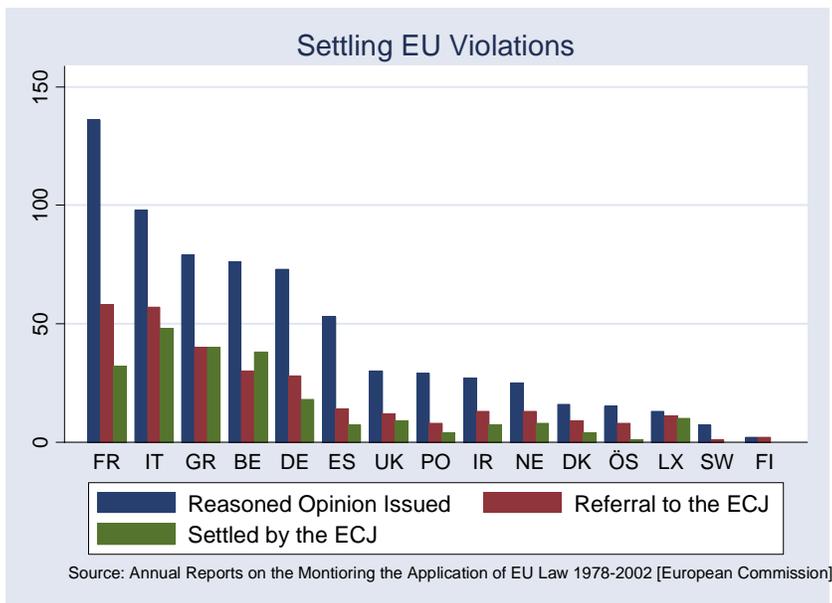


FIGURE 2.4: Treaty Settlement Practice across 15 EU Member States: 1978-2002

ECJ issues rulings in the matter (see figure 2.4). Between 1978 and 2002, the Commission initiated formal infringement procedures, known as “Reasoned Opinions,” most often against France, but the ECJ settled the highest number of infringements that originated in Italy.¹⁴

Such variations in compliance behavior imply that even the liberal democratic states of the EU, which have supposedly ceded their sovereignty to become part of a supranational order, have difficulty meeting their obligations under international law. When the liberal state is disaggregated, Anne-Marie Slaughter (1995) argues, transnational interaction or communication among the three primary branches of national government—the courts, the legislature, and the executive—with the institutions of other states and international organizations facilitate international cooperation and the rule of international law (Slaughter 1995). Political actors discover multiple solutions to common problems while reinforcing core political and economic values. Most importantly, liberal states are more likely to comply reliably and repeatedly with international law because liberal democracies possess both normative and institutional practices that make the detection and enforcement of international law easier (Slaughter 1993).¹⁵

While Slaughter’s is a powerful deductive theory of how international law works among liberal states, the vision she outlines is an overly optimistic one (Slaughter 1993; Slaughter 2004). The operation of international law across multiple

¹⁴ The exact nature, difference, and origin of these compliance stages will be explained in a subsequent chapter.

¹⁵ Slaughter (1995) identifies at least five factors liberal states possess that enhance treaty enforcement: (1) National executives are prevented from exercising arbitrary power because they recognize the rule of law in curtailing that power; (2) courts of liberal states will be able to proceed with enforcement of a treaty independently of executive interference; (3) since individuals can defend their rights in courts in cases of illegal government action, individuals can use courts to hold executives accountable under international law; (4) liberal democracies’ commitment to transparency allows others to detect more effectively any possible violations; and (5) liberal states are more likely to consider international law as part of a domestic legal order (the so-called “monist” legal doctrine; Slaughter 1995, 33-4).

levels of governance is often pictured as running smoothly and devoid of either interest or institutional conflict. It is dangerous, however, to assume that a branch of government or the political actors that run it will easily surrender to the demands of international law simply because it is perceived as “legitimate.” Legislatures or national parliaments are also institutions of law, whose legitimacy derives from the consent of the governed to be exercised by their representatives. And, just as the laws they devise may come into conflict with constitutional law, national legislation often comes into conflict with international law.

Three hypotheses exist within the EU studies literature to explain this conflict. The first examines the nature of parliamentary-government relations. National executives, as the representatives of their states in the foreign policy arena, serve as pivot points between the international and national levels of governance. Assuming that national executives wish to comply with international law, they face the unenviable task of meeting the demands of international institutions in enforcing international law and satisfying the demands of their national parliaments. This political task before the executive demonstrates not only how sovereignty is contested between national and international levels of governance, but also how sovereignty is contested among different domestic institutions of governance, in particular between the legislature and the executive.

The parliamentary accountability hypothesis tests the theory that national parliaments hinder compliance and could be losing sovereign control. According to this view, the legislative-executive relationship determines how effective international law will be in changing the domestic status quo. When national legislatures are comparatively weak, national executives are expected to be able to solve problems of non-compliance relatively easily and quickly. Conversely, when the national parliaments can effectively monitor the national executive and control the legislative

process, the settlement process is expected to last longer, until an independent international tribunal or court imposes a settlement. However, since there is no world government that possesses a monopoly on the exercise of the legitimate use of force, any theory of international law or compliance must include the possibility that states will refuse to comply. Although these cases are likely to be rare, when international law significantly challenges the powers of a nationally elected body, there should be full non-compliance or complete refusal by the government to change the status quo.¹⁶

The impact of national parliaments is only one possible explanation. Two alternative hypotheses, which are also tested here, also emphasize the role of domestic politics. First, a country's ability to adapt to international law may be a function of its civil or common legal tradition. Common law countries can more easily adapt to international legal demands, as long as no precedent exists that challenges the international legal opinion. Another alternative view of compliance suggests that states will comply with international legal demands and treaties only when it is in their interests to do. These interests may reflect the overall interests of the state at the international level or the interests of key political actors at the domestic level. The following chapters test each of these arguments using both quantitative and qualitative methods to determine which approach is most accurate and of greatest explanatory value.

Rigorous testing using both qualitative and quantitative methods demonstrates the vitality of the misfit hypothesis. Neither the politics of self-interest nor the monitoring capability of parliaments affects the likelihood of an infringement's

¹⁶ This theory of compliance with international law should apply to systems with either international or supranational adjudication. Supranational legal systems are distinguished from international ones in that the former govern individuals as well as states within a specified geographic space. I do not, however, expect this factor to significantly affect the mechanisms of compliance settlement discussed below. Therefore, unless technically necessary and while acknowledging important conceptual differences between European Union law and international law, for the purposes of this dissertation they will be treated in the same way.

occurring or the ability to settle an infringement. However, the institutional misfit hypothesis requires considerable refinement from the initial versions that appear in the literature. The source of violations of EU law is not the result of traditional policy practices or the actors that carry them out. Rather, the legal traditions that compose and shape the regulatory state solely explain why some states have more difficulty adapting to EU law. Differences in legal traditions that shape state regulatory behavior also explain why some states are more reluctant than others are to comply with the Commission's legal demands. The reasons cited for non-compliance have had little to do with challenges to entrenched political interests or the lack of parliamentary scrutiny.

The argument presented here also suggests that compliance with international law contains two dimensions. First, compliance is more than a simple dichotomy, more than the simple rejection or acceptance of an international rule. Rather, it requires the interaction of domestic and international institutions to determine what the rule is, whether the behavior or policy under suspicion is a violation of the rule, and when significant changes in the national legal status quo are required. The ability to settle possible violations relatively quickly and permanently over time constitutes the procedural dimension. Of course, no violation can exist without some actor, whether private or public, noticing a substantial difference between an international rule's intent and state behavior. This is the substantive dimension of compliance. However, this chapter will show why the ability of a state to settle its infringements of international law is theoretically and empirically independent of the origins or substance of the infringement.

II. Compliance as Process: Moving Beyond Simple Dichotomies

International law does not serve simply to realize the benefits of international cooperation through reducing uncertainty or transaction costs. International law also “shapes politics through its discourse of institutional autonomy, language and practice of justification, multilateral form of legislation, and structure of obligation (Reus-Smit 2004).” Much like the case of domestic law, here disputes will arise inevitably over the nature or content of a state’s obligations under international law. The politics of arriving at a common interpretation of the law and changing one’s behavior constitutes the procedural dimension.

Understanding compliance as a process implies three key components: interaction across multiple types of public and private actors, both national and international; interpretation and settlement of disputes; and, finally, the internalization of international law into domestic legal systems (Koh 1997). Applying elements of the transnational legal process approach allows us to take into account the entire range of compliance behavior that can be observed, moving us beyond simple dichotomies.

Interaction

Compliance moves through three specific steps (Koh 1996; Koh 1997).¹⁷ First, interaction takes place among multiple types of political or private actors deliberating over the nature of the law.¹⁸ These actors include transnational “epistemic communities” of experts or advocates.¹⁹ They may call on their own or other national governments to comply with international law through formal national institutions such as courts, representative bodies, or bureaucracies at the national level. This first

¹⁷ Earlier versions of the transnational legal process include Fisher (1981); Katz (1999); Steiner, Vagts, and Koh (1994).

¹⁸ See, for example, Risse (1999); Risse (2000).

¹⁹ See, for example, Haas (1992); Keck and Sikkink (1998).

step also includes discursive interaction across multiple levels of governance, such as between international organizations and national governments or between international and national courts. Through interaction, arguments about the nature of the law and its relationship to the current national status quo are exchanged and defended.

To take a recent example of legal disputation, non-profit advocacy organizations, such as Amnesty International, have published reports on the human rights abuses committed by the United States government in Guantanamo Bay, Cuba.²⁰ This has stimulated discursive processes within national and international public spheres carried out by actors who attack the US government for not complying with the Geneva Accords and by those who defend the US government's actions as legal. The actors range from non-governmental organizations to members of the US Congress to the US President and the United Nations. Interaction can also take place in more formalized public spheres, such as through the repeated use of Article 234 of the EC Treaty in the European Union. Under Article 234, national citizens can challenge their own government's policies and actions in national courts for possibly infringing EU law.²¹ These national courts will then refer these types of questions to the European Court of Justice to obtain a controlling interpretation of EU law.

Interaction between two or more parties over a dispute of international law is a sufficient condition for compliance with international law. Although it is hard to imagine in the currently highly interdependent world, there are cases of low or even non-existent levels of interaction between a state and other members of the international community and this can lead to non-compliance. Without interaction, there is neither an audience to which the national government must defend or justify

²⁰ Amnesty (2005).

²¹ See Alter (2000); Conant (2002); Stone Sweet and Brunel (1998).

its actions under international law nor a reason to do so. Severely closed and authoritarian regimes, such as those in North Korea, Zimbabwe, or Iraq under Saddam Hussein, would serve as such examples. While even these regimes use public spheres and formal institutions, such as the United Nations Security Council, to defend their actions, the rhetoric employed by these regimes is rarely viewed as credible, usually not legally discursive, and often hardly rises above blatant propaganda.²²

Under conditions of very low or non-existent interaction, there should be many cases of outright non-compliance. Full non-compliance takes place when states maintain the status quo or defect from an agreement independently of the judgment and arguments presented by others in deliberative settings. These deliberative settings may be formal, such as legalized dispute settlement mechanisms, or more informal, such as deliberation through diplomatic circles and international conferences. Nevertheless, an intersubjective understanding must be reached as to whether or not a state is complying with an international rule or norm.

Reasons for non-compliance vary. A basic rationalist reason is that the benefits of compliance may be marginally less than its costs. Constructivist reasons include the lack of a shared identity between two or more state actors or the lack of a shared consensus over what constitutes their identities and, therefore, what actions are pro- and prescribed. It may also be the product of the lack of legitimacy held by the violating state for either international governing institutions or other national governments. While states may cite either or both for not complying, if no effective

²² In order for interaction to achieve deliberative status, actors must provide valid reasons for their actions that are determined by the internal structure of their arguments and the “truth” of their claims (Habermas 1979) The literature on the logic of argumentation or communicative actions is small, but growing. The key work on the relationship between communicative action and the special nature of legal argumentation is Habermas (1996); and Kratochwil (1989).

interaction exists, then there is no opportunity available for other actors, whether private or public, to persuade the state to change its behavior and become compliant.²³

Non-compliance can occur only when an infringement has taken place, is intersubjectively understood by the rest of the international community as such, and the infringing state has refused to change its policy in spite of deliberative efforts (or material incentives, or the application of force when present) to bring the state back into compliance. Thus, the level of interaction does not cause compliance per se. Rather, the extent to which there is interaction among multiple types of actors is an underlying indicator of the extent to which there is a process taking place. Thus, it also indicates the relative probability that compliance will eventually occur.

The type of regime a state has can influence the amount of interaction that exists between national governments and international organizations. Democracies are more likely to encourage and be open to dialogue not only among state officials, but also through various communities within society, such as through legal and other professional associations. The democratic peace literature also suggests that democracies are more likely than illiberal regimes to comply with international law (Dixon 1993; Downs, Rocke, and Barsoom 1996; Raymond 1994; Slaughter 1995). The reasons cited included a democracy's respect for the rule of law and trust of judicial processes.

²³ It may be hard to imagine any situation in which there is not some level of interaction taking place between states and other actors, whether private or public. Yet, the simple examples of such closed societies such as North Korea or Myanmar (formerly Burma) clearly demonstrate that some states are engaged and integrated into the international public sphere and society more than others are. See Deutsch (1970); Deutsch et al. (1957). Moreover, it should be emphasized that it is not only the quantity but also the quality of interaction that matters. Thus, situations in which the international realm is a true reflection of Hobbes's depiction of anarchy, or of a war of all against all, constitute such an environment. More realistically, illiberal regimes of all stripes are expected to fail to engage in substantive justificatory discourse. Although my argument is parallel to that of Slaughter's (1995) view of "two zones," it is not necessarily true that illiberal regimes, however defined, will not comply with international law. Nor do illiberal regimes fail to comply with international law because of their identities per se. Rather, it is perhaps a symptom of their normative and institutional structures that prevents interaction with other states, especially democracies, which will often lead to non-compliance.

Yet the reasons behind compliance among democracies go beyond respect for the rule of law and trust of judicial processes. Rather, they are located in the actual operation of democracies. For example, recently Xinyuan Dai has argued that once agreements are signed, politicians seeking reelection are strongly encouraged by powerful interest groups endowed with high levels of information to comply with them, especially if politicians are under immediate electoral pressure. More insulated elected leaders, or those with longer time horizons, are less likely to feel the “push” towards compliance (Dai 2005).²⁴ Similarly, Oona Hathaway argues that, since international law often lacks a central enforcer to guarantee compliance, incentives to comply are established at both the domestic and transnational levels. These incentives function as enforcement mechanisms when private actors exercise them through domestic institutions, such as independent judiciaries and easily accessible court systems (Hathaway 2005).²⁵

Still, liberal democracies can and sometimes do fail to comply with their international legal obligations. For example, liberal states are most likely not to comply with international rules when they are in great conflict with institutionalized constitutional principles. Jeremy Rabkin presents a strong defense of the notion that national sovereignty presupposes that the state and, thus, law can govern only with the consent of the governed (Rabkin 2005). A constitution, whether written or not, is the embodiment of the rights and responsibilities individuals enjoy and is an additional source of legitimate law. When an international rule conflicts with these fundamental principles, non-compliance is very likely to occur.

²⁴ Similarly, Fiona McGillivray and Alastair Smith show in a complex game-theoretic model that when the costs of punishing leaders for violating international law are quite low, compliance is more likely and the credibility of states will increase among the signatories to an agreement. See McGillivray and Smith (2004).

²⁵ Transnational advocacy groups, such as in the area of human rights, also begin to mobilize in order to generate compliance with international agreements by their signatories. See Keck and Sikkink (1998); Risse, Ropp, and Sikkink (1999).

Cases of non-compliance have occurred in the EU. The reception of the supremacy of EU law has been mixed and varies among its liberal democratic member states. A cursory glance at the legal history of the EU before the German Federal Constitutional Court (Bundesverfassungsgericht or BvFG) illustrates the qualms national courts had in accepting EU legal supremacy because it could or did conflict with fundamental constitutional principles. The positions that the BvFG took in a series of famous decisions demonstrate the conditions under which liberal states will accept international law.

In *Solange I*, the German Court acknowledged that EU law constituted a separate legal order, but that Germany remained the final arbiter of what was constitutional according to the Basic Law (Grundgesetz) of 1949. Then turning to the rights enshrined in that constitution, the Court famously ruled:

As long as [Solange] the integration process has not progressed so far that Community law also received a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalog of fundamental rights contained in the Constitution [Grundgesetz], a reference by a court in the Federal Republic of Germany to the German Constitutional Court following the obtaining of a ruling of the European Court under Article 234 of the Treaty, is admissible and necessary if the German Court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with the fundamental rights in the Constitution.²⁶

Although the German constitutional court found that EU law carried such protections in a subsequent case (*Solange II*), the Court is always skeptical of and tests whether EU law contains at least as many rights and protections as the German constitution.²⁷

Even in the epic Maastricht decision, the Court found that the Treaty on European

²⁶ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (*Solange I*), Case 2 BvL 52/71, 27 BVerfGE 271, [1974] 2 CMLR 540.

²⁷ *In re Application of Wünsche Handelsgesellschaft* (*Solange II*) Case 2 BvR 197/83, 73 BVerfGE 339, [1987] 3 CMLR 225.

Union did not challenge a citizen's right to democratic governance enshrined in the Grundgesetz only because the Maastricht Treaty established elements of democratic governance at the EU level that did not supersede the powers of national democratic institutions.²⁸

The reluctance of the German Constitutional Court to accept the supremacy of EU law is illustrated by examples in the national courts of other EU member states. Italian courts, also recognizing a set of individual rights guaranteed by a postwar constitution, expressed reservations about EU legal supremacy.²⁹ In France, it was necessary to amend the Constitution to incorporate the Maastricht Treaty in 1991.³⁰ In the United Kingdom, the Treaty of Rome could become national law only through an Act of Parliament. This extended treatment of the reception of EU legal supremacy is intended to show that EU law became accepted only because it eventually possessed the qualities Jeremy Rabkin finds so necessary to avoid conflict between constitutional principles and international law. When EU laws or regulations come into conflict with fundamental constitutional rights, national courts are not shy in declaring them null and void, and thereby refuse to comply with them.

In summary, there may be any one of several reasons for a state's violations of international law, whether constructivist or rationalist. In a world of liberal states, the culprit may be the national high court, the legislature, or the executive. Nevertheless, the state has chosen to flout the international rule despite efforts made by others to change the status quo. Complete non-compliance therefore encompasses the result obtained from both the political causes of the infringement and the politics of

²⁸ Brunner and others v. The European Union Treaty (The Maastricht Judgment) Case 2 BvR 2134/92 & 2159/92, [1994] 1 CMLR 57. I temporarily set aside the issue of whether the European Parliament actually represents an effectively operating democratic institution and meets the German Constitutional Court's conditions.

²⁹ See cases listed in Bermann et al. (2002).

³⁰ Bermann, et al. (2002, 291).

attempting to settle that infringement. Whether there are high or low levels of interaction, complete non-compliance can be said to be taking place only if the state refuses to comply even after undergoing some form of interaction.

Interpretation

Given a certain level of interaction, the next step towards compliance is generating an interpretation of the law. Koh (1997) defines an interpretation as the “enunciation of the global norm applicable to the situation (ibid: 2646).” Often when the interpretation reached is perceived as the result of rigorous logic and based on shared underlying norms, political actors will comply with the ruling.³¹ In the many situations where there are third parties to settle disputes,³² the underlying reasons for complying may be anterior to the judgment itself, for example where the political institution resolving the dispute is perceived as legitimate and part of accepted international society. In situations that are less formalized or lack a delegated third party for settling disputes, the interpretation reached will be more fragile and is less likely to shape the future.

As Kenneth W. Abbott and Duncan Snidal admit, states often do not want to delegate to third parties or create hard law in order to maintain flexibility in the agreement and refrain from generating the prohibitive costs of losses in sovereignty that come with establishing such courts or hard law (Abbott and Snidal 2001). This also implies, however, that the likelihood that states will have more frequent disputes over the same substantive matter will be much higher as the legal interpretations that are reached are less likely to be as transformative of state behavior.

³¹ The logic of arguing requires that our claims satisfy certain criteria, and that means that they cannot be based purely on idiosyncratic grounds. Were this not the case, not only would no one assent to anyone else’s decision, but it would be impossible to give a coherent account of the obligatory character of other-regarding choices (Kratochwil 1989).

³² See Alter (2003).

Although “triadic dispute resolution” (TDR) is not a characteristic of all international institutions, it is so common in international relations that the nature of governance in these circumstances should be studied carefully.³³ Assuming that TDR is present, if the independent third party issues an interpretation of the law itself, then a particular interpretation of the law is being imposed on the parties involved in the dispute. The imposition of a judgment demonstrates that arguing about the nature of the law between multiple actors has failed. Over the history of the regime, if some political actors have their disputes referred to and settled by an independent third party often, it also demonstrates failure of a political actor to “learn” or internalize the meaning of the law. If the rulings are relatively consistent in their content, such as outlawing state subsidies to industries, and the violations the state is committing are legally comparable, then particular domestic features of the state may be affecting the ability of the state to internalize the constructed interpretation of the law.

Several reasons for the failure to agree upon an interpretation of the law are cited. Perhaps the issue that states are trying to settle is not conducive to having neutral third parties make a definitive decision that favors one actor over another.³⁴ Domestic opposition to a rule may be so strong that national governments must blame international legal obligations in order to overcome it. The procedures used to transform national law may take so long and involve so many different interest groups that the final product scarcely resembles what was originally demanded. The failure to internalize a rule may result from the shortcomings of the court itself. The international court may be trying to move faster and apply the law more broadly than wished for by its constituents, failing to demonstrate political neutrality or demonstrating poor legal reasoning (Slaughter 1997). Finally, from a constructivist

³³ For an extensive analysis of the nature of TDR and judicial governance, see Stone Sweet (2000).

³⁴ See Simmons (2002).

perspective, the content of a nation's identity may be highly contentious or political groups may have different perspectives regarding the legitimacy of international courts or international law in general.

The rest of this chapter lays out three possible explanations for the failure of states to settle their violations of European Union law. The first explanation is informed by the dominant perspective in qualitative EU compliance research, according to which the relative "fit" between the institutional status quo at the national level and the legal or policy demands of EU law explains the degree of non-compliance. The second explanation focuses on the institutional structure of national parliaments. When national executives enjoy a great deal of policy autonomy and can control the legislative process, national governments should be able to avoid an ECJ ruling. The third explanation suggests that the political interests of various groups in power shape the type of compliance behavior observed. None of the alternative explanations proves to be important in determining why an infraction of EU law occurred. As we will see in chapter 4, however, the constraints national executives face, in terms of the actors' abilities to veto changes in the national status quo, do affect the ability of a national government to settle a dispute over EU law before it reaches the European Court of Justice.

III. Domestic Institutional Constraints on Compliance

To this point in our discussion, we have treated the state as a unitary actor. This is not entirely inappropriate given that the state is often the target of international law, including customary international law.³⁵ Although the targeted actions are essentially state practices, the diverse preferences of domestic actors regarding international law and the ability to channel those preferences through domestic

³⁵ Restatement of International Law (Third), Foreign Relations Law of the United States '101 (1987).

institutions are vital to determining the likelihood that states will change their behavior and comply (Milner and Rosendorff 1997).

The First Perspective: The Role of Legal Tradition

In the early theoretical work on compliance in the EU, many scholars focused on the problem of implementing directives, specific pieces of legislation that require legal adaptation and application in the member states.³⁶ EU member states vary in their ability or willingness to implement these laws within specified time periods and in the extent to which they are applied. Real differences between implementation and compliance notwithstanding, the purported explanations for delay and faulty implementation of EU directives may apply to compliance with the EC Treaty and its regulations as well.

The institutional “misfit” approach has undergone several phases. When attempting to explain the differential impact of European legislation, the misfit hypothesis argued initially that successful compliance was explained by the degree to which European policy requirements matched existing national institutional practices (Héritier 1995). The first phase measured the degree of misfit simply in terms of the costs incurred by states in the process of adapting to EU legislation (Börzel 2003; Héritier et al. 2001; Knill 1998). A second phase of the “misfit” argument suggested that adaptation difficulties were rooted in the legal and regulatory norms at the domestic level. National laws are more than “just abstract rules.” They are the answers that nation-states have surmised, in specific political and economic conditions, to address the difficulties of social life. Thus, they embody collective values and beliefs, and context-specific interpretations of social life (Duina and Blithe 1999). These collective beliefs can be about the content of the policies themselves (Börzel and Risse

³⁶ See supra 35. See also Falkner et al. (2005); Mastenbroek (2003); Mendrinou (1996).

2003; Green Cowles, Caporaso, and Risse 2001; H eritier et al. 2001), or they can be collective beliefs about the proper methods to be used and legitimate actors necessary to carry out a policy (Knill 1998). The two variations of the misfit hypothesis differ in their emphasis on policy substance versus the policy process.

The initial comparative work that tested the misfit hypothesis across member states of the EU proved somewhat disappointing. Knill and Lenschow (1998) found that only three out of eight EU environmental directives confirmed their hypothesis. In addition, Haverland (2000) found that, when studying the implementation of a packaging directive, England transposed the law most quickly, despite a significant degree of misfit and much delay in Germany, even though its national legislation formally matched that of the packaging directive (Haverland 2000). Instead, the British implemented the law quickly in order to obtain greater market harmonization, and the Bundesrat blocked its adaptation because it would lead to a slight lowering of relatively strict standards. Finally, testing the misfit hypothesis through an analysis of six labor directives, Falkner et al. (2005) found once again that the UK implemented these directives relatively quickly despite a high degree of misfit and, conversely, poor implementation in France and Germany, where there was a good fit between the national status quo and EU legislation (Falkner et al. 2005).

The misfit hypothesis therefore faced several challenges. First, comparative analysis of directive implementation failed to yield the expected results. Second, the concept of misfit is highly malleable. In some cases, misfit pertains to the ideas, norms, and collective understandings of what the correct amount of state intervention in the economy should be, the degree to which products or services should be regulated to protect the consumer, or which actors should be included in the policymaking process. However, a third phase of compliance scholarship expanded upon the sociological institutionalism that served as the foundation for earlier theories.

For example, Beach argues that member states are normatively compelled to comply with EU law (Beach 2005). In addition, Sverdrup shows that Scandinavian countries insist on complying with international law due to their commitment to reach a consensus with the Commission (Sverdrup 2004).

Each of these studies makes an important theoretical contribution to the explanation of state compliance with international law. They suffer, however, from two shortcomings. First, it remains difficult to transfer these theories to other national contexts. It is unclear, for example, why the desire for consensus is absent in other EU member states while being unique to Scandinavian countries. Second, both Sverdrup (2004) and Beach (2005) ignore the dominant task and goals of the European Union, which is the creation of a single market. The European Commission and European Court of Justice are redefining how markets operate, what types of production and products are considered legitimate, and the standards under which market transactions take place. As EU institutions re-regulate the European economic space, they come into conflict with the dominant legal and administrative traditions, or regulatory cultures, that control economic practices at the national level. Therefore, the sources of non-compliance and the difficulty states face in settling them may result from different legal traditions at the national level.

Duina (2006) lays out a rigorous theoretical analysis of the way in which these national economies are remade through a comparison of different regional trade agreements (Duina 2006). Duina persuasively argues that in order for markets to function there must be shared viewpoints of reality, in two senses. First, market and state actors must come to a shared understanding of the nature of objects, an agreement over what reality “is.” These are definitional notions, such as what is a “firm,” an “organic” substance, or a qualified doctor. Second, they must share common normative notions over what market reality should look like (Duina 2006,

47). Together, these two factors constitute a country's regulatory culture, which is shaped by its legal tradition.

Scholars have often divided European legal tradition into two types: common and civil law. Common law is associated with the countries of the British Isles and its former colonies, while civil code systems refer to the legal systems in countries on the Continent. As Duina (2006) describes, common law is a reactive system. Definitions of objectives within markets and how they should operate are based on the constant evolution of standards through the use of precedent. Rules are not made a priori, but when disputes over particular items or practices occur. Because these rules are made through case law or as disputes arise between private actors, the system is slow to change compared with the pace of change in countries with a civil legal tradition. Customary legal traditions, in which judges try to render substantive justice to the actors involved, are also inherently flexible. The rulings issued by judges in common law countries attempt to respect the particular and unique features of cases before them and avoid making generalizations that would apply to an entire universe of situations.

In contrast, the civil law tradition attempts to define entirely and exhaustively what markets are and what constitute legitimate forms of market behavior. They specify regulatory principles that should govern economies and are independent of time. Civil law is definitive in nature and uses lists, categories, and successive orders in order to cover as much economic reality as possible (Duina 2006, 52). The task of the judge is simply to apply a particular rule or regulation to a set of given facts. Justice is determined by the degree to which the solution rendered by the judge flows logically from the legal principle, not whether the parties involved in the dispute perceive the solution as fair or equitable. As opposed to the common law system, there is a greater degree of certainty in the system and, as a result, less flexibility. The

particular is discounted in favor of the general. As Duina argues, “Civil law . . . is a regime centered on the a priori articulation of regulatory principles that are to regulate social life. Though these principles can change over time, they are intended to be definitive in spirit (Duina 2006, 52).”

Regulatory Cultures and Legal Traditions

These two legal traditions often serve as basic archetypes in reference to which it is possible to determine the type of regulatory behavior expected from state regulators. The divisions are quite satisfyingly clear: the British Isles versus the Continent. Yet, in reality, the distinctions are not so clear. Instead, states have always incorporated a variety of elements into their national legal traditions. There is no EU member state that is a pure expression of a civil or common law system. Every state contains some elements of both. Instead, the reasons that some states have more difficulty complying with supranational law than others can be traced to the extent to which legal norms and principles have been codified and represent the civil code archetype.

Before the French Revolution, all of Europe shared a common legal past and heritage (Bellomo 1995). “Common European law,” as Bellomo terms it, consists of two different sources: the Justinian code and canon law. The Justinian Code, the central piece of Roman law and forgotten during the dark ages, was resurrected by Irnerius in Bologna in the twelfth century. Irnerius and his students re-introduced the classic norms of Roman law just as European cities began to rise again and methods of settling disputes without resorting to the use of the force were in demand. Copies of this codex were distributed across Europe, even to England, through medieval networks of scholars and universities. In addition, the Church and its subsidiaries increasingly applied canon law across Europe, based on Gratian’s *Decretum*, in order

to tend to the issues of the faithful and unify the practice of Christianity in early medieval Europe. Together, the Code and the *Corpus iuris canonici* established a *ius commune* for all of Europe. It allowed merchants to trade with each other, even though they came from vastly different political cultures and societies. The Church, on the other hand, used the canon law as a means by which to unify, strengthen and, above all, rationalize its control over the daily lives of its faithful.

Canonical and ancient Roman law served as the underlying foundation for settling legal disputes across Europe in the Middle Ages. Contrary to the views of other legal historiographers, Bellomo argues that the *ius commune* (Roman and Church law) acted as the legal structure for local laws across Europe until the nineteenth century (Bellomo 1995). Local laws and norms, or *ius proprium*, were infused with the norms of the *ius commune*. The norms were identical and, most importantly, Europe's common law provided the terminology and methodology by which to form opinions. It also constructed or reinforced a significant degree of autonomy with which jurists could settle these disputes based on these norms. These jurists traveled as pilgrims to the centers of the European legal universe—the universities of Bologna, Padua, Perugia, Montpellier, Toulouse, Orleans, and Salamanca—at great risk to themselves in terms of both economic and possible mortal sacrifice, studied the *ius commune* there, and implemented the legal norms and procedures in their own native lands when they returned. As cities began to reemerge in Europe, especially in Bologna, Milan, Padua and Venice, the number of new laws, statutes, and regulations began to proliferate, along with a class of magistrates necessary to interpret them. However, these local laws were never privileged over the *ius commune*, because their content would change at the whims of the legislators and their jurisdiction, usually comprising urban city dwellers, was highly limiting and often arbitrary. Even in the Holy Roman Empire, infamous for its lack of political

unification and multiple sovereign entities, Roman and canonical law filled the contents of municipal law across German cities, as well as governed the relations between the Holy Roman Emperor and the electing principalities (Bellomo 1995). Thus, even though local laws were important features in the legal jurisprudence of a re-urbanizing Europe, the *ius commune* acted as the common thread connecting and holding together a patchwork of sovereign entities in medieval Europe. This common legal order lasted for centuries, until the arrival of Napoleon and his armies at the turn of the nineteenth century, which sought to eliminate the two sources of the *ius commune*, Roman law and the Church, and replace them with two modern ones, the state and the people.

As Napoleon's armies conquered Europe, they sought not only the elimination of the *ancien regimes* of Europe, but also the legal codes and norms that governed them. The period of codification had begun.³⁷ Stemming from the ideologies of the French Revolution, codification would bring unity and equality to the law. Particular norms, rules, and privileges reserved for distinct classes, the bourgeoisie, the peasants, and nobility or royalty, would be abolished in favor of a uniform code that applied to every citizen equally. The new Code civil, or Napoleonic Code, of 1804 sought to rationalize the old order by providing a rule for every possible situation or object that exists. Infused with notions from the Enlightenment, the drafters of Code civil believed the entire universe could be mapped and regulated by a single system of laws. For the rising bourgeoisie, codification provided the citizen with stability and certitude "in every moment of his life and every aspect of his legitimate activities (Bellomo 1995, 11)."

³⁷ Codifications of the law began in the early 1700s in the Kingdom of Sardinia, the city of Venice, and, most importantly for Germany, during the reign of Maria Theresa in Austria through the issuance of the *Civilgerichtsordnung* of 1782 and the *Allgemeine Gesetz über Verbrechen und derselben Bestrafung*. However, these codifications were used only to clarify the power of the absolute sovereign, to rationalize his or her reign, and maintain the social division of society into classes.

The idea that judges could interpret the law to fit particular circumstances or use the norms associated with the *ius commune* to render substantive justice was expunged from the judge's set of interpretative tools. Instead, jurists are directed to fit a norm or rule to a particular state statute. By its own philosophy, the civil code contains all the necessary language and procedures with which to settle disputes. As a result, judges were no longer the servants of princes and kings, but rather of the law and, thus, the state. Codification does not imply a mere re-ordering of every element of a citizen's life. It also awarded the state supreme authority and control over that life. Based on the principles of equality and uniformity, all traditional privileges, rights, and responsibilities were obliterated in favor the state's desire to construct and regulate all elements private and public. In fact, the distinction between the public and the private was eliminated along with the nobility and other components of the aristocracy. Codification, in sum, denotes the ordering of the nation according to the state's will or desire.

How is such a will constructed? Using the basic principles of Rousseau, the state is the pure expression of the people's will. Since the citizens of the republic are the absolute sovereigns, there is no need for checks or balances or a separate autonomous branch of governance. Rather, the law as adapted by the legislature is the final word. Thus, while all of time and space is regulated by the state, how that space is defined depends on the collective will of the people as expressed by the legislature. Because national communities constitute the "people" or citizens, the *ius commune* that bound Europe together would soon come undone by Europe's own diverse national landscape.

Napoleon's armies brought with them the ideals of the French Revolution as they marched across Europe and deposed ancient regimes. Not only did they depose, temporarily, the ancient monarchies and pre-modern class structures, but they also

attempted to sweep away the local traditions and rules that sustained those regimes. However, just as Napoleon's rule of Europe was short-lived, so was the full impact of Code civil. Napoleon's code encountered opposition as it confronted other legal regimes, particularly in Germany. In Prussia, the Landrecht of 1794 remained in effect under Napoleon's rule. The idea that the law of the nation needed codification gained credence, however, as Napoleon's forces departed and prior regimes were restored. Yet the laws reintroduced possessed the flavor of the national territories they were meant to govern. In German-speaking Europe, an entirely different school of thought regarding the role of law and the state emerged. Under the historicist school of legal interpretation, Friedrich Carl von Savigny and other German legal scholars argued that the people did need a uniform set of laws to guide their lives, but this uniform code must reflect the "spirit of the people," as Bellomo writes of the historicist position, "as it had been historically configured, consolidated, and structured—the spirit of the people re-experienced and comprehended as it had been expressed by a succession of jurists through time, contributing to and shaping tradition by their writings" (Bellomo 1995, 18). Codes could not be imposed upon the people independently of history. Champions of the resulting scholarly movement, Pandectism, argued that the law required certainty and order, but not a code. Instead, a system of jurisprudence was required that all jurists and legislators respected. The state was not sovereign, but tradition was. Thus, in German-speaking lands, there was a turn back to the traditional combination of Roman and canon law. The only task of the jurist was to determine whether the "spirit" of the law was being followed. That spirit of the law existed outside the state, even limited it. Academics in universities who had spent years studying the past and formulating basic legal doctrines, not bureaucrats and administrators, were responsible for defining the law as these doctrines were understood, through a thorough reading of history. Consequently, German jurists

dismissed the idea that all of social reality had to be defined a priori. Instead, only particular principles were to be respected. Individuals were free to engage in economic transactions and other activities as long as these fundamental principles, which are a combination of Roman law and resurrected Germanic custom, were respected. As a result, codification did not occur until the early twentieth century. Even then, these laws were subject to the norms associated with the medieval system of the *ius commune*.

The German system of jurisprudence occupies therefore a kind of middle ground in terms of the degree to which time and space is codified. If national legal systems can be placed on a spectrum measuring the degree to which the French system of codification took hold and shaped a nation's jurisprudence, then Germany would fall somewhere in the middle of that spectrum. In marked contrast are the legal systems of the British Isles. The *ius commune* came to England in 1066, and its doctrine was kept alive by legal academics in the ivory towers of Cambridge and Oxford universities, and there it remained. Unlike on the Continent, the Church and the monarchy never gained absolute sovereignty, and feudalism, a key institutional expression of the *ius commune*, was always more weakly institutionalized in England. In fact, common law and the judges interpreting it served as the key barriers to the building of centralized rule from London (Merryman 1985). In the case of Britain, codification of the law would have awarded the sovereign power only at the time of the revolution. The judge in England and other common law countries used common law to award substantive justice and constrain the power of the monarch and, later, the state. When disputes occur, the judge in the common law system has ample flexibility to find a solution that provides substantive justice or responds to changing social and economic circumstances. When those disputes are between the state and the individual, the state is not the automatic victor. Rather, precedent and its

interpretation, the doctrine of *stare decisis*, will determine the appropriate solution. The common law, finally, became a central component of British identity, constructed in opposition to developments on the Continent. Codification does exist in both Ireland and Great Britain in the form of Acts of Parliament or Statutory Instruments. These are the necessary tools states use to regulate and manage society. However, they are usually limited in scope and used to clarify common law tradition (Merryman 1985). Therefore, what makes the legal systems of Britain and Ireland unique is less the presence of the common law tradition than the absence of codification. Low levels of codification imply not only a reduced role for the state in the economy, but also that much less activity in private or economic life is regulated.

Thus, along the spectrum of codification, the British Isles lie at the extreme low end. At the other end of that spectrum lies not France, the home of the Napoleonic code, but Italy. The basic system that governs Italian law is derived from the *Codice Civile* of 1942. The Italian Civil Code, as intimated by its date of origin, is closely associated with Benito Mussolini and fascist rule. Thus the Italian *Codici Civile* became, under the jurist Alfredo Rocco, the direct expression of totalitarian state rule. Codification accomplished two tasks. Similar in purpose to the German historical school, codification would express the interests of an “organic” spirit of the people, albeit defined now in terms of the masses and not of a specific class. Second, codification would solidify the state’s authoritarian rule over a diverse and divided society.

In reaction to the fascist regime, the Italian legislature began to work around the *Codici Civile* and pass legislation that regulated Italian society even further upon the collapse of fascism. In the immediate postwar era, the Italian legislature began to pass a series of special laws that filled in the “gaps” in the Italian civil code. Second, parts of the *Codici Civile* were overturned, superseded, or simply frozen in place and

ignored upon the passage of special laws. According to a survey conducted by the Constitutional Court of Italy, more than five hundred thousand pieces of legislation were passed between 1948 and the early 1990s (Bellomo 1995, 28). Bellomo and others term this “de-commodification”: “The Codice Civile cannot be recognized as having . . . the value of general law, [or as being] the seat of principles that are set forth and ‘specified’ by external laws.”³⁸ Indeed, the Italian law increasingly lacks uniformity and fundamental principles that are respected by all. And national codes should at least provide jurists and citizens with a legal order that possesses clarity, is homogeneous, and, of course, knowable. However, Italian law also expresses the code ideal that the legislature, as the repository of the people’s will, is the ultimate sovereign. While the proliferation of laws in Italy has violated the notion that the law should be rational and unitary, it more than satisfies the proposition that the law is whatever the people, through the legislature, say it is and that it cannot be limited in scope or depth of detail. Consequently, more and more Italian economic space became regulated through high levels of codification.

Codification and Compliance

The extent to which law is codified explains why some EU member states violate supranational law more than others. As levels of codification increase, more of a country’s economic space becomes predefined and controlled. Therefore, as the European Union, namely the Commission, seeks to remove barriers to the free movement of goods and services within the single European market, those countries that have more actively codified both objects and types of economic activities in advance are expected to violate EU law most often.

³⁸ Natalino Irti, *L’eta della decodificazione*, 2nd ed., 27 cited in Bellomo (1995, 29).

To some degree, the amount of codification is correlated with the amount of state regulation that exists. Yet, this rule belies the true reason that states have difficulty complying with EU law. While the amount of state regulation serves as a good predictor of the number of violations that will occur, it explains little as to why national governments may have difficulty changing the status quo. In France, Italy and other civil code countries, when a violation occurs, an entire code or regulation must be revised or rewritten. In civil code legal systems, there is less flexibility when changes to the law are required. In contrast, in Germany and other systems based on Roman law, changes in the regulatory code can take place quite easily as long as fundamental principles based on legal tradition are not challenged. In common law countries such as the UK and Ireland, even fewer violations are expected, due not only to lower levels of regulation, but also to the ease with which infringements of EU law can be addressed by adding to or changing existing codified laws. However, if the Commission demands changes to the status quo that conflict with entrenched legal norms that have developed through precedent, then the national government is more likely to appeal the case and refuse to comply until the European Court of Justice issues a final ruling.

In summary, compliance is a function of a country's regulatory culture and legal tradition. The degree of fit between the EU legal order and the national regulatory system depends on whether the same legal principles are being articulated at the EU level and how easy it is to change the legislative status quo. The relative fit between an EU Treaty Article or regulation and domestic legislation is not always defined a priori. Interaction across different levels of government will clarify the nature of the infringement and determine why a particular piece of domestic legislation violates EU legal principles. Changes in or the defense of the status quo still must be couched in justificatory legal language. In addition, the reason that some

states have more difficulty than others do in settling their legal disputes with the Commission depends on the prescriptions the Commission is demanding. Those countries that have a greater amount of regulated and codified economic space will have greater difficulty in settling an infringement. This is not, however, the only reason for which states refuse to comply until the ECJ issues a ruling. Settlement of a specific infringement also depends on whether a fundamental legal principle is under attack by the European Commission.

Second Perspective: The Political Autonomy of the National Executive

The process of compliance is an example of a “two-level game” (Putnam 1988).³⁹ In the area of compliance research, scholars are currently divided as to whether domestic politics assist states in maintaining their commitments or make compliance more difficult. For example, Downs and Rocke argue that domestic politics force states to make “shallow” agreements (Downs and Rocke 1995). Because governments face considerable uncertainty over the future demands of powerful interest groups, the agreements that states make lack strong enforcement mechanisms, which only encourages non-compliance when states do choose to cooperate substantively.

For example, in the EU, König and Hug (2000) and Hug and König (2002) have persuasively shown how parliamentary constraints affect treaty negotiations and outcomes. The authors show that when the preferences of the pivotal parliamentary

³⁹ Like Robert Putnam’s original piece, much of the “two-level” game literature focuses on how domestic actors, and parliaments in particular, act as constraints on international negotiations. See Iida (1993); König and Slapin (2005); Milner and Rosendorff (1997); Mo (1995); Pahre (1997). While my theory of compliance complements these approaches, it differs in two fundamental ways. First, I assume here that the legislature has specific preferences as an institution vis-à-vis international law. Subsequent research will, however, consider whether there is a significant difference in the preferences of the median legislator in the majority and the national executive. Second, even when domestic opposition is included in the international negotiation process, unintended consequences and the fundamental ambiguity of a treaty’s text will produce significant compliance problems.

actors in one state diverge substantially from the positions of those in other states and can control the ratification process, these states will gain more at the negotiating table. Through extensive empirical analysis, the authors confirm Thomas Schelling's (1960) original claim that weak national executives are paradoxically powerful, because they can achieve favorable treaty outcomes by citing extensive domestic constraints (Schelling 1960).

In contrast to treaty negotiations, however, there is often very little flexibility when a state is attempting to comply with international law. In the European Union, when the European Commission determines that an infringement has occurred, it specifies the nature of the complaint, the legal basis for considering it a violation, and the means with which to address the infringement. If the national executive has a sufficient degree of policy autonomy and can easily change the national status quo, it is more likely that the interpretation of EU law devised by the Commission will be implemented without dispute. If national parliaments are included in the compliance process, then a ruling by the European Court of Justice is more likely to occur in order to overcome domestic opposition. Therefore, just as national parliaments can serve as constraints on the national executive during treaty negotiations, they can also hinder treaty compliance.

The mechanisms used to establish and monitor the executive are the constituting features of parliamentary democracy because they are responsible for maintaining both democratic representativeness and accountability. The problems that can develop within principle-agent relationships are well-known (Lupia 2004). First, the correct agents must be selected such that they properly reflect the interests of the voters who selected them (adverse selection). Second, once the agents are selected, mechanisms must be in place to keep them honest and diligent (the problem of moral hazard). When national parliaments possess high levels of both, the increased level of

democratic accountability should ensure that the policies reflect the preferences of a majority in parliament. High levels of accountability also mean that there are methods available with which to oversee the executive's foreign policymaking, delaying the process of compliance.

When national parliaments can effectively monitor the national executive and its deliberations with international organizations, the advantages of delegation are limited. Individual parliamentarians in that case obtain more information about the nature of international law and its possible impact on the legislative status quo and the impact changes in the national law will have on their specific interests. With more information comes more influence. Assuming parliamentarians are primarily interested in re-election, esoteric demands made by a foreign institution are less likely to persuade domestic political actors to comply. Domestic parliamentarians are also less likely to have expertise and training in the specialized nature of international law and, thus, to raise serious objections to complying with rules that are unfamiliar to them or lack legitimacy.

Also, when extensive committee structures are in place, the foreign executive is made accountable to the interests of the median member of parliament. Appearing at committee hearings, replying to committee inquiries, and passing on information from negotiations with international organizations allows individual parliamentarians to express their own views on the implications of compliance. Independently of whether divergence exists between the preferences of government and parliament, allowing parliamentary influence will slow down the deliberative process through which to reach a common interpretation of the law.

Even if relatively autonomous national executives reach a common interpretation of the law, they must then internalize this interpretation in order to prevent future violations. This usually means passing new legislation. National

governments have at their disposal a number of institutional mechanisms with which to control the legislative agenda. Building on the work of Herbert Döring, George Tsebelis uses seven key tools available to national executives to control the legislative process and constructs a single measure of agenda-setting power (Döring 1995; Tsebelis 2002).⁴⁰ The more agenda control national executives possess, the more likely states are to “learn” or internalize international law through the transformation of the legislative status quo.

Conversely, when national parliaments participate in the legislative process, amendments to a “compliance bill” are more likely, jeopardizing the effect the law will have in permanently addressing issues of non-compliance. If committees can rewrite a government-proposed rule, the relative disparity between the demands of an international organization and the actual “compliance bill” is likely to grow. When the government has less control over the legislative agenda, the time it takes for a bill to pass will also increase. In the case of the EU compliance process, infringements are more likely to escalate in the compliance process simply because the member state neither responded to nor implemented the necessary legislative changes on time.

Agenda control and parliamentary supervision operate independently from each other in the compliance process. Increasing parliamentary supervision means lowering the quality of deliberation between the national executive and the international organization enforcing international law. Rather than providing legal justifications, the short-term interests of individual parliamentarians are articulated, and such expressions of personal interest are often less credible within the perspective of international law. In contrast, agenda setting refers to the ability of the national

⁴⁰ The details of how Tsebelis arrives at this aggregate number and its components will be dealt with in the chapter that follows.

executive to implement a shared interpretation of the law and transform the status quo such that compliance is obtained in the future.

One final way in which the inclusion of parliament affects the compliance process involves the duties and obligations the legislature has to its voters. Under representative government a legislature's first duty is to its constituents or to its electors. Again, Jeremy Rabkin provides a strong defense of democratic rule based on consent of the governed rather than on imposed rule by undemocratic international institutions (see Rabkin 2005, chapters 3 and 9). The national legislature and the principles that guide its decision-making are viewed as more legitimate in constitutional democracies, Rabkin argues, than under international law. The legislative process becomes more democratic as parliamentary involvement increases. If Rabkin is right, then increased parliamentary involvement will prevent international law from having a significant impact. From a normative and positive perspective, therefore, procedural politics are expected to be fraught with conflict over issues of sovereignty when the national executive is effectively supervised.⁴¹

This argument about the role of national parliaments is contrary to other scholars' views on the role for national parliaments in international politics. For example, Helen Milner and other authors contend that cooperation among states is inhibited most significantly by low levels of information (Milner 1997, chapter 2). Assuming that legislative preferences diverge from executive preferences and lack information about a given deal, the legislature is likely to prevent effective cooperation (70). According to this view, parliamentary committees and contacts with

⁴¹ This argument is comparable to one given by scholars who have argued that strong states have more effectively adjusted to international economic shocks than weak ones. When speaking of strong states, most authors have invoked state autonomy from societal pressures. Such states have been able to choose policies without input and constraints from societal groups. To the extent that such groups engage in the democratic process by influencing legislature behavior, strong states are also relatively weaker than democratic ones. (Katzenstein 1978; Krasner 1976; Mastanduno, Lake, and Ikenberry 1989).

the national government should enable compliance, not hinder it. However, in regards to compliance with international law, I argue that ignorance is bliss. If legislatures, as well as interest groups, are included in the deliberation over international law, they increase the diversity of arguments presented that are used to defend state actions. As parliaments improve their capacity to monitor the executive and gain more information, they also begin to comprehend the possible ramifications of compliance for their own domestic interests, whether material or immaterial. In addition, domestic constituent demands are more likely to be perceived as a higher priority than the necessity of obeying international law. As a result, the arguments parliamentarians make are less likely to be couched in forms of legal justification and more likely to reflect blatant attempts at defending one's self-interest.

Lisa Martin provides an alternative conception of the role parliaments play in the compliance process (Martin 2000). Arguing against conventional wisdom (Mansfield, Milner, and Rosendorff 2002; Milner 1997), Martin shows not only that national legislatures play a role in foreign affairs, but also that they enhance a state's credibility in making international agreements. She hypothesizes that institutionalized legislative participation increases a state's credibility when making an international agreement (Martin 2000, 49).

While theoretically rigorous and empirically strong, her conclusions cannot be accepted without some reservations. First, her argument blends the bargaining and implementation stages into a single iteration of international cooperation, when there are good reasons to separate the two. Uncertainty over the actual gains achieved by cooperation, the ambiguity of a treaty's text and intended meaning, and the changing interests of the actors who signed the agreement (and the agents who must enforce it) over time suggest that it would be highly problematic to assume that one stage directly affects the other.

Second, even when extensive implementation of an agreement is required, problems of implementation do not necessarily imply non-compliance (Martin 2000, 41). Compliance is conceptually different from implementation. Implementation refers to the difference between the intent of legislation and the outcome observed (Krislov, Ehlermann, and Weiler 1986). Compliance, on the other hand, “can be said to occur when the actual behavior of a given subject conforms to prescribed behavior, and non-compliance or violation occurs when actual behavior departs significantly from prescribed behavior (Mitchell 1994, 430; Young 1979, 3).” As Michael Zürn correctly points out, “[Compliance] does not refer to the willingness of the actors to comply”(Zürn 2005), but to the actions states are taking (Simmons 1998; Simmons 2000). While the politics of implementation and compliance can overlap, they are two distinct concepts and, thus, denote two different forms of politics.

The Third Perspective: Domestic or National Political Interests

If states are utility maximizers, then agreements can be made with other states that will allow them to realize their individual and collective goals. The key to compliance, rationalist approaches would argue, is to change the state’s relative utility such that it is in its interest to comply. Thus, as Ian Hurd illustrates, rather than relying on simple acts of coercion, self-interest is the key compliance mechanism in these models (Hurd 1999).⁴² The key to compliance is changing the relative utility of compliance such that the costs to the state of defecting exceed the benefits.⁴³

There are a variety of methods by which the costs of defection or the benefits of compliance can be increased. Downs, Rocke, and Barsoom (1996) argue that

⁴² Margaret Levi’s magisterial account of compliance with taxation systems across European history is an example of the self-interest, or “quasi-voluntary,” version of compliance receiving emphasis over coercive and ideological forms of obtaining obedience. (Levi 1988).

⁴³ Another way of conceiving the rationalist approach here is through the notion of consent (Reus-Smit 2003, 598-601).

compliance is more likely when effective sanctions are instituted that make the benefits of defecting at least less than zero and have a high probability of being applied to those doing the cheating. The purpose of sanctions, the authors argue, is to address those circumstances in which agreements call for significant changes in the national status quo.⁴⁴ Along with possible sanctions for defecting, one must add the direct costs of changing state behavior stipulated by some form of international agreement, such as blows to the reputation of the defecting state and exclusion from any future agreements.⁴⁵ Compliance is also affected by the relative probability that these sanctions will actually be borne exclusively by the cheater. Factors that would affect the probability of cheating include: a) the likelihood that other states or an international institution will detect the violation; b) the level of sensitivity other states have to one or more states' defecting, and c) if necessary, the type of collective action other states must take in order to sanction the non-complying state.

Similarly, the benefits of cooperating should include not only the direct gains of cooperation, but also its positive side-effects, such as the development of new technologies and financial or other forms of assistance provided to facilitate compliance (see Underdal 1998 for a complete list of hypotheses).⁴⁶ Ultimately, rationalists argue, since a majority of agreements that states make are mixed-motive games and require the participation of other states to realize their benefits, compliance is likely to be quite common.⁴⁷ Even the procedures that states employ to address problems of compliance allow states to settle infringements through bargaining

⁴⁴ Of course, this goes to their argument about the prevalence of bias out there.

⁴⁵ See Downs and Jones (2002).

⁴⁶ In addition to acknowledging the role of sanctions, Guzman argues that compliance is also a function of the relative reputation a state is likely to earn as a result of violating international law. Building on the basic foundations of neoliberal international relations theory, states are likely to obtain the long-term benefits of cooperation by signaling their trustworthiness to other states by complying (Guzman 2002).

⁴⁷ These agreements being made may also reflect the fact that states are making agreements to carry out policies that they otherwise would have anyway.

(Jönsson and Tallberg 1998). If this is combined with effective verification procedures and relatively costless methods of sanctioning a defecting state, then high rates of compliance are expected.

The gains and losses that accrue to a state for complying are not required to be operationalized at the national level. Non-compliance may also occur if the international rule or law conflicts with the interests of powerful political actors at the domestic level. Conversely, ease of transposition and adaptation may prevail when powerful domestic actors support compliance because it is in their interest. Falkner et al. (2005) found party effects in sixteen of their ninety-one case studies, which, for methodological reasons, may underestimate the role of party politics. It was simply the case that directives related to improving workers' rights and privileges were approved in those countries governed by the Center-Left as opposed to those governed by the Center-Right. Both hypotheses, citing the national and domestic political interest in complying, are tested in the following chapters.

Conclusion

In a world of liberal states, national governments constantly face the political quandary of adjusting to their obligations under international law while at the same time remaining accountable to their domestic constituents. In a world in which governance is increasingly carried out by global networks and supranational legal systems, national governments face fundamental tradeoffs between developing policy solutions for global problems while maintaining democratic legitimacy. One theory of compliance with international law seeks to explain how national executives balance these two objectives and why that ability to balance them varies across the fifteen member states of the European Union. As democratization efforts continue to spread across the world, these tensions will be ubiquitous among liberal democracies, but

expressed and handled in a different ways, depending on the comparative institutional context of governing.

Thus, there are good normative reasons to test the hypothesis that national executive autonomy shapes non-compliance in the EU. At the same time, however, the European Commission and the European Court of Justice are slowly remaking the European legal order. Through its jurisprudence and jurisdiction over national law and governments, it is actively seeking to resurrect the *ius commune* of the past. As shown in the chapters that follow, the Commission and Court used the EC Treaty to reconfigure national legal traditions such that goods and services can freely traverse across national boundaries. The codification of laws by national communities erected those barriers. Through the doctrine of mutual recognition, the ECJ and Commission are attempting to construct a new *ius commune* for Europe that serves as the legal superstructure for the single internal market. In addition, just as merchants and traders served as the strongest supporters of the common law that united medieval Europe, transnational actors in twenty-first century Europe are also cooperating with these supranational institutions to transform their own local societies.

The following chapters test the three alternative perspectives on compliance presented above. The next chapter describes the development of this new European legal order and the politics of the EU in two member states—Germany and the United Kingdom. Subsequently, the comparative nature of compliance in the EU is demonstrated and explained through a quantitative analysis of over 1200 violations of the Treaty of the European Community (EC Treaty) and its associated regulations. Following that, two qualitative chapters trace the politics of settling infringements of EU law in the UK and Germany as the European Commission sought the liberalization of the European market in the area of manufactured goods and other items. In a concluding chapter, the implications this theory has for understanding the “democratic

deficit” in the EU are presented and the future of sovereignty in a world composed of international law and liberal democracies is discussed.

CHAPTER 3
CONSTRUCTING THE SINGLE MARKET:
AMBIVALENT INTERESTS AND WITHOUT SCRUTINY

The single internal market represents one of the crowning achievements of European integration. Following the creation of the European Coal and Steel Community in 1956, the member states pursued a conscious strategy of increased economic interdependence to avoid the misery and tragedy of nationalist conflict that characterized the first half of the twentieth century. The centerpiece of that economic strategy was the integration of national markets. Firms would be able to sell their wares across the EU. An EU citizen would be free to work and reside in any member state. National borders would no longer stand in the way of the free flow of capital. Yet accomplishing that task was more challenging politically than perhaps the founding fathers of the European Union envisioned.

The obstacles that arose to European economic integration were deep and widespread. Despite the commitment by many member states to a liberal economic order within the confines of European borders, downturns in the international economy, powerful interest groups, or simple bureaucratic inertia prevented the full realization of the single market concept. As a result, the European Commission and Court of Justice slowly constructed a new, supranational legal order so as to keep the engine of European integration running. This new legal order, described below, challenged the status quo among the member states in several respects. First, national legal traditions became embedded in a set of supranational legal norms. When national and EU legal rules clash, EU law takes precedence. Second, as a result of European integration, the interests of some states were met, while others slowly battled over the

terms of integration. As a result, the national legal traditions of many countries also came into conflict with supranational law.

This chapter traces the historical origins of EU law and its impact on member states. The construction of an EU legal order emerged slowly over time and often without the explicit approval of member state governments. In particular, litigation in the area of the free movement of goods, one of the central purposes of the single internal market, shaped the nature of EU authority and national regulatory freedom. Once the legal foundations of the EU law are described, the interests that two particular member states have in pursuing European integration are addressed. In the case of Germany, EU membership and integration fulfilled key foreign policy goals that are a function of its own state identity. In contrast, EU membership was always highly contested in the United Kingdom. Finally, the difficulties states have encountered in complying with EU law are not just a function of their own state identity or interests. Rather, problems of non-compliance may also result from significant differences between EU law and national legal traditions. Here again, I use Germany and the United Kingdom as key examples. The contrasting legal traditions of these two countries serve as a basis for understanding why they have had difficulty adjusting to the demands of this new supranational legal order.

I. The Legal Construction of the Single Market

Among the four freedoms enshrined in the Treaty of the European Community (EC Treaty), the free movement of goods throughout the EC always stood as one of the chief priorities of European integration. In the original Treaty of Rome of 1956, the first article concerned the removal of all national barriers and discriminatory practices that prevented the free movement of commercial and industrial products. Through litigation instigated by the European Commission or private actors utilizing

Article 234 (ex Article 177) in their own national courts, these supranational institutions have not only helped construct a new supranational order among the EU member states⁴⁸. The legal doctrines and principles developed by the ECJ have also shaped the trajectory of European economic integration by further defining what type of regulatory practices are considered legally appropriate.

The single European market (SEM) is the core element of the European integration project. It is more than just the 1985 White Paper published by the European Commission and its proposed completion by January 1, 1992, known as the 1992 Program. Rather, the single European market refers to the entire set of regulations, directives, and other legislative items that constitute the customs union, common market, and now economic and monetary union of the EU. It consists of more than just the EU directives approved by the EU Council of Ministers that are associated with the 1992 program and the harmonization of technical standards. It also includes ECJ case law, Commission and Council decisions, and other legal tools various EU institutions have utilized to construct a single market. In some cases, the establishment of the single market required positive steps of cooperation among the member states. In other cases, especially in the EU's early years, it required the enforcement of the EC Treaty's principles by the Commission and the ECJ themselves. The infringement case studies focus on this part of the EU's historical development.

One of the primary tasks of the Commission is to cooperate with the European Parliament and Council of Ministers to regulate the EU's single market. Few would argue that the EU is not involved in other policy-related activities, such as funding distribution through the Common Agricultural Policy or redistributive policy

⁴⁸ All EC Treaty articles will refer to their current numbering as amended by the Treaty of Amsterdam in 1997.

implemented in directing rich-state contributions towards poorer regions through Social and Cohesion funds. However, because of the small size of the EU's budget and its lack of a direct tax on EU citizens, these policies are relatively insignificant in the EU compared with the regulatory tasks of the EU.⁴⁹ Thus, if the EU can be considered a new "supra-state," it is primarily a regulatory one (Majone 1996). Since the 1970s, the number of directives and regulations based on the EC Treaty has increased exponentially, although this proliferation of rules has leveled off in the last years for which data is available (see figure 3.1). In some cases, the amount of legislation produced by Brussels and which must be transposed by national parliaments is relatively minor. At the same time, the scope and depth of regulation has expanded to such a degree that few areas of national policy exist that are unaffected by legislation at the EU level.⁵⁰

Several theories exist in the literature to explain why the amount of legislation produced by the EU has increased so dramatically in the past thirty years. First, there is significant demand for supranational legislation. Multinational firms and transnational interest groups lobby for supranational regulation to profit from intra-European trade or from integrating one sector's spillover into another sector (Burley and Mattli 1993; Sandholtz and Zysman 1989). Defenders of an opposing view, the liberal intergovernmentalist position, argue that European legislation merely reflects the interests of the member states and their relative bargaining power (Moravcsik 1998). Because the largest member states benefit more than they lose from integration, the full membership has both approved of a significant amount of legislation and

⁴⁹ Obviously, the CAP is a major exception to this argument, for which a vast majority of the Commission's resources is used.

⁵⁰ The most often-cited example is a member state's foreign and security policy.

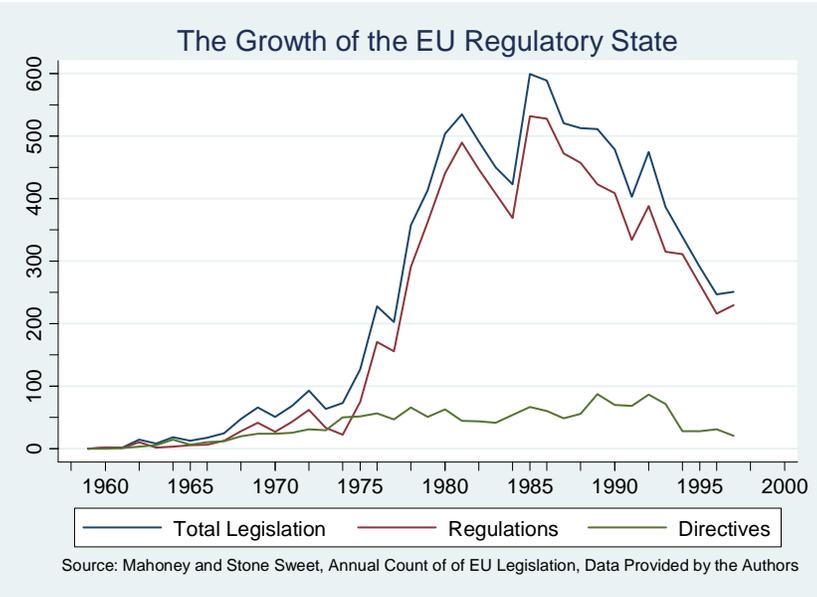


FIGURE 3.1 The Growth of the EU Regulatory State

ceded some elements of state authority to supranational institutions. Alternatively, a state may call for supranational regulation so that it can impose or “upload” its own regulatory standards on the rest of the member states and, thereby, avoid regulatory competition with the less-regulated national economies within the EU (Héritier 1995).

On the supply side of the equation, both the regulatory school and neofunctionalists claim that the Commission and ECJ have their own, separate interests in expanding their powers and influence. As fundamentally political institutions competing for power and authority with member states, the Commission and the Court expanded their respective political powers by offering their specialized services to a transnational constituency (Pollack 1997). The Commission provides the information and expertise necessary to reduce the costs of trans-European transactions by proposing legislation that harmonizes technical standards across the EU, while it and the ECJ also cooperate to enforce and police those agreements made, gaining credibility and autonomy as a result.

The task here is neither to determine which perspective is most accurate nor to assess fully the impact of these supranational rules on domestic policy regimes. Instead, to explain why these conflicts emerge and why some of are settled by an ECJ ruling, we focus on whether states are complying with these supranational rules. In order to do so, attention must be drawn to the difficult two-level game national governments must play as they attempt to satisfy the demands of supranational institutions while remaining accountable to their national parliamentarians.

II. The Legal Integration of the Single Market

The generation of a single internal market that would permit the uninhibited flow of goods, services, capital, and even people across national boundaries stands at the center of the project of European integration. In fact, the original first articles

listed in the Treaty of Rome of 1956 were concerned with the free movement of goods.⁵¹ The main focus of European economic integration in the 1950s and 1960s was the removal of all tariffs, quotas, and duties or charges that discriminated against goods among the original six members. Title 1 lays down the legal basis for the establishment of a customs union and, later, the common market. First, Article 23 removes all national tariffs, charges, and duties on products originating from within the common market and establishes a common external tariff.⁵² The legal center of the free movement of goods lies, however, with Articles 28 through 30 of the EC Treaty. These articles remove all quantitative and qualitative restrictions on the free movement of goods, respectively, including “all measures having equivalent effect.” The debate over the meaning of this clause lies at the center of the politics of complying with EU law in the area of the free movement of goods.⁵³

Legal jurisprudence in the area of the free movement of goods has been vital in shaping the legal relationship between a member state and the EU, the proper role of the state and its ability to regulate the market, and, albeit to a lesser extent, the legitimacy of the European Court of Justice itself. In the early days of ECJ jurisprudence, Articles 23-31 of the EC Treaty served as the vehicle on which to develop a distinct supranational legal entity. Several key elements of the EU legal

⁵¹ In 1991, the Maastricht Treaty or Treaty of European Union added two additional titles before the free movement goods.

⁵² Article 23 contains an additional clause that did not just remove all specific duties and charges on products among the member states. It also states that “all measures of equivalent effect” were to be abolished as well. This clause was subsequently used by the ECJ, together with the Commission, to attack all types of charges, fees, or costs that could possibly be imposed by national governments, often for innocuous reasons or that of minimal effect. In addition to Article 23, Article 90 seeks to prevent the member states from transforming charges on foreign products into discriminatory forms of internal discrimination. Also vital to the establishment of the customs union, and later the common market, was the free flow of goods and services from third countries once they have entered the EU and have been charged the appropriate duties and fees, as stipulated in Article 24.

⁵³ Besides Article 30, which is discussed below, the final article listed under Title 1 of the EC Treaty addresses state monopolies and prohibitions against any discriminatory policies that affect the procurement or marketing of goods among member states. Since this article and its legal implementation fall under issues dealing primarily with competition policy, we can ignore this item for the time being.

order arose through litigation related to the free movement of goods. For example, the doctrine of direct effect, in which Community law is automatically effective and has authority in a member state's territory, emerged from a dispute over a tariff that Dutch authorities assessed on ureaformaldehyde imported from Germany.⁵⁴ The doctrine of EU legal supremacy was established when an Italian citizen sued the national Italian electric company under Article 31 of the Treaty for unlawful monopolistic practices in *Costa v. ENEL*.⁵⁵ Additional litigation under Title 1 of the EC Treaty also re-asserted supremacy of EU law in *Simmenthal II*.⁵⁶ While the ECJ was attempting to find a solution to fundamental conflicts between national and EC law in these cases—for example, whether an Italian national court could invalidate a national law when it conflicts with EU law—the initial basis for this and many other disputes that established the EU legal infrastructure arose out of disagreements over the proper exercise of the state's regulatory power regarding their own national markets.

Disputes over the proper role of state regulation constitute a significant plurality of the number of EU legal violations committed by member states. As figure 3.2 illustrates, violations of the EC Treaty articles related to the Internal Market occupy a large share, approximately 38%, of the total number of infringements that member states have committed since 1978. Violations in the policy areas of employment and social affairs as well as agriculture are also quite numerous, but comprise only a third of those committed under the internal market (see figure 3.2). There also seems to be a general match between the cross-national distribution of the total number of EC Treaty infringements and the distribution of infringements related

⁵⁴ *Van Gend en Loos v. Nederlandse Administratie der Belastingen* Case 26/62, [1963] ECR 1.

⁵⁵ *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, Case 6/64, [1964] ECR 585.

⁵⁶ *Amministrazione delle Finanze Dello Stato v. Simmenthal SpA*, Case 106/77, [1978] ECR 629.

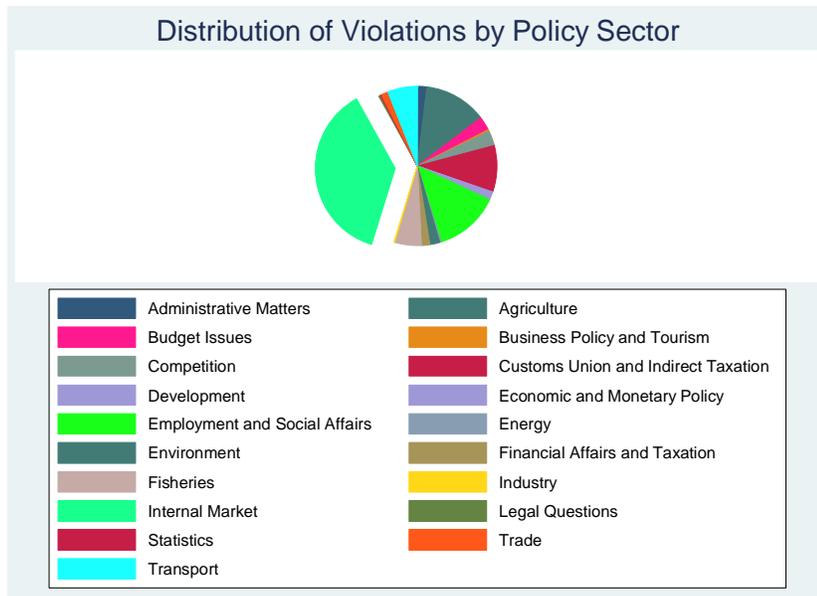


FIGURE 3.2 Distribution of Violations by Policy Sector

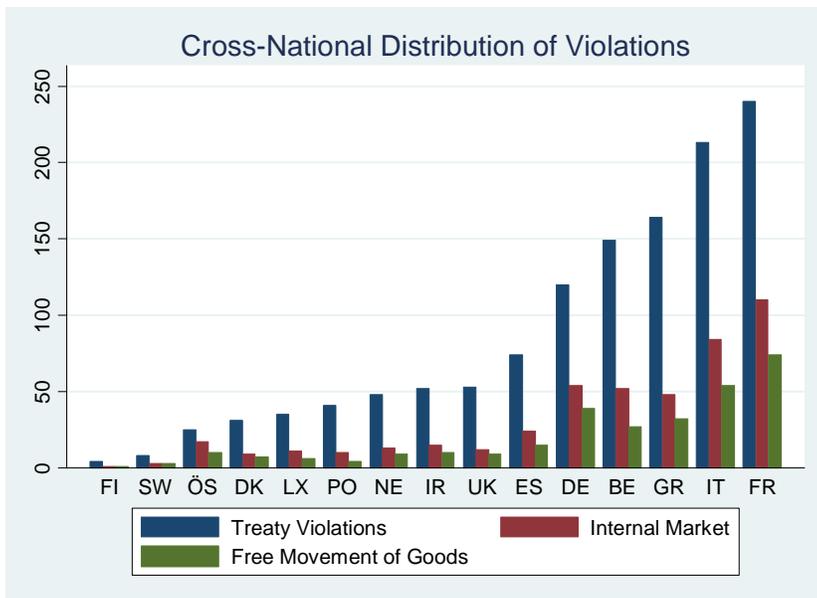


FIGURE 3.3 Cross-National Distribution of Violations

to both the Internal Market and the free movement of goods (see figure 3.3).⁵⁷ Thus, the single internal market, and the free movement of goods in particular, serve as a promising area of study if we wish to explain why states violate EU law.

ECJ jurisprudence in the area of the free movement of goods played the most significant role in defining the purpose of the common market and the proper role of national governmental power vis-à-vis the European economy. The most important elements of the Treaty that relate to the free movement of goods are Articles 28 and 29, which prohibit any restriction on imports and exports, respectively, on the free movement of goods within the Community, including “measures having equivalent effect.” Yet, Article 30 states that the member states could still justify any obstacle to the free movement of goods on the 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.”⁵⁸ In the absence of significant European legislation to define the relative weight or scope of these conditions, the Court’s task was to chart that legal territory itself. Given the extremely vague language in the EC Treaty—for example, “all measures having equivalent effect”—the ECJ was not just settling disputes between the Commission and a member state over the meaning of the text. Its decisions also determined the extent to which national regulatory traditions and practices would be required to change as a result (Maduro 1998). The difficulty in complying with EU law is that states with high levels of codification have already predetermined what those exceptions should be.

⁵⁷ The free movement of goods is only one component of the four “freedoms” that constitute the internal market, which also include the free movement of workers, capital, and services. In these cases, however, the use of directives rather than direct enforcement by the Commission and the ECJ has been the primary method to achieve market harmonization.

⁵⁸ Article 30, EC Treaty.

According to Miguel Poires Maduro's masterful exegesis of ECJ case law in this area, the Court did not seek a completely deregulated economic space when it placed national regulations under suspicion for possible discriminatory behavior. Rather, through a series of rulings, the Court eventually established a doctrine of "majoritarian activism" (Maduro 1998). Through successive decisions related to Articles 28 and 29, Maduro argues that the Court was fulfilling its role as the protector of the EC Treaty and preventing protectionism by attempting to harmonize regulatory standards based on the practices that existed among a majority of the member states.

The Court's first attempt to clarify the infamous language of "all measures having equivalent effect" in Articles 28 and 29 occurred in *Statistical Levy*.⁵⁹ In one of its first actions under Article 226 to enforce the EC Treaty against member states, the Commission opened proceedings against Italy for assessing a level of ten lire per every hundred kilograms of imported goods in order to finance the gathering of trade statistics. Despite the clearly de minimis nature of the Italian charge, the Court ruled that

any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic and foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect . . .

The Court would attack not only national measures that were clearly discriminatory, but all theoretically possible obstacles to the free movement of goods. The doctrine of attacking all possible measures was later confirmed by the Court's decision in *Dassonville*, which boldly stated, "All trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or

⁵⁹ *Commission v. Italy* [1969] ECR 193.

potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”⁶⁰ The Court not only conflated the difference between national measures that inhibit the access of products into national markets and the effect of national measures on the sale of these products once they arrived. It also assumed the powerful role of determining when those national laws placed an undue burden on foreign producers (Weiler 1999, 361-2). Thus, based on these early decisions, one would expect that the Court’s task was to slowly dismantle national rules that prohibited free trade within Europe and re-codify national law.

Two subsequent rulings, however, qualified the extent to which the Court would force member states to remove national regulatory measures in such areas as public health, consumer protection, or the environment. First, in *Cassis de Dijon*, the Court ruled that Germany’s desire to protect the public health of German consumers was legitimate, under Article 30 of the Treaty, but could be achieved through less intrusive means than banning all liquors below a certain minimum level of alcohol, such as through labeling.⁶¹ Thus, as the Court famously stated: “There is no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, [products] should not be introduced into any other Member State,” establishing the doctrine of mutual recognition.

The doctrine of mutual recognition is based on a proportionality test. The decision in *Cassis* did not necessarily imply that products manufactured according to “the lowest common denominator” would be permitted to enter national markets. Member states could retain their regulatory measures as long as the regulation did not “disproportionately” discriminate against other member states’ goods, or other member states’ goods would be allowed entry if the exporting state’s regulations met

⁶⁰ *Procureur v. Dassonville* [1974] 837.

⁶¹ *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, [1979] ECR 649.

the technical standards of the targeted state. The Court is not primarily concerned with removing national regulatory obstacles simply for the sake of completing the internal market. Rather, it takes into account standards employed by a majority of other member states and then determines whether the national standard under suspicion is stricter than those employed by other member states, accomplishing the same regulatory goal. As Maduro (1998) makes clear, the Court's primary interest is the development of a harmonized, not deregulated, European market:

The lack of harmonization of national rules places a burden on economic agents in the extra costs of having to comply with more than one set of rules. This impedes the achievement of some of the essential aims of an integrated market, such as economies of scale and lower prices. The problem is not the burden which the regulation imposed per se on economic agents, it is the burden which derives from the existence of more than one regulation (68).

Thus, even when an EU directive would limit the free movement of goods, the Court tolerated such measures.⁶² The Court's willingness to allow some national forms of protection was confirmed in the Sunday Trading Cases, whereby the Court found that a British law forbidding certain retail sales on Sundays was not discriminatory and could be justified as a legitimate state interest.⁶³ In its famous Keck decision, the Court even retreated slightly from its earlier decisions in Dassonville and Cassis: "Contrary to what has previously been decided," national regulatory measures that are applied irrespective of national origin to products from within the EC are lawful, "provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States."⁶⁴

⁶² Bodin v. Mingeut Case 241/86, [1987] ECR 2573.

⁶³ Torfaen Borough Council v. B & Q PLC Case C-145/88, [1989] ECR 3851.

⁶⁴ Keck and Mithouard Cases C-267 & 268/91, [1993] ECR I-6097.

Many reasons are cited for the Court's decision (Weatherhill 1996; White 1989; Wils 1993). The member states were justifiably concerned about the possible the implications of the Sunday Trading Laws case. The Court would have to weigh the desire for free trade against entrenched historical norms that define the national public interest. The Court was especially averse to interfering in this area. By 1992, the member states also demonstrated their commitment to economic integration through the Single European Act and associated EU directives. The development of a qualified majority voting in the Council of Ministers also reassured the Court that a single member state could no longer block efforts to harmonize the European market (Weiler 1999). Therefore, the Court felt relatively assured that it and its institutional partner, the Commission, could lift their feet off the legal accelerators given that the engine of integration was coasting along rather smoothly.

The Keck decision affected only "selling arrangements," however, or the modes and methods by which products are sold in the EU, and not the products themselves. Much of the Cassis decision still stood. Any national requirement that goods imported from another member state be manipulated in some way in order to be sold in a member state's market would come under the strict scrutiny of the Court and, as the guardian of EU law and the Treaties, of the Commission as well.

The Court's task then would be to apply a balancing test. Since Cassis and afterwards, the Court's task has been to determine if national governments have properly justified such regulatory controls as necessary or whether modes of regulation exist elsewhere that a majority of the member states use to accomplish the same goal without discriminating against imports. In effect, the Court is weighing one member state's historical, environmental or safety interests against the rest of the Community's interest in allowing their products to smoothly cross over national boundaries. Moreover, the fact that ECJ is seeking to harmonize rather than simply to

deregulate the European market does not mean that national rules and products standards would be allowed to stay in place. Instead, many of the rules and norms that states have employed to regulate their own markets would have to be justified and rewritten or removed in order for them to achieve compliance. As a result, the more a state's economy is regulated, or codified, the more likely it is not to comply with EU law, controlling for the ability of the Commission to detect or be notified of such discriminatory rules.

If the European Court of Justice is using this standard to assess the legality of national regulations, and its intention is to create a regulatory framework for all member states, then some countries' regulatory regimes may come under attack more often than those of others, depending upon on the degree to which some regulatory practices deviate from the "European" norm the ECJ is establishing over time through case law developments. The likelihood that a national regulation will be investigated by European authorities will depend on the degree to which national regulations place requirements on form, size, weight, composition, presentation, labeling, and packaging.⁶⁵ Even though these aspects of the products appear quite technical, product regulation is part of entrenched national regulatory styles that are justified for public health, safety, or environmental reasons, or even just on the basis of tradition. To the extent that a member state has failed to provide a convincing rationale for the existence of any such regulations, or the Court has perceived the regulation as unnecessarily discriminatory, the member state has been cited as violating the EC Treaty. Thus, when the Court issues rulings against a member state, it is also slowly chipping away at the rules and norms that are sustaining particular patterns of national regulation.

⁶⁵ See Keck, §15.

III. Control of the Executive in the Federal Republic and the United Kingdom

Compliance with international law is a two-level process. No matter which political parties have been in power in Germany, there has always been strong support of the EU there, whether for materialistic reasons or because the German government was fulfilling its basic foreign policy goals of wanting to be welcomed back into the community of nations. Because there are such high levels of political support for the EU both in the national government and within the population at large, it is difficult to explain why Germany violates the EC Treaty, and why it has greater difficulty in settling some infringements than others do.

In contrast, the parliamentary accountability hypothesis suggests that problems of settling an infringement are independent of the government's foreign policy preferences. If Jeremy Rabkin (2005) and others are correct, and parliaments want to exercise their scrutiny when changes in the domestic legislative status quo are necessary, then irrespective of the issue at play and what the violation concerns, parliamentary involvement in the compliance process will prevent easy settlement of an infringement of EU law. In short, once an infringement is detected and its cause determined, the ability to settle an infringement depends on the degree to which national governments can deliberate effectively with international institutions and participate in that process. When national executives have greater autonomy from national parliamentarians, it is expected that national governments will be more likely to settle their legal disputes with the European Commission and avoid rulings imposed by the European Court of Justice (ECJ). While the origins of these legal disputes over unfair competitive practices and discriminatory tariffs are dominated by the quality of market regulation, the degree to which national executives are held to account should determine whether or not a member state is brought before the Court.

In Germany, ex ante mechanisms of control over agents are comparatively strong. The political parties screen individuals by selecting candidates who occupy high positions on state lists. At the same time, possible candidates for office work up the party hierarchy and demonstrate their worth in order to be selected as members of parliament. In this process they face a higher degree of accountability to the party than to the average citizen. In addition, from the perspectives of the voter in Germany, the existence of multiple agents makes it more difficult to achieve accountability. With several levels of governance, whom the voters should be holding to account becomes rather unclear. Thus, given the high levels of control that political parties hold over the screening of candidates, accountability to the party's preferences rather than to the voters' is more important.

Levels of accountability change substantially, however, when we move to the next chain of delegation: from parliament to cabinet. Anthony King distinguishes between "intra-party," "inter-party," and "opposition" modes of executive-legislature relationships (King 1976). In terms of ex ante controls on the government, the opposition is, naturally, weakest. To the extent that opposition parties control the upper house, the Bundesrat, they can affect the policies and personnel of the cabinet. Nevertheless, quite naturally, the powers of screening and selection are very weak for parties in opposition in Germany. Yet the parties in opposition do possess some significant tools with the use of which they can monitor the executive, which will be discussed below.

High levels of executive accountability in Germany are primarily the result of the presence of numerous ex ante mechanisms to keep the executive in line. In terms of ex ante control, the most important device is the formation of the government's policy program, which is the product of a contract among the major parties in the coalition. The most important elements of a government's agenda are agreed upon in

this formal contract before taking office. While it is certainly technically possible for the government to either ignore or significantly amend its agenda afterwards, both tradition as well as a party's threat to exit the coalition and bring down the government act as sufficient deterrents. In addition, since cabinet members must also be members of the Bundestag, the extensive screening and selection mechanisms employed by political parties act as a further guarantee against adverse selection. Cabinet ministers usually have high levels of seniority in the party, at either the federal or land level, so members of parliament typically possess a great deal of information about these candidates.

The comparatively high levels of executive autonomy in Germany are also a consequence of some ex post forms of executive control or accountability mechanisms. The weakest means of maintaining accountability in the German parliament is the use of the vote of no-confidence in the government. The Chancellor alone can propose a vote of no confidence, not members of parliament. And, under Article 67 of the Grundgesetz, a "constructive vote of no-confidence" explicitly states that an absolute majority must not only vote against the incumbent Chancellor, but also offer an alternative candidate. The Chancellor cannot be brought down for the simple failure to implement promised legislation. As a result, there have been very few votes of no-confidence in post-war parliamentary history in Germany.⁶⁶

Given the high hurdles that must be overcome in order to hold the Chancellor and her government to account, members of parliament in Germany rely on another

⁶⁶ There have been only three votes of no-confidence in post-war German history. In 1972, Willy Brandt's attempt to reform the governing coalition in the face of a parliamentary majority in opposition to his government failed. Both subsequent votes of no-confidence that followed were also engineered by the government in order to re-construct the governing coalition. In 1982, Chancellor Kohl engineered a successful vote of no-confidence in order to bring about new elections and bring the FDP into a coalition with the CDU/CSU. Most remarkably, in 2005, Chancellor Schröder also engineered a vote of no confidence after losses in state elections to the CDU. Although the vote of no-confidence barely succeeded, subsequent federal elections brought down the Red-Green coalition, which was replaced by a Grand Coalition of the SPD and CDU with Angela Merkel as Chancellor.

set of monitoring mechanisms to prevent the agent, the national executive, from pursuing policies that conflict with the preferences of a parliamentary majority. First, all of the major parties operate with working groups and shadow ministers with high levels of expertise and specialization in their fields to monitor the activities of government ministers. Second, all political parties can utilize powerful legislative procedures to publicly hold the government to account. They include several opportunities to ask questions of the government through Große Anfrage, which generates parliamentary debate over a topic, and Kleine Anfrage, which members of parliament submit to the government in written form in order to obtain detailed answers to its questions. In addition, a significant amount of time is allotted to questions and debate in parliament throughout the workweek. Finally, the federal government repeatedly provides formal reports to members of parliament, both on an annual basis and in regards to members' urgent questions (Saalfeld 2004a).

In addition, according to the parliamentary accountability hypothesis, the settlement of a legal dispute between the Commission and a member state is hindered by the role of committees and the inability of the national executive to effectively implement changes in the legislative status quo. When national executives can conceal information about the nature of a legal dispute or its implications for either the national status quo or interest groups, it is more likely that a government will be able to settle these disputes. From the perspective of the individual parliamentarian, a national executive's decision to comply with supranational law constitutes a possible threat of moral hazard to the extent that it runs counter to the preferences or interests of the parliamentarian. The individual parliamentarian's interests are likely to be more short-term oriented, assuming that her prime motivation is re-election. Or, as Jeremy Rabkin (2005) suggests, individual parliamentarians may also be opposed to the imposition of international law simply because it lacks fundamental legitimacy. No

matter what the source of opposition may be, the extent to which legislators are actually informed about the nature of the legal dispute and its possible impact on the legislative status quo will determine the ability of a state to settle a legal violation.

Parliamentary committees can have *ex ante* and *ex post* accountability functions. When they are responsible for drafting legislation, they increase the likelihood that the final legislative product reflects the wishes of the majority of the electorate. When committees are composed of multiple parties that are part of a coalition, the likelihood that a piece of legislation reflects the coalition contract also increases. These are some of the *ex ante* ways in which the government is held to account. In terms of *ex post* mechanisms, committee members can also hold their own executives to account through hearings and investigations. The opposition can also play a role, if chooses to do so. The presence of opposition party members ensures that the legislation reflects their demands. However, their ability to ask questions, offer amendments and use other parliamentary devices also helps ensure that the majority does not stray far from what is deemed acceptable by a vast majority of the electorate.⁶⁷

Compared with other legislative bodies in other democratic regimes, the Bundestag enables individual parliamentarians to scrutinize and monitor the national executive quite extensively. First, there are over 21 standing committees that correspond to executive agencies and departments. They not only receive reports from the corresponding ministry, but also draft and give initial readings to legislation. Most members of parliament spend most of their working time with committee work, and they can call for public hearings at any time. The opposition also receives information through these committees. Under the Bundestag's rules of procedures, the committee's

⁶⁷ As the contemporary American political climate perhaps illustrates, the ability of committees and the legislature in general to monitor the executive may depend on the level of party discipline that exists among members. Here, however, this argument is limited in scope to parliamentary democracies.

members are allowed access to any information deemed important or vital. Given committee members' policy expertise, the government cannot easily ignore their contributions. In these committees, there is detailed discussion over the draft of legislation in which the opposition and government parties are allowed to participate equally. In addition to these standing committees, several other committees exist to monitor the general activities of the government, such as to curtail possible mismanagement or unlawful spending (Saalfeld 2004a, 363-64).

The Oversight of EU Affairs in Germany

The ability to oversee and supervise the national executive is not limited to domestic affairs. As a result of increased European integration and the increasing marginalization of the national parliaments caused by significant amounts of European legislation, both houses of parliament in Germany, especially the Bundesrat, developed committee structures and other oversight mechanisms that attempt to monitor the national government's EU policy formation. Before 1985, both houses of parliament lacked information and control over what was decided in Brussels. Through log-rolling, secret meetings, and informal networks between the Council of Ministers and the Commission, most legislation produced by the member states was passed without the informed consent of national parliaments.

Beginning in 1985, however, the Bundesrat and, to some extent, the Bundestag as well, obtained new powers to supervise the federal government's policymaking at the EU level. Upon ratification of the Single European Act (SEA) in 1986, the federal government was required to inform the federal states of all legislation that pertained to their regulatory activities and include their opinion in formulating the national position. Second, the SEA formed the nascent Committee of the Regions. It also permitted the Länder themselves to participate in decision-making within the Council

of Ministers in matters related to their constitutionally delegated duties. As a result, the Committee of the Regions became a key institutional player in policy-making at the EU level, in which subnational governments gained new sources of authority and power at the expense of their national counterparts (Hooghe 1996).

The debate over the proper role of the Länder and parliamentary sovereignty in EU policymaking grew more acute as a result of the German Federal Constitutional Court's decision in the Maastricht case. In short, the Bundesverfassungsgericht ruled that the Maastricht Treaty, as ratified by the Bundestag, did not violate the principle of democratic governance as laid out in the Grundgesetz, or Basic Law, of Germany. However, ratification of the Maastricht Treaty entailed that the institutional and political status of the Länder and the Bundestag must be explicitly stated. Therefore, a new constitutional amendment, Article 23, and two additional statutes were passed that codified the powers of both houses of parliament in regards to EU/EC legislation. Under Article 23, the Federal Government now has the obligation to inform both the Bundestag and Bundesrat of all legislative proposals in the EU legislative process. Before the Council of Ministers approves a legislative item, the Federal Government must consult with the Bundestag, obtain their opinion regarding possible legislation, and include it during negotiations with other member states in the Council of Ministers.

Alongside the new institutional powers the Bundesrat and Bundestag obtained subsequent to the Maastricht Treaty, the Bundestag employs its extensive mechanisms of committee oversight and control in regards to EU legislation. Once an EU proposal is delivered to the Bundestag, a leading committee (federführender Ausschuß) is assigned the responsibility of delivering an opinion on the legislation to the full plenary, whose recommendations are generally followed. In addition, an Inquiry Committee (Enquête-Kommission) was formed to apprise the Bundestag of

developments relating to fundamental European integration issues, problems of coordination between the European Communities and the legislative bodies, and cooperation between the Bundestag and European Parliament. The Kommission, was not, however, renewed for the parliamentary session between 1987 and 1990. Instead, a standing committee on European Union Affairs was established to deal with all institutional matters related to the European Union, such as ratifying new treaties and establishing institutional cooperation among the various institutions of the EU and the Bundestag. The Committee, acting as the sole representative of the Bundestag in regards to EU affairs that are under its jurisdiction, consists of members of the Bundestag and members of the European Parliament (without voting privileges). Despite the advantage of having a permanent committee charged with the responsibility of overseeing the executive government in matters related to the EU, coordination problems frequently arise between departmental committees and the EU Affairs committee, and full agreement over the nature of the division of labor between them is not completely settled (Saalfeld 1996).

Rivalries among committees over control of German EU policymaking are not limited to the EU Affairs committee. Since the earliest stages of European integration, the Foreign Office (Auswärtiges Amt) and the Ministry of Economics have fought over the general direction German policy should take. While the Foreign Office favored building institutions at the supranational level, the Economics Ministry favored taking a functional approach towards integration through an increasingly integrated European market. The Foreign Ministry perceived the EU as part of Germany's external relations, while the Economics Ministry saw EU law as merely an extension of domestic policy. Over time, the Economics Ministry, which has been renamed the Federal Ministry for Economics and Technology, developed a significantly large staff to coordinate all EU affairs related to Pillar 1 of the EU, while

the FO concentrated on matters of EU expansion and Pillars 2 and 3. Both ministries staff the Permanent Representative of Germany in Brussels.⁶⁸

Within these ministries, policy is developed by bureaucratic experts trained in EU law and with special expertise in particular policy areas. As Renate Mayntz and Fritz Scharpf note, decision-making generally follows a “dialogue model,” in which experts repeatedly consult with their superiors and inform them of important developments in EU policy while being granted increasing levels of autonomy to deal with technical issues (Mayntz and Scharpf 1975). Each federal ministry has its own section, or *abteilung*, that deals solely with EU affairs. Given that EU legislation rarely affects only one ministry, there is extensive inter-ministerial cooperation. When disputes do occur between them, they are more likely to be settled by political appointees located higher in the chain of authority. Given such high levels of specialization and functional differentiation, there was little need to establish a separate ministry for European Affairs, as was once called for by Bavaria in the early 1990s. While the Foreign Office may focus on formal diplomatic issues or larger questions of significance, EU legislation and policies have become fully enveloped into the policy apparatus of the German federal government.

Through these extensive ties of coordination, the German government limits the degree to which the national executive can pursue policies that violate the interests of individual members of parliament. First, the German legislative process enables the average parliamentarian not only to monitor but also to participate in the legislative process. As a result, consensus usually must be reached before legislative change takes place, although it is not required. While political partisanship has increased

⁶⁸ The Secretariat, which coordinated the activities of the federal government with the Permanent Representative, was temporarily located in the Finance Ministry as Oskar Lafontaine took office in 1998 in the first Red-Green government. Even though he resigned a few years later, the Secretariat remained in the Finance Ministry until the elections of 2006, when it was relocated in the newly-named Ministry of Economics and Technology.

significantly in Germany in past years, dialogue among the responsible parties continues to be the norm. The overlap between committees and ministries encourages the sharing of information, limiting the degree to which the national executive can pursue policies independently of parliament. Significant levels of information sharing suggest that the risk of moral hazard in the area of EU policies is quite low. The limited competence and extensive checks on the executive's authority in both domestic and EU affairs, which are more or less practically indistinguishable from each other by now, suggest that changing the legislative status quo is not easy.

Finally, the strong federal nature of the German state functions as an additional control on the national executive, in particular in the area of foreign affairs. Federalism does not imply that executive power is widely distributed or shared. When federal states are charged with implementing as well as with formulating legislation in some cases, they operate as additional agents with co-equal powers to check the activities of other agents. Delegation to multiple agents increases the number of ex ante controls principals have over their agents, consequently decreasing the likelihood that legal settlements will be reached with international organizations that violate the interests of these principals.

Because the German government contains these powerful ex ante and some ex post forms of monitoring the executive, it is expected that when the German government goes to Court, national parliamentarians will have been informed about the possible violation, will challenge the legal justification the Commission provides, and will delay the process of changing the national status quo until the ECJ issues a ruling. The inclusion of members of parliament is expected to slow the process of compliance, irrespective of party affiliation or preference towards European integration. The ability of committees and the Bundesrat together to monitor the executive and slow the legislative process should play an important role as to whether

a case is settled by the ECJ or not. In contrast, in those cases that are settled before they reach the Court, then, if the parliamentary accountability hypothesis is correct, either the national executive is able to bypass the parliament or there is no significant parliamentary opposition to transforming the status quo.

The Strength of the Executive in the United Kingdom

Those who defend the parliamentary accountability hypothesis argue that the institutional features of parliamentary democracy explain why some countries settle their violations more easily than others do. Those institutional features reflect the extent to which national executives are able to change the national status quo and implement legislation independently of parliamentary oversight. Despite the widely varying preferences of various political parties or interest groups regarding the substance of the legal infringement, it is expected that parliamentarians are less likely to be concerned with international legal obligations than with maintaining their ability to control the national legislative process. Parliamentarians are not only covetous of their legislative authority, but also skeptical about the results of weighing the long-term gains of cooperation versus the short-term losses that changing domestic law entails. In short, members of national parliaments are trying to limit the extent to which their appointed executives engage in practices that invite “moral hazard,” complying with international law independently of the preferences of elected officials.

In marked contrast to its German counterpart, the national executive in the United Kingdom enjoys a great deal of autonomy. However, although the United Kingdom possesses the best regulatory quality among 15 EU member states, violations of EU law still occur. There will inevitably be discrepancies between the general proscriptions under the EC Treaty and actual state policy. It is expected, however, that the process of settling an infringement of EU law rarely requires

consultation with Parliament. Because the prime minister enjoys considerable autonomy and can control the legislative agenda, most violations of the EC Treaty in the area of the free movement of goods are settled before they reach the ECJ.

The Westminster system does possess several *ex ante* mechanisms ensuring that qualified and loyal individuals are selected to run the government. With a first-past-the-post electoral system, the competition for votes centers on two parties that fall on opposite sides of the Left-Right spectrum with a persistently strong showing by a comparatively centrist third party, the Liberal Democrats. Since coalition governments are extremely rare, the voters themselves play a more important role in holding their elected officials to account than do the political parties.⁶⁹ Mechanisms to maintain party discipline are expected to be comparatively robust, given the strong incentives that exist to free ride on a party's victory and then vote against the government when bills come up for passage (Cox and McCubbins 1993). In addition, almost all officials nominated for positions in the Cabinet come directly from the Parliament. De Winter reports that the UK has the highest level of parliamentary seniority for cabinet members among 13 West European countries (De Winter 1991). Thus, there are a variety of government selection mechanisms that should prevent moral hazard. Nevertheless, the Westminster system's relatively weak *ex post* system is illustrated more accurately by the absence of strong committees and reporting obligations.

The *ex ante* mechanisms mentioned above relate only to selecting those individuals who enter the government. Additional mechanisms are employed to shape the legislative agenda such that the government adheres to the majority's policy

⁶⁹ Whether a majoritarian system produces a government that more accurately reflects the preferences of the voters depends on the total share of the electoral vote a single party obtains. Certainly a coalitional government that represents 75% of the voting population more accurately represents the voters' interests than a single party that received 51% or less of the vote in a majoritarian system. The claim here is only that it should be easier to connect policy practices and programs to a particular party if the government consists of only one party and is, thus, more easily held to account.

preferences. The central goal is to ameliorate problems of information asymmetry. Members of Parliament, as agents, are faced with the basic problem of delegating to officials the tasks of governing while avoiding losses of information. Debates in Parliament, in both the House of Commons and the House of Lords, serve as one of the most well-known examples of holding the government accountable. According to Keith Krehbiel, parliamentarians have the incentive to share information with voters when there is public competition between political forces in opposition (Krehbiel 1991). Although these debates rarely affect legislation, they do allow both backbenchers and the opposition to highlight policies or programs that are deemed ineffective or incredible. The government, however, usually comes to some agreement with the opposition to limit the duration of the debates as well as their scheduling. In addition, there is evidence that these debates have declined in importance and in their capacity to hold the prime minister to account in the House of Commons (Dunleavy et al. 1993). The answers that are obtained usually provide little hard information (Franklin and Norton 1993). Thus, the time-honored and much-admired “Question Time” in the House of Commons is used mainly to illustrate the members’ debating skills and less to extract important information.

Finally, while committees exist in both the House of Lords and the House of Commons, their legislative tasks are minimal. Bills are always drafted by the government through various departments. Instead, the primary purpose of these permanent committees is to function solely as an ex post mechanism of accountability by exercising their “police powers.” These committees can request documents and carry out investigations, but in contrast to committees in Germany, they exist only to monitor Whitehall, ensure that policies are being efficiently carried out, and make private information public (Saalfeld 2004b). In fact, since membership on these committees is determined by the proportion of seats each party has in Parliament, they

function as little more than small microcosms of debate and party competition (Norton 1998). Finally, given high levels of party discipline in the UK, holding the prime minister accountable through a vote of no-confidence is extremely difficult.

Recent developments in British politics illustrate how democratic accountability and transparency have increased in some ways and diminished in others. First, through major civil service reforms initiated by the Thatcher and Major governments, the civil service is primarily charged with fulfilling its duties to individual ministers in such areas as policy development and relations with Parliament. Actual policy implementation is left to an executive agency, headed by a chief executive who reports directly to the ministers of their sponsoring departments. They can also be directly questioned by members of Parliament.⁷⁰ Second, through case law innovations, such as *Factortame*,⁷¹ and the incorporation of the European Convention of Human Rights, British Courts find it increasingly acceptable to challenge Acts of Parliament. While they cannot exercise judicial review per se, they can declare certain laws “incompatible,” which has the equivalent effect (Blackburn and Kennon 2003). Devolution to regional assemblies in Scotland and Wales has improved accountability, but only for citizens of these regions.⁷² As of yet, these assemblies do not serve as a check on Parliament itself. One final element in maintaining executive accountability outside Parliament is the existence of “policy communities” (Rhodes 1997). Networks of professional organizations and interest groups are responsible for managing many of the services and institutions that were privatized during the Thatcher era. R.A.W. Rhodes argues that this practice has

⁷⁰ An alternative view suggests that the creation of executive agencies has diminished the level of political accountability, because ministers can shift the blame for policy implementation failure or snafus on these career civil servants. Separating policy responsibilities between those responsible for its formulation and its implementation only increases the degree of opaqueness in terms of who is ultimately accountable and responsible for what in government (Saalfeld 2004b).

⁷¹ Case 221/89, *Regina v. Secretary of State for Transport, ex parte Factortame*, [1991] ECR 3905.

⁷² England does not have an equivalent regional assembly.

increased the level of bargaining within specialized agencies and reduced the amount of hierarchical control (Rhodes 1997).

In summary, while several ex ante mechanisms exist in the UK to avoid adverse selection, there are comparatively few ex post devices to hold the national government to account. Combined with the ability of the government, and only the government, to control the plenary agenda, the result is that individual members of parliament have little influence over the work of the government. The most effective means of holding the government to account for any case of moral hazard is the holding of elections, which occurs only once every five years.

Parliament did not, however, readily cede its power to legislate and position as the people's sovereign. In fact, as the pace of European integration increased and the ability of Brussels to intervene in national affairs strengthened, Parliament was able to adapt to some extent and place additional ex ante forms of supervision on British policy vis-à-vis the EU. The British Parliament devised tools that monitor the national executive in the area of EU affairs that do not have their equivalent in terms of national legislation. Yet, even in the case of EU affairs, the absence of both ex ante and ex post mechanisms for monitoring the executive persists.

The Lack of Scrutiny over EU Affairs

Despite a British polity and political parties generally divided or ambivalent over the proper relationship to have with the European Union, or perhaps because of such "awkwardness," the civil service, in cooperation with the Cabinet, is chiefly responsible for both the formulation and implementation of EU policy. Hardly any ambivalence towards the EU's authority in enforcing EU law is intimated by Whitehall's cooperative relationship with Brussels. Successful coordination with officials from the EU emerges for two basic reasons. First, Parliament lacks any

rigorous mechanism either to monitor the executive in relation to EU affairs or to hold it to account. Second, the Cabinet and the civil service enjoy a significant degree of independence from Parliament in relation to EU affairs. Without significant interference from elected officials, most disputes over EU law are settled quickly. Thus, even though the number of violations the UK commits is quite low, the number of times the ECJ must settle a dispute is also low due to the cooperative nature of relations between the Commission and the British bureaucracy, contrary to some people's expectations (and, perhaps, interests).

Approval of membership in the European Community was highly contentious and by no means guaranteed. One reason the bill authorizing the UK's entry into the EC, the European Communities Act, gained the approval of Parliament was the establishment of "select" or permanent committees in both chambers to scrutinize EU legislation.⁷³ Through the Select Committee on European Legislation in the House of Commons, members of Parliament have the right to request any document related to EU matters that Brussels produces. Meeting once a week, it is required to give its opinion regarding the legal and political importance of each document. Since it receives over 1000 documents a year and the Committee has only 16 members, the committee is extremely overworked.⁷⁴ In addition, members of other committees may request documents from other departments that relate to the EU. Only the most controversial or important items are selected for further debate on the floor of the house. The government then makes a motion to approve or table the document.

Theoretically, the UK representative in the Council of Ministers can proceed with voting on European issues only once a document has completed the scrutiny

⁷³ A parallel Select Committee exists in the House of Lords. However, since the House of Lords has even fewer responsibilities regarding EU law, it is not worth discussing here.

⁷⁴ In order to reduce its workload, the Committee was split into two, with Committee A responsible for core issues that affect the United Kingdom, including agriculture, transport, environment, and the Forestry Commission, while Committee B is responsible for all other documents.

process. In some cases, the UK minister may proceed even though formal approval has not been given, such as when the material is confidential, routine or trivial (Norton 1996b). One should not, however, overestimate the importance of these Select Committees. Because the government controls their agenda and membership, few changes or amendments are added on to these documents. In addition, by the time the Select Committee addresses a document, action on it has already been taken either by the European Parliament or at the Council of Ministers. Although the government has committed itself to consulting with Parliament before taking a final position on legislation before the Council of Ministers, the complexity of the EU legislative process precludes regular consultation with Parliament (Kassim 2000). Finally, as K. Armstrong and S. Bulmer argue, Parliament is a “talking” rather than a “working” Parliament, in which most of the legislative process is carried out by the government or executive, while individual members of Parliament are of relatively little importance (Armstrong and Bulmer 1996).

Most EU policy formulation and implementation is left to bureaucrats in Whitehall and the executive’s Cabinet. With a dominant and centralized executive, few problems arise between Whitehall and Brussels when constructing and carrying out EU policy. Mirroring the level of coordination that exists in Germany, individual ministries as well as the European Secretariat have ensured excellent communication across multiple levels of governance. The ministries with the most experience with EU matters, namely the Ministry of Agriculture, Fisheries, and Food (MAFF), the Department of Trade and Industry (DTI), the Home Office, and HM Treasury, all have learned to coordinate their actions with the Commission. For example, in DTI, five entire units are responsible for the single market, state aid, industrial policy, energy, and enlargement under the Trade Policy Division. Officials in these units work easily and often with their colleagues in Brussels, and their superiors in the European

Directorate of DTI interrupt only when difficulties arise. The match between DTI's policy agenda and that of the EU's, internationalizing and codifying free trade, acts as an additional factor that maintains a smooth relationship between the two levels of governance (Buller and Smith 1998).

Overall EU policy is managed by the European Secretariat in the Cabinet Office and "provides the permanent core of executive coordinating activity (Wright 1996)." In contrast to the way in which it works in Germany and other countries, EU coordination is the chief purview of an entirely independent cabinet office in order to prevent rivalries and conflicts over the direction of EU policy. Consisting of officials from other departments, the European Secretariat monitors EU activities taken by other ministries and reports directly to the Prime Minister. The European Secretariat ensures that all departments are carrying out their work in line with overall British policy. The importance of the European Secretariat is illustrated by its independence from the Foreign and Commonwealth Office, which would typically be responsible for external affairs. Finally, the strong attention and concern the UK gives to EU policy is demonstrated by the fact that the UK Permanent Representative is staffed by officials with extensive technical expertise and experience with EU issues, able to handle much of the minutiae related to EU policymaking (Kassim 2000).

The process of handling an infringement of EU law illustrates both the effective coordination among various ministries and the exclusion of democratically elected officials. When a possible infringement is detected by the Commission, informal discussions are held with the responsible ministry. As shown in table 3.1, the UK's infringements center on policy areas that directly affect some of the UK's key policy interests, such as the Common Agricultural Policy (11), Fisheries (9), and the Internal Market (11). In addition to these areas, one UK official acknowledged that some policy areas, such as environmental affairs, generate more violations than others

do because of highly organized lobbying groups that are seeking changes to national law through EU legislation.⁷⁵ Yet, many of these infringements have reflected problems of adjustment to EU demands, rather than political motivation on the part of interest groups.⁷⁶ If informal discussions fail to bring about a solution and the Commission wishes to proceed with the matter, the UK Permanent Representative receives the Reasoned Opinion and passes it on the European Secretariat, who then assigns the infringements to the responsible ministry (Ibañez 1999).

According to UK officials, most violations of EU law affect secondary or statutory legislation, or the heart of the regulatory state, rather than Acts of Parliament. As such, changes in the legislative status quo are relatively trouble-free. Most such changes can be made through the use of Statutory Instruments, which a Minister from a specific department can issue, and become law unless the House of Commons objects.⁷⁷ In other cases, through consultations between lawyers within a specific department and the Treasury Solicitor's Office (TSO), which is responsible for defending the UK in all legal matters, the European Secretariat can decide to defend a law before the European Court of Justice. Once a suspected violation is challenged by the UK, the Treasury Solicitor's Office becomes responsible for the case. Since its reputation as a legal authority cannot become tarnished, the TSO is careful in choosing cases to defend. If the TSO suspects the challenge of an infringement is motivated for political reasons, it will refuse to participate and the Attorney General will halt

⁷⁵ Telephone Interview with UK Official 4 in the European Secretariat, April 4, 2006.

⁷⁶ Interviews with UK officials 1-3, London, UK, in November 2004.

⁷⁷ This is known as the negative procedure. A small percentage of statutory instruments, approximately 10% of all infringements, are issued through the affirmative procedure, which requires the approval of both Houses before coming into effect.

TABLE 3.1 Policy Distribution of Infringements

	ÖS	DE	D K	SW	FI	NE	BE	LX	FR	IT	GR	PO	ES	IR	UK	Total
Administrative Matters	0	3	0	0	0	1	11	1	2	0	1	1	3	0	0	23
Budget Issues	0	6	2	0	0	2	5	0	3	7	2	1	3	1	2	34
Econ. & Mon. Affairs	2	0	0	0	0	0	4	0	3	1	3	1	2	0	1	17
Internal Market	17	56	9	3	1	13	49	11	105	82	46	10	24	13	11	450
Customs Union & Ind. Taxes	1	8	5	2	0	5	11	3	16	15	18	8	8	8	6	114
Competition	0	1	2	0	0	1	4	0	6	10	3	5	1	2	2	37
Fin. Issues and Taxes	0	0	1	0	0	0	4	0	4	7	1	0	0	4	0	21
Em.t & Social Affairs	4	18	2	0	1	6	40	11	27	18	17	1	10	3	3	161
Agriculture	0	17	1	0	0	5	1	3	23	41	39	2	6	5	11	154
Transport	0	6	1	0	0	3	7	3	9	16	10	8	6	2	2	73
Energy	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	3
Trade Policy	0	1	0	0	0	1	0	0	4	0	8	1	0	1	1	17
Development	0	0	0	0	0	0	0	0	0	1	1	0	1	0	0	3
Fisheries	0	0	5	2	1	7	5	5	15	3	3	2	7	6	9	65
Environment	0	2	1	0	0	1	3	3	6	1	2	1	1	3	3	25
Legal Questions	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	3
Business Policy & Tourism	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
Industrial Policy	1	0	0	1	0	0	0	0	0	1	2	0	0	0	0	4
Justice	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	2
Statistics	0	0	0	0	0	0	0	0	0	0	2	0	1	0	0	3
Total	24	119	29	8	4	46	144	34	226	203	159	41	74	48	51	1,210

all pending cases. In addition, the UK's Legal Service excludes particular types of arguments from the UK's defense, such as refusing to change the status quo because it reflects traditional practices. The goal of the Legal Service is to provide the most legally persuasive argument to obtain a favorable ruling from the European Court of Justice. While tensions can develop between politicians, policymakers, and the lawyers responsible for the infringement, they are always handled in a professional manner and the Attorney General of the UK has ultimate authority over the practice of settling a suspected violation of EU law.

As a result, the United Kingdom has developed a productive and cooperative relationship with EU institutions. The need and desire to cooperate with Europe is especially strong within the Whitehall bureaucracy. In addition, the weakness of ex post mechanisms of parliamentary accountability, both in general and in relation to EU affairs, only smoothes the process of compliance. Yet, the British government still violates the EC Treaty in the area of the free movement of goods, and some such violations are settled after a ruling by the European Court of Justice. The origin of these infringements could result from the extent to which British laws and regulations "fit" with EU demands.

IV. National Interests and the Single Market

Germany's Role and Interests in European Integration

A strong alternative hypothesis for contrasting rates of compliance points to the pure economic or ideational interests each country has in complying with EU law. Given the powers the Commission and ECJ have accumulated in the past thirty years, do the policies and regulations reflect the interests of one of its most powerful and supportive constituents? The thesis that the EU is nothing more than the agglomeration of the most powerful states' interests, with smaller states joining to

avoid being excluded from the gains of cooperation, is one key alternative explanation for the existence of non-compliance in the EU (Gruber 2000).

To some extent, Germany's interests in European integration depend on which theoretical approach is employed to explain integration itself. Whether employing a rational institutionalist or social constructivist approach to explain German foreign policy vis-à-vis the EU, however, we need not view these schools of thought as competitors. In some circumstances, they are actually complementary. Instead, what is important is their ability to predict or adequately explain the observed record of non-compliance.

First, based on liberal intergovernmentalism, Germany's record of non-compliance with the EC Treaty would depend on the degree to which its interests are satisfied by policies the EU pursues.⁷⁸ Based on a variation on simple international trade theory, Germany's preference for industrial liberalization depends on whether gains in the export sector of the economy are greater and more concentrated than losses suffered by import-competing industries. This argument has several implications. First, since Germany's export sector is quite large relative to the rest of the economy and compared with those in other EU member states, Germany should commit fewer violations of EU law to the extent that EU agreements lead to the opening of previously closed markets. Indeed, Germany's trade with the EU constitutes a significant share of its total trade and is of great economic importance. Second, sectors that are most highly protected by German national legislation are most likely to become the target of Commission investigations. Third, we should expect the number of violations to decrease over time as the German economy adjusts to a more

⁷⁸ The traditional policy areas of the EU center on agricultural and industrial trade liberalization, exchange-rate stabilization, and the removal of national regulatory barriers. Since this project concentrates on compliance with the free movement of goods, Germany's relative interest in the completion of the common market in terms of manufactured items will be considered.

open European market. In terms of regulatory competition, Andrew Moravcsik makes the simplifying assumption that non-producer groups mobilize in wealthy states to protect the environment, the consumer, or a worker's health and safety (Moravcsik 1998). Wealthier states, as measured by GDP per capita, fear regulatory competition from states with lower standards, as it were a "race to the bottom," and are therefore less likely to comply with the EU's regulations.⁷⁹

Depending on the hypothesis employed, the predicted relationship between Germany and the number of infringements it commits points in the opposite direction. As a relatively wealthy state, it should rank comparatively high in the number of infringements it commits. As figure 3.4 shows, however, there is no relationship between wealth and the number of infringements committed within the area of a single market across the member states' countries. Although Germany ranks as one of the wealthiest countries in the EU, the total number of infringements it commits places it somewhere in the middle of the distribution (see figure 3.5). Second, there does not appear to be an observable relationship between the number of infringements a member state commits and its level of trade with the EU when measured in terms of EU exports as a percentage of total exports. However, with the exception of Belgium, those countries in which EU trade is of comparatively little importance to the national economy as a whole tend to commit the highest number of violations (see figure 3.6).

⁷⁹ Moravcsik ignores the possibility that national standards can be re-regulated at the EU level. While difficult and current institutional arrangements favor "negative" over "positive" integration, (Scharpf 1996), integration in the area of social policy and the environment demonstrate that effective coalitions can form to translate national regulatory standards to the EU level.

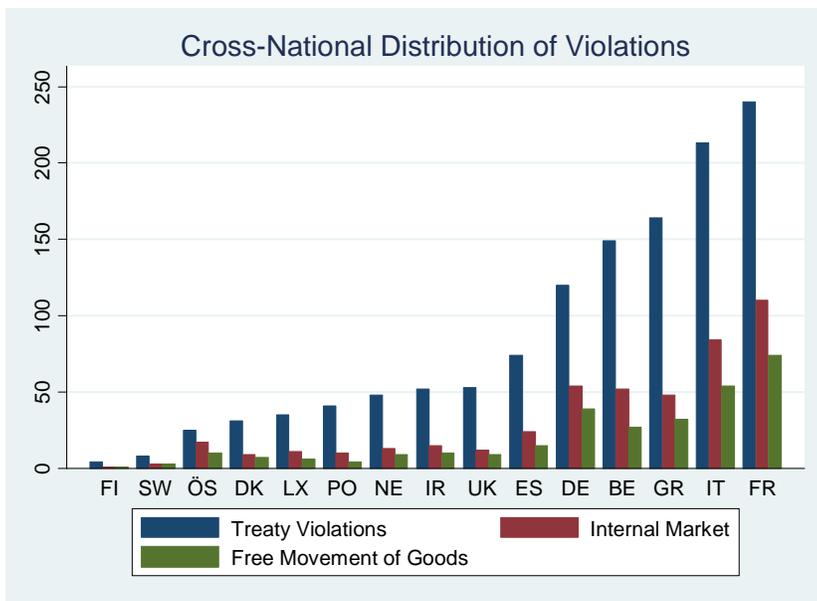


FIGURE 3.4 Wealth and Violations

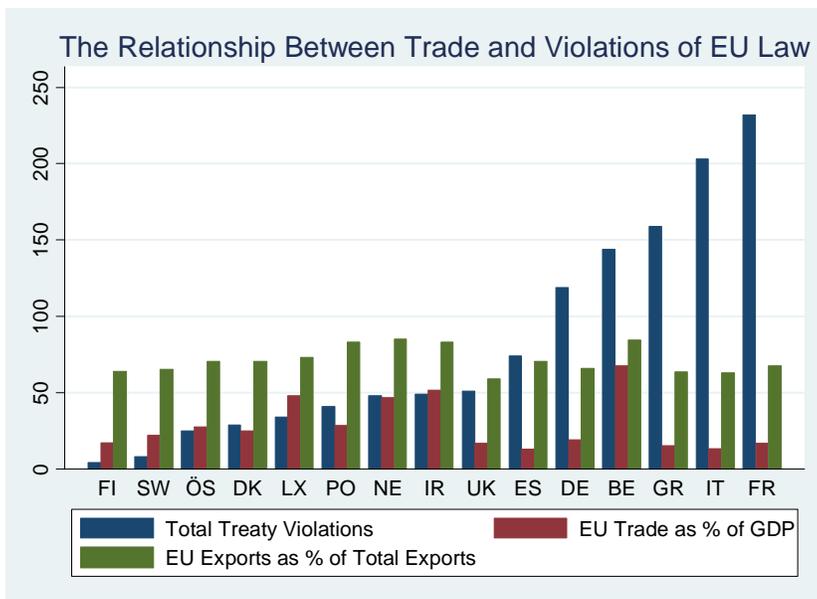


FIGURE 3.5 Cross-National Distribution of Violations



FIGURE 3.6 The Relationship between Trade and Violations of EU Law

Germany's interests in European integration cannot be defined primarily by reference to the anticipated benefits of cooperation to particular sectors of the German economy or to the realization of geopolitical goals. Instead, German foreign policy vis-à-vis the European Community and its member states is also the result of powerful forces of institutional socialization. While Germany sought and obtained significant geopolitical and economic benefits early in the history of European integration, Germany's foreign policy in relation to the EU reflects more the transformation of its own political values or state identity as a result of belonging to these institutions (Katzenstein 1997). The interests of Germany and of Europe have become fused together to such a degree that one cannot easily distinguish one from the other (Katzenstein 1997). As a result, the ability of the EU to carry out its mission fully and integrate Europe does not merely provide economic gains to particular sectors of the German economy. Indeed, its failure would result in the complete failure of Germany

to integrate itself within Europe and participate effectively in the international system. Any complete refusal to comply with the EC Treaty, according to this perspective, would fundamentally contradict the ideational structure of German identity itself.⁸⁰

Although Germany's state identity has been thoroughly Europeanized, this does not mean that it does not exercise power or wield influence in the European Union. In fact, by embedding German power within the EU's institutions, the German government is able to achieve some policy goals that other states, such as the United Kingdom, cannot. In terms of constitutional politics, Germany's emphasis on multilateralism and the development of consensual solutions, such as the application of cooperative federalism, fits congruently into the pattern of politics within Germany. As a result, Simon Bulmer argues, Germany is able to exercise "soft" rather than "hard" power through these institutions (Bulmer 1997). In terms of regulative politics, or the everyday affairs and policies of the EU, Germany has broadly succeeded in preserving its social market economy and even extending it to other member states (Anderson 1997).⁸¹ The successful combination of export-led growth policies and strong social protections for workers is illustrated by the Single Market Program and by EU social policy, respectively.⁸²

Given that Germany's success in establishing an institutional order and set of policies that matches its interests has played a fundamental role in constructing its own state identity, little room exists within these theories to explain why Germany violates

⁸⁰ The "state identity" thesis would produce a strong and weak version. The weak version would suggest that outright refusal to obey an ECJ ruling and maintaining the status quo in open conflict with the EU would be unimaginable in terms of Germany's state identity; Germany will therefore always comply with EU law. This argument is independent of the legal nature of the EU and its transformation as a region. The stronger version of the identity thesis would stipulate that the German government would do all it could to avoid infringing the EC Treaty and prevent disputes from escalating to the ECJ because it would violate fundamental elements of its state identity.

⁸¹ While there have certainly been some notable shifts in the use of hard power by Germany in some policy areas, especially since re-unification, there is a general continuity in Germany's use of European institutions in order to exercise its influence (Anderson 1997)

⁸² One such example is the passage of the EC Works Council Directive, 94/45/EC of 22 September 1994.

the EC Treaty. The only remaining argument concerns whether the import-competing sectors of the German economy are resisting integration. If true, this type of analysis can be done only by examining individual infringements, as in chapter 5 below. Nor do these approaches offer an explanation for the cross-national distribution of infringements observed across the EU in general (see figure 3.7). Finally, even if Germany ultimately follows the edicts of the ECJ, identity-based explanations cannot account for the origin of such treaty infringements when they do occur or explain why some of these infringements are not settled before they reach the Court.

For example, assuming that the amount of support for the EU among the national population serves as a rough indicator of the extent to which Germans perceive the fate of the EU as intimately intertwined with that of their country, there is no relationship between this feeling of belonging and the number of violations committed. Even though support for the EU is generally high throughout the time period considered, at least within the national population, Germany has violated EU law more often than some states with less support for the EU within the national population. Moreover, while support for the EU changes over time in Germany, approval of the EU is positively correlated with the number of violations Germany commits each year (figure 3.8). In fact, as will be shown in chapter 4, the countries with the highest level of approval for the EU have violated EU law most often. Thus, while both rational institutionalist and social constructivist accounts of Germany's preferences for and interests in European integration are persuasive, they offer little help in explaining why Germany would violate the EC Treaty, why it would do so more or less than other states, or why some violations are settled by the ECJ and others not. In order to explain this, one must unpack the institutional nature of the German state itself and understand how domestic politics affects the process of compliance.

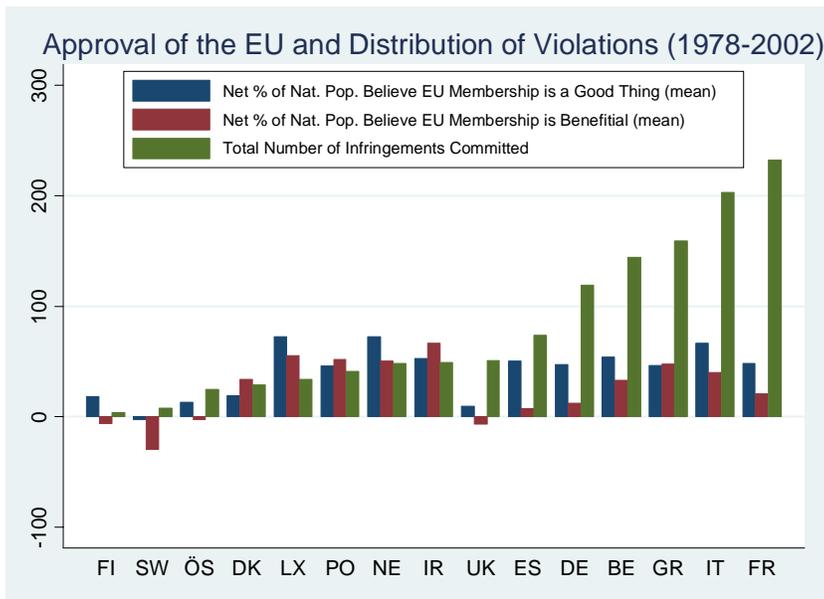


FIGURE 3.7 Approval of the EU and Distribution of Violations (1978-2002)

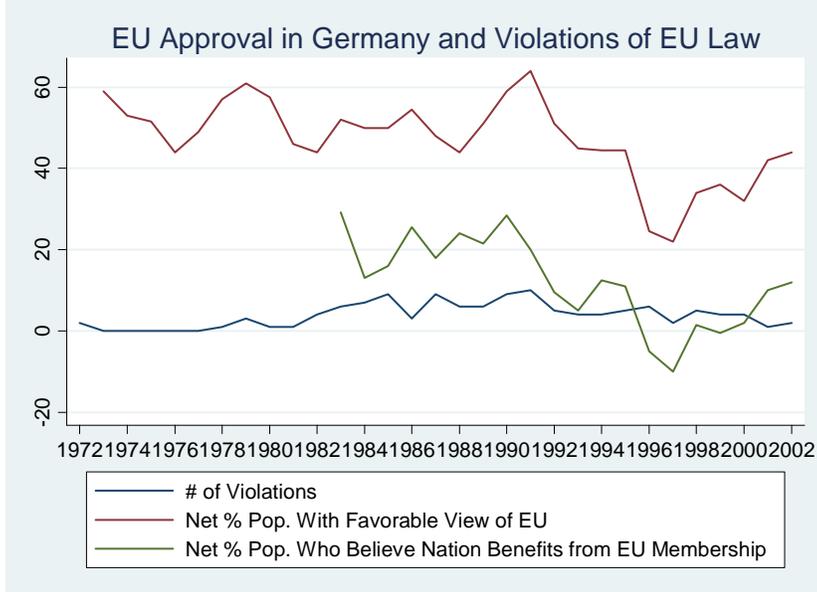


FIGURE 3.8 EU Approval in Germany and Violations of EU Law

The Uneasy Relationship between the UK and the EU

Since 1973, the United Kingdom has had an awkward relationship with the European Union (George 1998). While successive British governments have more or less supported the establishment of a free market and the removal of trade barriers, they have also generally opposed handing over to the European Union the state power needed to create and monitor this market. The general support of a free market within the EU and the government's opposition, at least within the elected Parliament, to EU supranational power and authority, established a lasting paradox. Some argue, moreover, that European and international law has not been as easily integrated into the British legal and political order as in Germany and other member states. Rather, Parliament, as a democratic institution, has historically held the position of being the final source of all political authority and, thus, sovereignty. However, as demonstrated below, these tensions are rarely borne out during the compliance process. Instead, the

UK has rarely violated the EC Treaty because its regulatory practices rarely exceed the standard of proportionality. Whenever the UK violated EU law and the cases were referred to the ECJ, these disputes were over fundamental legal conflicts and the failure to integrate EU law fully into the British legal order.

British ambivalence about European unity began early in the history of the EU and continues to the present day. Skepticism about the EU took hold in both political parties, but especially early within the Labour Party. The UK refused to join the European Coal and Steel Community in 1956, which was perceived by Clement Atlee as challenging the development of British social democracy (Young 1998). While the original EC-six sought to establish a single market for the manufacture of steel and coal, the Labour government in the UK was occupied with nationalizing such industries at home. Later, as the customs union came into shape and generated economic gains for its members, subsequent Conservative governments perceived exclusion from the common market as no longer tolerable, as Britain's trade with former imperial colonies quickly became less important than its trade with the Continent (Moravcsik 1998). Pro-European elements of Prime Minister Macmillan's government submitted the UK's first application for membership in 1961, but it was soundly rejected by de Gaulle, who was suspicious of the UK's support for supranationalism and its ties to the United States. As a result, Britain waited an additional twelve years, until de Gaulle had departed from the political scene, to join the common market.

Support for the EU remained relatively tepid among both British elites and the population throughout the 1970s. Despite increasing trade ties with the Continent, "Euro-sclerosis" infected all member states, especially Britain. Two oil crises and the subsequent recessions of the 1970s slowed the process of European integration, and national governments, including in Britain, began to violate the EU's rules on state aid

by subsidizing failing industries. While the seeds of monetary cooperation were growing in the late 1970s, the single market languished and the prospect of a single European market that allowed the free movement of goods and services appeared bleak. Ironically, along with other factors, it was the arrival of a virulent anti-federalist but pro-market prime minister in the United Kingdom that restarted the engine of European integration.

Prime Minister Margaret Thatcher's tenure at 10 Downing Street challenged some of the basic policy foundations of the EU, but she also introduced and helped contribute to the development of a more integrated Europe through her support of the Single European Act. While Thatcher's policy approach is often blamed as an obstacle to European integration, her government played a key role in the drafting of the Single European Act and its subsequent implementation. Many of the economic reforms the member states were required to carry out had already been implemented in the UK, such as the deregulation of financial and other business services across the EC, privatization of major national industries, the elimination of obstacles to transnational mergers and acquisitions, and the simplification of customs rules (Moravcsik 1998). Thatcher received strong support from across the business sector and within her own Cabinet; the British position on European integration had never been so unified. The price for the Single European Act, for Thatcher, was qualified majority voting in the EC Council when approving European legislation, which only sowed the seeds for increased supranationalization.

Despite Thatcher's success at restarting the engine of European integration, she helped instill a rather virulent form of Euroskepticism within the UK at the same time, particularly within the Conservative Party. It is true that the root of Britain's skepticism towards the European project among the British population dates to before Thatcher's arrival (Forster 2002). Nevertheless, Thatcher's outright hostility to

European federalism and EU institutions remains a hallmark of her years in office. Demanding “her money back,” Thatcher challenged one of the main policy goals of the EU, the Common Agriculture Policy (CAP), by obtaining a rebate for almost two-thirds of the net British contribution to the CAP in 1980. Her persistent use of hostile language when referring to EU institutions and deep skepticism towards other European leaders, who may have been seeking a “protectionist, interventionist and federalist” Europe, helped entrench a strong contempt for European institutions, at least within the Conservative party and in the population as a whole. Only when her intransigence towards future integration jeopardized Britain’s ability to participate in the European Union and the gains of further cooperation was she removed from office by her cabinet. Yet, the divisions she established within her own party, as well as in all of Britain, over the proper relationship between the United Kingdom and the EU continues to this day.

Skepticism towards the EU among the UK population as well as British political elites is belied by Britain’s overall level of compliance with supranational law. Euroskepticism has several faces in the UK and across the European Union.⁸³ One aspect most often cited is Britain’s own national identity as being separate from Europe, as having developed a unique character (Haseler 1996).⁸⁴ Others locate the origins of Britain’s Euroskepticism in its unique position in postwar Europe, having won World War II with its economy relatively intact but having lost its empire (Young 1998). There is little doubt that these elements play an important part in defining British national identity vis-à-vis Europe. However, the most common connotation of

⁸³ For an excellent survey of Euroskepticism inside and outside the EU, see (Harmsen and Spiering 2004)

⁸⁴ For example, Menno Spiering argues elsewhere that the distinction between British national identity and European identity is illustrated by the fact that the term “Europe” or “European” is usually meant as something alien or separate from British culture, instead of something encompassing or producing a sense of belonging (Spiering 1997)

the term ‘Euroskeptic’ expresses opposition to political authority being exercised by EU institutions and suspicion towards a federal European arrangement.⁸⁵

One of the central components of Euroskepticism and opposition to EU power and authority is the doctrine of parliamentary sovereignty. In marked contrast to the case in Germany, the legitimate power to govern is in Britain neither divided among different institutions that balance and check each other nor shared across several different levels, such as according to geographic regions.⁸⁶ Instead, Parliament is traditionally considered to be the sole source of legitimate legal and political authority. Without a written constitution, sub-national governments or a separate executive branch, all democratic legitimacy lies among the directly elected members of Parliament. Because all political control and authority lie within one single body, Parliament is said to hold a monopoly on all elements of state sovereignty, which cannot be “shared” or “pooled” with other institutions, in particular with those in Brussels.

While it premises a strong normative argument, the principle of Parliamentary sovereignty has occupied a minor position in debates within Britain over the European Union. First, the argument for Parliamentary sovereignty was and continues to be articulated mainly by a small faction in the Conservative Party and the Labour Party’s extreme Left. The fear that European integration would eventually subsume British democracy was first articulated in the 1960s, when debate over joining the EC began. The so-called “anti-Marketeters,” such as Sir Derek Walker-Smith and Neil Marten,

⁸⁵ The term ‘Euroskeptic’ first begins to appear in the *The Times* of London in reference to those who had rejected the referendum to join the EC in 1975 (Spiering 2004) Its meaning can range, in Britain, from anyone who questions further European integration, such as approval of the Euro, to those who have advocated Britain’s complete withdrawal.

⁸⁶ Devolution of powers to Scottish and Welsh Parliaments does not significantly affect the contention that the British Parliament is the ultimate sovereign. While each regional parliament enjoys some additional powers in some domestic policy areas, UK legislation takes precedence when such laws conflict, and all foreign policymaking and the power of taxation remain with the British Parliament.

argued that issues of sovereignty should not take second place to economic concerns, the rationale driving Britain's entry in the EC at the time (Forster 2002).⁸⁷ In 1975, the leaders of the National Referendum Campaign, organized to oppose British entry, similarly argued that joining the EC threatened British democracy, a sentiment that was once again shared among members of both the extreme Right and radical Left in the Conservative and Labour Parties, respectively.⁸⁸ As the Labour Party began to move to the center and the radical Left was gradually pushed aside in the early 1980s, the Conservative Party remained the sole bastion of defenders of this philosophy. Known as the "drys," they strongly opposed ratification of the Single European Act and the use of qualified majority voting, fearing an increasingly federal Europe. As noted, Thatcher's own increasingly virulent Euroskepticism ultimately led to her removal from office by the moderate majority in her cabinet who were seeking a more pragmatic relationship with Europe. The subsequent decade saw growing internal strife within the Conservative Party over Europe, while Labour emerged in the early 1990s as a generally pro-Europe party.

Believers in the principle of Parliamentary sovereignty also suffered a series of legal defeats throughout the 1980s that further marginalized them. Integrating EU law and the doctrines of legal supremacy into British law required several additional formal steps not required in other member states, because the UK possesses a dualist notion of international law. Under this doctrine, international law is a distinct set of rules and regulations that is separate from the domestic legal order. Under a dualist legal tradition, the constituency or subjects of international law are solely states. If

⁸⁷ These sentiments were shared by the leader of the Labour Party, Hugh Gaitskell, as well. He once remarked, "We must be clear about this: It does mean if this [European federation] is the idea, the end of Britain as an independent European state. I make no apology for repeating it. It means the end of a thousand years of history" (Gaitskell 1996).

⁸⁸ They included Enoch Powell and Neil Marten of the Conservative Party and Michael Foot and Peter Shore of the Labour Party.

these states' obligations come into conflict with domestic rules or laws, which should happen rarely, these conflicts can be resolved only through legislation approved by elected members of parliament.

In spite of formidable partisan and legal obstacles, the doctrine of EU legal supremacy gradually took hold in Britain. First, the European Communities Act of 1972 stipulates that EC law has direct effect in the national legal order and designates the European Court of Justice as the final arbiter in disputes between national and EU law. While further steps towards integration are conditional on Parliament's support, such as the adoption of the euro in currency policy, the EC Act established a monist legal order for the United Kingdom, at least in terms of EU law. Moreover, through the two *Factortame* cases, British courts acquired the capacity to overrule Acts of Parliament that they perceive to be conflicting with the rights or obligations of the British government and citizens under EC law.⁸⁹ The British court system, not Parliament, was now the proper arena in which to settle disputes between EU and national law.

Aside from overcoming legal obstacles to EU legal supremacy, virulent Euroskepticism was never widely shared among the main political parties nor within the population at large. During Prime Minister John Major's government, an uneasy stalemate existed between Euroskeptics and pro-Europeans during the ratification of Maastricht. However, party discipline over European issues collapsed soon afterwards. The decision over whether to join the euro-zone further strained the relationship between the Major government and the rest of the party. In a 1997 survey, Philip Norton found that only 25% of Conservative party members supported EU membership without question, while 54% described themselves as being in some

⁸⁹ These cases include *The Queen v. Secretary of State for Transport, ex parte Factortame* (*Factortame I*) Case C-213/89, [1990] ECR-I-2433 and *Regina v. Secretary of State for Transport, ex parte (Factortame II)*, House of Lords [1991] 1 All ER 70, [1990] 3 CMLR 375.

degree Eurosceptical (Norton 1996a). Meanwhile, with the arrival of New Labour in 1997, the government had been replaced by one of the most pro-European British governments in thirty years, seeking to put Britain once again “in the heart of Europe” (Forster 2002).⁹⁰ While referenda over acceptance of the euro have been repeatedly postponed by the Labour government, there are signs that both the population and the two main political parties are charting a relatively moderate course towards EU institutions, although perhaps at a tempo faster than the general population wishes.

Several reasons exist, therefore, to explain why Euroscepticism has not affected compliance with supranational law in Britain. First, the dominant interest groups and sectors in the British economy have enjoyed generous economic gains through EU membership. Exports to EU member states have rapidly increased over time, but this development has had limited impact in terms of either its share in Britain’s total exports or its share in the total economy (see figure 3.9).

Euroscepticism within the population at large has also oscillated over time, depending on both political and economic events related to the EU and within Britain itself. Still, as in the case of Germany, there is no relationship in the UK between opinions of the EU and the number of violations committed (see figure 3.10).

⁹⁰ Despite New Labour’s pro-Europe stance, debate over joining the single currency continues to this day and strongly motivates the Euroskeptics in the UK.

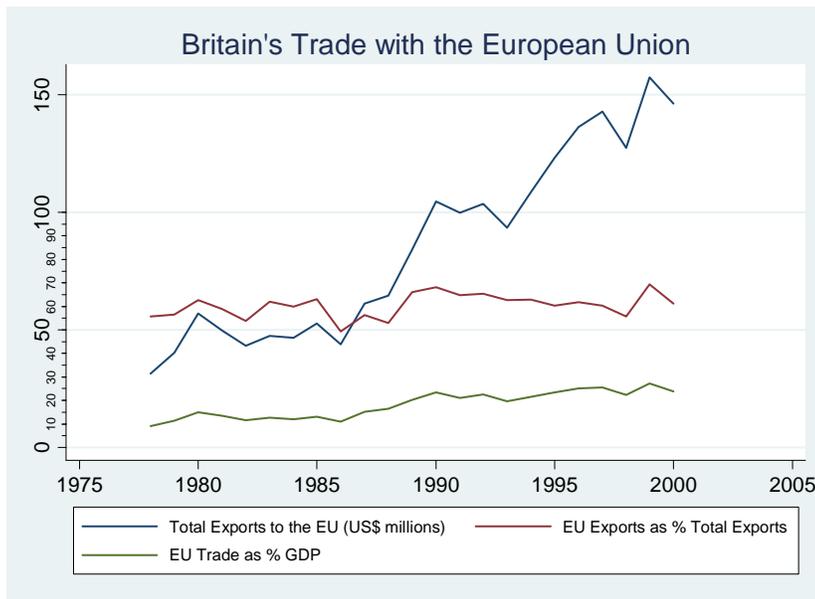


FIGURE 3.9 Britain's Trade with the European Union

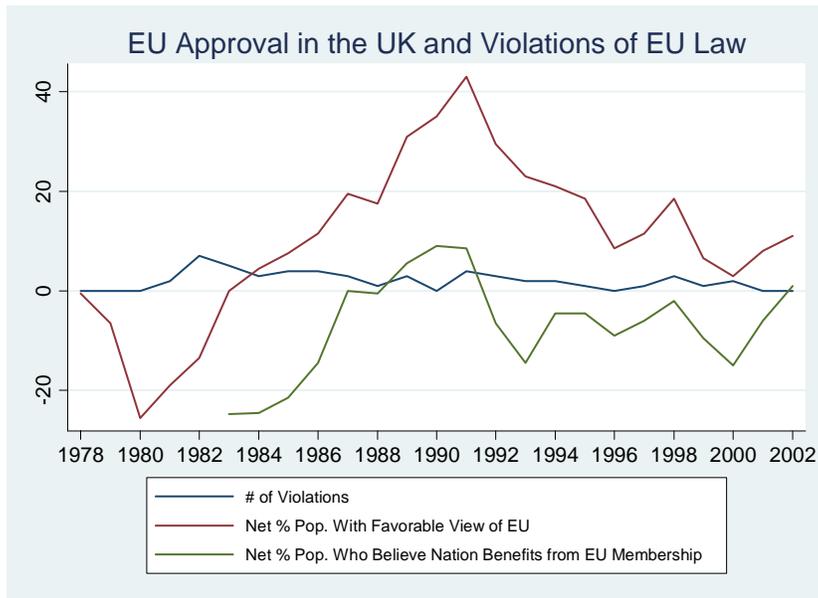


FIGURE 3.10 EU Approval in the UK and Violations of EU Law

Given the political economy of postwar Britain, the winners in European cooperation have always prevented either the rhetoric of the Euroskeptics or the losers in the struggle over European integration from making a credible threat of Britain's exit from the EU. Second, Prime Ministers Margaret Thatcher, John Major and, to some extent, Tony Blair succeeded in immunizing the British public from most of the costs of EU membership. Securing the British rebate under the CAP, obtaining an exemption from the Social Protocol, and remaining outside the euro-zone have each reduced the chances of significant opposition to EU membership from gaining more than just rhetorical strength in the UK. Finally, while Euroskepticism can be concentrated among a few highly vocal members of Parliament and other opinion-makers, such as the broadsheet tabloids, including especially the Daily Telegraph, British institutions of governance have been thoroughly "Europeanized," charged with maintaining the important balance between Britain's meeting its EU obligations and taking into account a skeptical public (Allen 2005; Bulmer and Bruch 1998). Thus, the British government has succeeded in pursuing European integration independently from parliamentary supervision and monitoring.

V. Enforcing EU Law

The European Commission uses a "two-track" method to detect possible infringements on the part of member states in the course of enforcing EU law (Tallberg 2002, 616).⁹¹ The Commission is first made aware of possible violations by

⁹¹ The mechanisms described here refer only to cases in which the target of the suspected violation is a public or governmental actor. The Commission's power to detect and prosecute infringements of EU law varies according to particular policy areas and the type of actor being targeted. For example, the member states must actually report to the Commission all forms of state assistance to private firms or entities under Article 88 of the ECT. In cases of violations of competition policy by private actors, Regulation 17 under Articles 81 and 82 empowers the Commission to perform surprise inspections of the offices of enterprises suspected of violating the law. In contrast, and most controversially, under Article 104c of the ECT, the Commission may report as to whether a member of the Euro-zone has violated the Growth and Stability Pact and provide an opinion as to whether there is an excessive

conducting its own investigations of complaints lodged by private actors such as citizens, firms or public interest groups. Given the substantial material costs of conducting such investigations and the high political costs associated with confronting member states, the Commission encourages and relies on private actors to report possible infringements. The Commission can also—but has rarely had to—initiate infringement proceedings as a result of parliamentary inquiries and notifications by other member states.⁹²

Once an infringement is detected, the Commission initiates a series of informal discussions with the member state in an attempt to settle the issue without resorting to formal procedures under Article 226 and 228 ECT. A “pre-226” letter is sent to the member state mainly to obtain information and determine the nature of the infringement. If the Commission still considers the state practice an infringement or the state has not responded to the letter within a specific time period, a confidential Formal Letter of Notification is sent, explaining the nature of the infringement and calling on the member state to meet its obligations, without necessarily determining what methods that would involve. If at that point the Commission still believes that the state has not taken the necessary compliance measures, formal procedures under Article 226 begin with the public issuance of a Reasoned Opinion.

budget deficit according to the law, but prosecution of possible non-compliance rests with the Council of Ministers.

⁹² The member states can monitor each other under Article 227 of the ECT, but this instrument is rarely used, perhaps for obvious reasons. If a member state does notice a possible violation by another state, the Commission will inevitably become involved in the dispute as the “guardian of the Treaties (Article 211 ECT).” This was the case when France refused entry to British beef after the Commission declared it safe from BSE or “mad cow disease.” The Commission prosecuted the French food agency, the case went before the ECJ, whereby France lost the case and was forced to reopen their markets to British beef over fierce domestic opposition. Article 227 was invoked by Belgium in their attempt to allow the export of wine produced in the La Rioja region of Spain without first being bottled (*Belgium v. Spain* C-388/95 [2000] ECR I-3123). Nevertheless, states are reluctant to employ Article 227 for the simple reason that they fear retribution from other states for those practices others consider a possible violation of EU law. Parliamentary questions as sources of possible further investigation are only slightly less rare.

The Reasoned Opinion stipulates the legal grounds by which the Commission determines that an infringement has occurred, and rules as to why the arguments presented by the member state are unsatisfactory or why the suggested or implemented changes in national practices are insufficient. If the member state still fails to respond to or address the Commission's concerns, the case is referred to the ECJ for settlement. The notice of referral to the ECJ provides the member state and the Commission with one last chance to come to a settlement before the ECJ makes a ruling. When the member state still refuses to comply with the ECJ's ruling, the Commission invokes Article 228 and the infringement process begins again. If the Court finds that the member state still has not complied with the demands of the Commission, similar procedures are used until financial penalties are imposed by the Commission.

Jonas Tallberg and several scholars consider this entire EU process as reflecting the effectiveness of enforcement (Tallberg 2002; Börzel 2003). For example, Tallberg points out that the number of cases declines almost exponentially as one moves from one stage to the next, such that eventually 100% compliance is obtained (Tallberg 2002, 619). Yet, it is premature to consider this as supporting evidence for the success of the enforcement approach. First, the threat of sanctions is not very credible. Fines have been imposed only once in the EU's history.⁹³ While the sanctioning device is designed to discourage non-compliance by making it more costly economically than changing the status quo, the Article 228 process is rarely employed (less than 5% of infringements reach this stage). Second, states have complied with EU law even before the sanctioning mechanism was awarded to the governing institutions by the

⁹³ See *Commission v. Greece (Kouroupitos Rubbish Tip II)* Case C-387/97, [2000] ECR I-5047.

Maastricht Treaty in 1993.⁹⁴ For almost 30 years, the member states complied with ECJ decisions in a vast majority of cases even though the EU lacked any sanctioning mechanism whatsoever.⁹⁵

Third, in order to demonstrate the effectiveness of the enforcement, the fact that fines and other forms of punishment are in place cannot serve as empirical evidence of enforcement at work. The effectiveness of enforcement depends on comparing the magnitude of the fine to the benefits of maintaining the status quo. To determine whether the enforcement hypothesis explains why compliance is being achieved, one must know what policies or practices states are willing to forgo in the face of possible sanctions, especially in order to explain the cross-national differences and changes over time in compliance. Therefore, the actual political goals of European integration must be compared with the actual practices or interests of the member states in order to test the enforcement hypothesis. In sum, in order to test whether legal traditions, national interests, or the structure of national parliaments affect the process of compliance, each must be tested using the tools of comparative analysis at our disposal.

Domestic political or legal conditions within member states can measure comparative rates of compliance only if it is possible to believe that the cases of EU legal infringements lack any bias, in terms of absolute number or comparatively across the member states. As Tanja Börzel argues, the data provided by the European Commission could be seriously under-reporting the total amount of non-compliance that exists, mainly due to both scarce resources and political unwillingness (Börzel 2001). The lack of resources the European Commission faces compared with those

⁹⁴ This brings up the complicated methodological issue of proving that deterrence works. For example, it is unclear whether the presence of a sanctioning mechanism and the absence of non-compliance prove that sanctions works or that deterrence was successful.

⁹⁵ For examples of situations in which even national courts and actors ignore ECJ decisions, see Nyikos (2003).

available to nation-states to enforce EU law is well known. The task of monitoring now whether every law that is in force among the twenty-seven member states complies with EC Treaties is daunting to say the least. The problem is only magnified when one considers EU directives, which must be monitored in terms of when they were adopted, whether they have been adopted legally, and whether they are being applied correctly. Altogether, these monitoring difficulties mean that the institution responsible for monitoring compliance, the European Commission, must sometimes calculate the political risk associated with prosecuting a member state. This risk could include backlash against the Commission in terms of EU legislation that preempts the Commission's actions or even reduction in the Commission's and ECJ's powers. For example, some legal scholars have interpreted the Keck decision as a pre-emptive move on the part of the ECJ to allow some regulations against the free movement of goods within the EU because it perceived growing opposition to its doctrine from its constituents, the member states.

It is certainly true that the Commission lacks the full capacity to detect all infringements. And, in the past, when these institutions were weakest, there is some evidence to support the claim that it chose which cases to pursue in hopes of not just constructing a single market, but also of establishing a legal foundation of greater institutional powers for itself (Pollack 1997; Tallberg 2000).

There is however little evidence to support the claim that cross-national rates of non-compliance are affected by any of these issues today. First, the cross-national distribution of infringements shows that the Commission has prosecuted large as well as small states, although neither large nor small are concentrated at any particular end of the spectrum. Second, now that the Commission has been awarded the powers to serve fully as the "guardian of the Treaties," it has exercised those powers judiciously. Before officials in the Commission can launch infringement proceedings against a

member state, all decisions must be approved by the Legal Service in the Commission's Secretariat General's office. Professional lawyers advise Commission officials in the Directorate General's or the various cabinet offices of the ECJ as to whether a case they are pursuing has legal merit. If a case cannot be settled between the Commission and the member state in question, lawyers determine the likelihood of winning before the ECJ and will prosecute a case further only if they are convinced that they have a high probability of winning, which they do in almost 99% of all cases.⁹⁶ Finally, Commission officials do respond to complaints they receive from EU citizens who are raising issues of EU legality about practices in their own countries or in other countries. In addition, the Commission can choose to prosecute a particular case because of its legal or political importance, as seen in its recent attempts to sue Germany and other countries for violating the Growth and Stability Pact (Conant 2002). Yet there is little reason to suspect that these concerns would affect the overall distribution of infringements across member states. As shown in subsequent chapters, even when controlling for the possible origins of an infringement there is no statistically significant relationship between the origin of the complaint and the number of violations committed per year. In addition, aside from cases that receive a great deal of attention in the public media, the Commission is most often burdened with settling disputes over less important or materially significant barriers to the free movement of goods. Finally, given the Commission's scarce resources, it chooses the cases it pursues carefully based on the degree to which a national law is discriminating against products or services from another member state or otherwise violating EU law. If this is true, then the relative the number of violations a member state is committing is not the result of any inherent bias in the Commission's prosecutorial conduct, but

⁹⁶ Interview with Commission Official 1, November 2004.

rather of the relative inability of some states to adapt or change their legal order to comply with EU law.

CHAPTER 4

THE COMPARATIVE POLITICS OF COMPLIANCE

I. Introduction

Why do some member states of the European Union settle their infringements of EU law sooner than others do? Why will some countries violate EU law frequently over time, while others do not? Most importantly, which of the three perspectives presented in Chapter 2—levels of codification, political self-interest, or parliamentary accountability—best explains why states commit these infringements and refuse to settle them? These questions serve as the central focus of this chapter.

The scholarly literature on compliance with European Union law is currently divided among three main perspectives. The first perspective argues that non-compliance with EU law and the difficulties associated with implementing EU law at the national level are the result of a “misfit” between the legal demands of the European Commission and the way in which the economy is codified at the national level. The second hypothesis suggests that non-compliance is merely a function of the relative interests a state or actors within the national government have in complying with international law. Only when the threat of sanctions becomes credible, after the European Court of Justice has issued its ruling, will EU member states comply. Finally, a third perspective argues that problems of non-compliance occur frequently, but the status quo cannot be effectively and promptly changed when individual parliamentarians control the legislative process.

This chapter tests each of these hypotheses using newly collected data on infringements of the Treaty of the European Communities (the EC Treaty) and its associated regulations from approximately 1975 to 2002. First, more detail is provided

concerning the types of variation observed among fifteen member states.⁹⁷ The variation in non-compliance observed, across both time and countries, depends a great deal on the type of law under consideration. Then, each hypothesis related to non-compliance is tested to determine which most accurately explains the variation in non-compliance observed with reference to the EC Treaty. Using original data that compiles and traces the stage at which a settlement was reached of over 1200 violations of the ECT, the quantitative analysis strongly supports the argument that the degree to which a national economy is regulated or codified by national law explains why some states violate EU law more often than others do. Other domestic factors also affect the compliance process, taking into account the changes that occur over time within the member states. One shortcoming of quantitative analysis is its inability to describe precisely either the origin of an infringement of EU law or how it is settled. This process of compliance is reserved to chapters 5 and 6, which trace the process of complying with EU law in the Federal Republic of Germany and the United Kingdom.

II. Detecting and Measuring Non-Compliance

Decentralized Forms of Detection

The Treaty of Rome of 1957 constructed and activated the engine of European integration. The leaders of Germany, France, Italy and the Benelux countries established a customs union that would eliminate all tariffs and duties on goods and services moving within their respective national boundaries and at the same time create a common external tariff on all products originating from outside the union (Moravcsik 1998). While each state may have realized important political and economic gains as a result, the exact terms and nature of that customs union remained

⁹⁷ Again, by member states of the EU, I refer only to the EU-15 that existed prior to the recent eastward and southern expansion. They are: Sweden, Finland, Austria, Denmark, Germany, the Netherlands, Belgium, Luxembourg, Italy, Greece, France, Portugal, Spain, Ireland, and the United Kingdom.

to be determined. Inevitably, disputes arose over the meaning and purpose of the articles in the ECT. The European Commission (EC) and European Court of Justice (ECJ) were created in part to adjudicate them.

Gradually, a legal and institutional structure emerged from the interaction of national private and public actors and supranational institutions. Private actors utilized the rules of the political game that were available to make claims against others, usually their own member state, to generate either new rules or interpretations of a rule and, as a result, new forms of governance at the supranational level were developed (Haas 1958; Haas 1964; Sandholtz 1993; Slaughter, Stone Sweet, and Weiler 1998; Stone Sweet 1998; Stone Sweet and Brunnel 1998). Decisions by the ECJ and the establishment of legal precedents hindered the ability to reverse the shifts made in the normative governing structure. It also led to the entrenchment of particular interests by generating increasing returns for the victors of these dispute mechanisms (Pierson 1996; Pierson 1998).

As Alec Stone Sweet and Thomas Brunnel show, private actors realized they could take advantage of new legal pathways to make states honor their commitment towards establishing a common market (Stone Sweet and Brunnel 1998). Driven by the desire to realize the gains of a single, harmonized market, exporters and importers increasingly made demands on their own states or others to comply with the ECT through their national courts. Because the mechanisms the member states (as principals) used to monitor the Commission and the ECJ (their agents) were costly and of limited effectiveness, a mutually beneficial dynamic emerged that allowed private actors to achieve a relatively free market, giving the European Court of Justice and the Commission the powers to govern (Pollack 1997). The development of the single European market and the creation of the EU supranational legal order were highly dependent upon each other. Without the establishment of an effective dispute

mechanism, whereby the ECJ enjoys a monopoly on the legitimate interpretation of EU law, the establishment of the single internal market would have taken much longer, if it would have occurred at all.⁹⁸ In addition, without multiple types of private and public actors using what legal pathways existed to challenge national laws that hindered the free market, the political integration of Europe would have been much more limited.⁹⁹

These simple forms of transnational interaction between private actors, national courts and EU institutions certainly led to increased political integration. Yet, the construction of governance depended on interaction taking place among a specific set of countries (see figure 4.1). For example, as Alec Stone Sweet and James Caparaso predict, Germany, being the largest economy in the economic block, leads in the number of preliminary references (Article 234 ECT) made by national courts (1,079), while smaller states with considerably less intra-EU trade rank lower (Stone Sweet 1998). The authors also show that the ECJ receives referrals from national courts across a range of policy sectors that are not evenly distributed. Their extensive cataloging of the data shows that the number of preliminary references declines in some policy sectors, but increases in others.

If Alec Stone Sweet and others are correct that the construction of governance is the result of transnational interaction between private individuals and national and supranational legal institutions, then the cross-national variation in the sources of these references raises a series of important questions. Does the fact that a majority of preliminary references originate from the larger economies imply that the judicial

⁹⁸ For example, foundational case law establishing direct effect, (*Van Gend en Loos v. Nederlandse Administratie der Belastingen* Case 26/62, [1963] ECR 1), and the supremacy of EU law, (*Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, Case 6/64 [1964] ECR 1-585), was the result of private actors interacting with national courts who then made preliminary references to the ECJ under Article 234 ECT.

⁹⁹ In fact, Stone Sweet et al. (1998) show that areas with less political integration also exhibit lower levels of transnational activity.

integration of Europe and the rules being devised are against the interests of these states? Or, if the rules being constructed emerge from legal disputes over the application of EU law within the larger states, are the smaller states being forced to adapt to rules over which they have little to no input? The

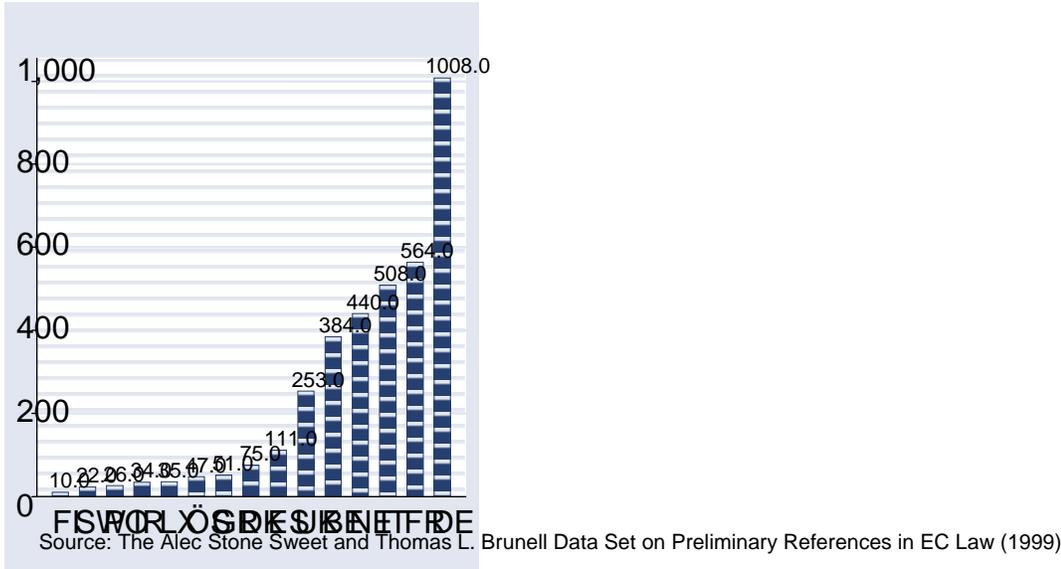


FIGURE 4.1 Preliminary References by EU Member State

opposite may also be true, however. Assuming that transnational activity and intra-EU trade drives the number of preliminary court references in the EU, the smaller member states may be successfully avoiding the scope and authority of EU law. Examining the record of non-compliance offers us an opportunity to answer those questions.

Finally, the number of preliminary references has increased significantly over time, but the number of treaty infringements has declined over the same period (see figure 4.2). Between 1980 and 1990, the number of infringements of EU law and

preliminary references made by national courts increased. However, the number of violations committed by the member states started to decline around 1992, while the number of references to EU courts continued to increase dramatically. Does this mean individuals are noticing more conflicts between national law and EU law than the Commission and, thus, more non-compliance? If so, then states are failing to learn and internalize EU law into their national legal systems. The contrasting trends could also result from EU law becoming an important part of national legal doctrine, whereby citizens can now have their disputes adjudicated by national courts instead of being required to notify the Commission and have it enforce the law. The answers to these questions are based on the assumption that Article 234 References are an effective means of measuring non-compliance in the European Union. There are good reasons to doubt that this is so.

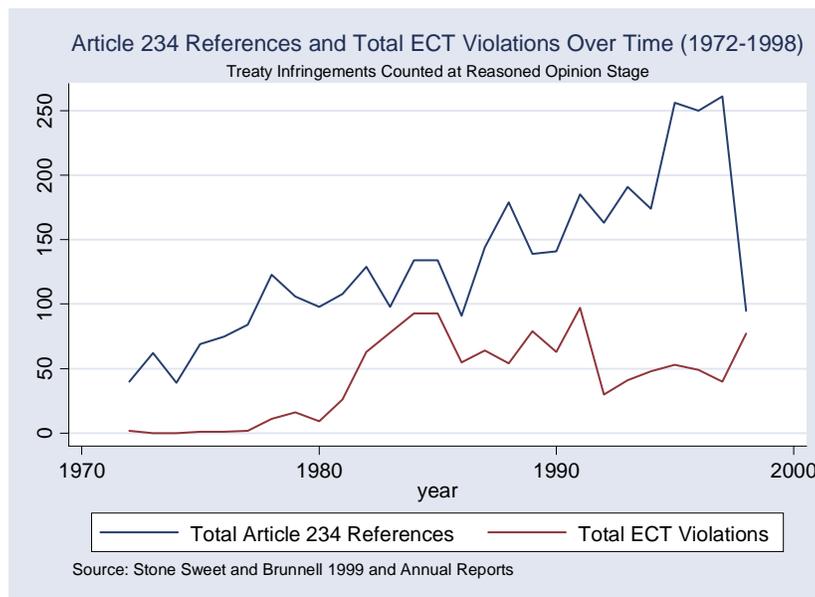


FIGURE 4.2 Article 234 References and Total ECT Violations Over Time (1972-1998)

The use of Article 234 of the ECT, or the Preliminary Reference Procedure, is a formal method by which interaction is structured among various types of private and public actors to foster EU integration by challenging national laws that came into conflict with EU law. The involvement of national and supranational courts provides a relatively efficient mechanism by which national legal systems will internalize EU law. Most importantly, some scholars have argued that Article 234 references also serve as a decentralized form of detecting non-compliant behavior (Börzel 2003; Tallberg 2002).¹⁰⁰ In fact, the Commission reports that a substantial number of the suspected infringements of EU law it prosecutes under Article 228 of the EC Treaty are the result of individuals' reporting to their offices (see table 4.1).

TABLE 4.1: Detection of Infringements

Year	Total	Individual Complaints	Cases Detected by the Commission			Failure to Notify ¹⁰¹
			Parliamentary Questions	Petitions	Total	
2000	2434	1225	15	5	313	896
2001	2179	1300	5	1	272	607
2002	2356	1431	30	20	318	607
2003	2709	1290	23	20	253	1166
2004 (EU-15)	2146	1080	23	13	285	781
2004 (EU-25)	2993	1146	23	13	328	1519

Source: European Commission (2005) Annual Reports Monitoring the Application of EU Law

¹⁰⁰ The preliminary reference procedure acts as a “fire alarm” such that EU institutions can detect whether non-compliance is occurring at relatively low political and economic cost to the institutions themselves (McCubbins and Schwartz 1984).

¹⁰¹ This number refers to whether national officials have informed the Commission as to whether or not EU directives have been implemented.

There are good reasons, however, to question the reliability and validity of Article 234 references as an indicator of non-compliance and the growth of a supranational order. Firstly, cross-national bias raises serious questions about how reliable decentralized compliance procedures are in detecting the total amount of non-compliance that exists and its relative distribution.¹⁰² Secondly, it is debatable on its face whether the use of this procedure is an effective means of detecting or measuring non-compliance. When national courts refer a case to the ECJ, the latter seeks an interpretation of EU law in reference to a particular set of claims made by the respondents. The respondents in a case may be making claims that involve issues related only to EU law, and national courts serve as the only relevant local venue in which to exercise those claims. In this scenario, either the national court is uncertain as to how EU law should be applied in this particular case, a lack of precedent in a particular area of the law exists, or it may be merely seeking a clarification of the law in light of contradictory ECJ decisions.

If national courts do refer a case to the ECJ that involves a possible conflict between national and EU law, the ECJ will not necessarily find a conflict between national and European law. Nor is it necessarily the case that the European Commission's opinion on the matter will always be followed, assuming that the Commission perceives a conflict to exist.¹⁰³ Therefore, while significant case law has developed that emphasizes the "supremacy" of EU law, in part through the use of Article 234, this procedure is not a very accurate measure of non-compliance. A more

¹⁰² For example, Clifford Carrubba and Lacy Murrah (2005) find not only that high levels of EU trade and political support for European integration is associated with frequent use of the preliminary reference procedure, but also that levels of political awareness or knowledge in a country also affect the use of this procedure (Carrubba and Lacey 2005). Karen Alter attributes the use of Article 234 less to private individuals' advancing their short-term economic interests, and more to the willingness and institutional prerogatives of national courts and their ability to exercise judicial review (Alter 1998; Alter 2000; Alter 2001). The fact that national courts serve as the gatekeepers of these procedures and can exercise them at their discretion should raise serious doubts about Article 234 references as indicators of non-compliance.

¹⁰³ For example, see Stone Sweet and Caparaso (1998, 131).

accurate measure that uses Article 234 references would have to include: the nature of the dispute between EU and national law, the number of cases at the national level that invoke EU law that are not referred to the ECJ, and whether the ECJ finds a conflict between national law and EU law.

Centralized Forms of Detection: The Varieties of EU Law

Instead of using Article 234 References, several scholars have utilized the European Commission's Annual Reports on Monitoring the Application of Community Law when testing hypotheses with quantitative methods (Haas 1998; Mendrinou 1996; Tallberg 2002). They have generally treated all infringements in the same way, even though there are clear distinctions between different types of EU law. These distinctions must, however, be made because failing to do so affects one's ability to draw conclusions as to whether non-compliance is a problem in the EU, whether it increases or decreases over time, and why member states refuse to violate supranational law in the first place.

Law in the European Union is essentially divided into two types. Hard law refers to rules at the supranational level that are immediately applicable and in force at the national level. Hard law therefore consists mainly of the EU Treaties and associated regulations and decisions made by either the Commission or the ECJ. Directives are a "softer" form of EU law because they are devised by the European Commission and voted on, currently chiefly through the co-decision procedure, by the European Parliament and Council of Ministers, which establish particular policy goals and guidelines. But the member states are left to devise their own national legislation that best accommodates national legal practices and regulatory traditions while still

meeting the policy goals of the directive.¹⁰⁴ In terms of infringements of EU law related to directives, the infringements can be broken down further in terms of whether the Commission was notified that a directive was implemented on time, whether the piece of national legislation contains the necessary legal components, and whether the directive has been properly applied to a specific situation at the national level.¹⁰⁵

What is treated as non-compliance in the EU has a serious impact on the cross-national and cross-time patterns of EU infringements observed. Figure 4.3 traces the number of infringements over time of directives in terms of these three dimensions as well as the number of treaty infringements that occurred between 1978 and 2002. While infringements related to non-notification change greatly over time, other types of infringements seem to remain relatively steady with a general decreasing trend between 1990 and 1995 and then increasing after 1995. But there are differences even among these types of EU law. Figure 4.4 shows the total distribution of infringements by EU legal type from 1978-2002 among 15 EU member states. Not only do problems of non-notification once again constitute the majority, but also the types of EU law that states violate most often varies from state to state. For example, figure 4.4 shows that non-notification that a directive has been implemented is the dominant form of non-compliance behavior committed by the member states. And the member states tend to apply EU directives incorrectly more often than implement them incorrectly legally. However, the ranking of the member states differs based on the type of EU law under consideration. When considering only EC treaty violations, France commits more violations than Italy, but the reverse is true when considering non-notification and incorrect application of an EU directive. Belgium commits more violations of the

¹⁰⁴ There are even “softer” forms of law, such as the Open Method of Coordination, that place little or no legal obligations on the member states.

¹⁰⁵ The case law of the European Court of Justice constitutes the final component of EU law at the international level. ECJ case law is binding on both private and public actors within the EU.

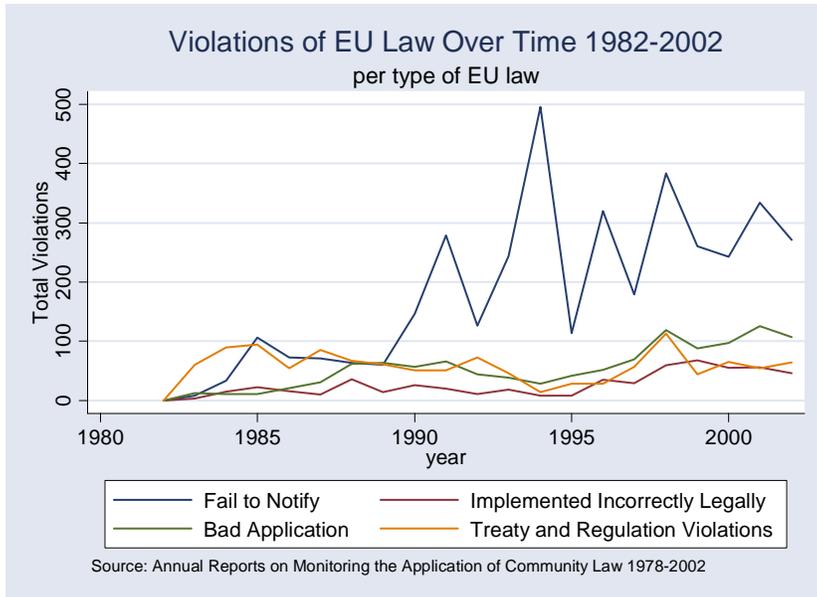


FIGURE 4.3 Violations of EU Law Over Time 1982-2002

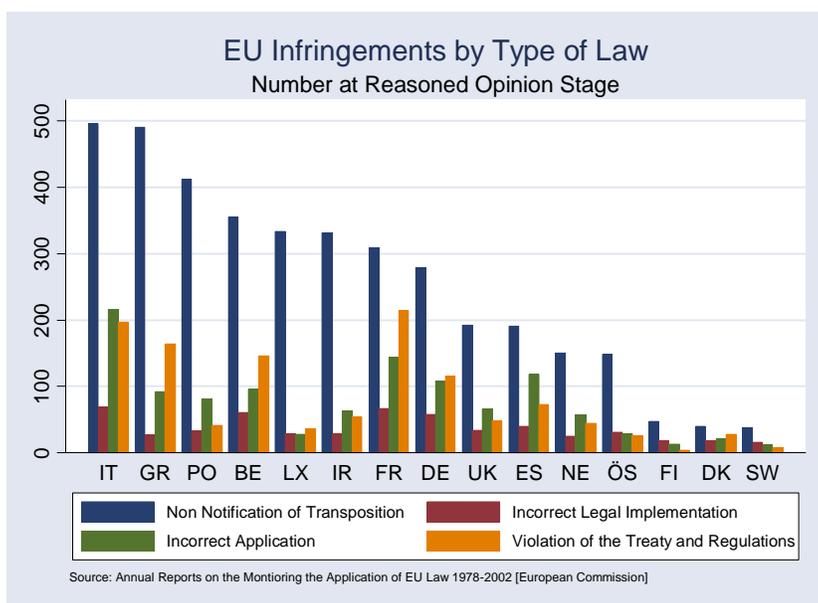


FIGURE 4.4 EU Infringements by Type of Law

EC Treaty than Spain, but the reverse is true when considering the incorrect application of an EU directive. These distinctions are emphasized to demonstrate how careful one must be when selecting forms of non-compliance about which to make generalizations and test hypotheses.

Besides the different patterns of non-compliance, doubts should be raised as to whether infringements related to EC directives are forms of non-compliance at all. Non-compliance is a particular type of behavior, action, or policy that violates an established rule (Simmons 1998; Simmons 2000; Zürn 2005). And what compliance means can change over time. It would be a mistake, therefore, to treat problems of directive notification, correct legal implementation, and application of those directives as sources of possible non-compliance. Correct legal implementation and application of a directive are instances in which the policy output is measured against the intent of the rule. If there is a gap between the two, this is still not necessarily non-compliance.

Many qualitative studies (and some quantitative ones) of EU directive implementation focus on how much time member states take before implementing a directive (Duina 1997a; Duina 1997b; Falkner et al. 2005; Knill 2001; Knill and Lehmkuhl 2002; Mastenbroek 2003). In extreme circumstances, if a member state absolutely refuses to implement a directive, it becomes a problem of compliance. In this case, member states are violating EU law in terms of their obligations under the EC Treaty to fulfill the goals of creating a single market.¹⁰⁶ And if a member state fails to notify the Commission that a directive has been implemented through national legislation then, technically, this also constitutes an infringement of the EU treaty. Both of these issues, however, relate to the difficulties that states face, either willfully or unintentionally, in meeting the policy goals of a directive, not to particular state actions or policies that are suspected of violating international rules. Moreover, given that directives allow the member states to devise their own methods of realizing EU policy goals, the comparative politics of EU directive implementation is not the most fruitful realm in which to compare theories of compliance.¹⁰⁷ Only if a state's behavior or policy comes into conflict with an EU directive that has been implemented can it be considered non-compliance. In fact, the empirical data on regulations and directive illustrate this to be the case. As shown in figure 3.1 (see above), the number of regulations the EU has issued, with cooperation of the EC Council, has always exceeded the number of Directives approved by the Council and Parliament.¹⁰⁸

¹⁰⁶ EU member states are also liable for any actions they take or fail to take under the terms of the directive, even though the directive may not have been implemented yet (see *Francovich v. Italy* Cases C-6/90, 9/90, [1991] ECR I 597 and *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, Case C-106/89, [1990] ECR I-4135).

¹⁰⁷ Directives are a form of supranational rulemaking relatively unique to the EU context. Given that my interest here is to develop a theory of comparative compliance for a wide variety of international institutional settings, it is more reasonable to focus on the hard law of the EU.

¹⁰⁸ Christine Mahoney kindly provided the data and are based on results presented in (Stone Sweet 2005)

In addition, in order to determine the extent to which national governments have accepted and internalized the EU rules, there are good reasons to focus first on compliance with the rules related to “negative integration” rather than positive integration in the EU (Scharpf 1999). Negative integration refers to the removal of tariffs, quotas, and other trade barriers that prevent the free flow of goods and services, while positive integration refers to the reconstruction of regulation at the supranational level. Negative integration results primarily through the enforcement of the ECT and its associated regulations and has been far more successful in integrating the EU member states for several reasons. Since the Treaty of Rome, the Commission has sought to bring down impediments to the free movement of goods and services, workers, and capital. Any derogation from this goal is not only extremely vague, but the member state is encumbered with the burden of proof to show that a practice suspected of violating the ECT constitutes a legal exception. A simple overview of the policy distribution of ECT violations shows that a vast majority are in the area of the single internal market (see figure 4.5).

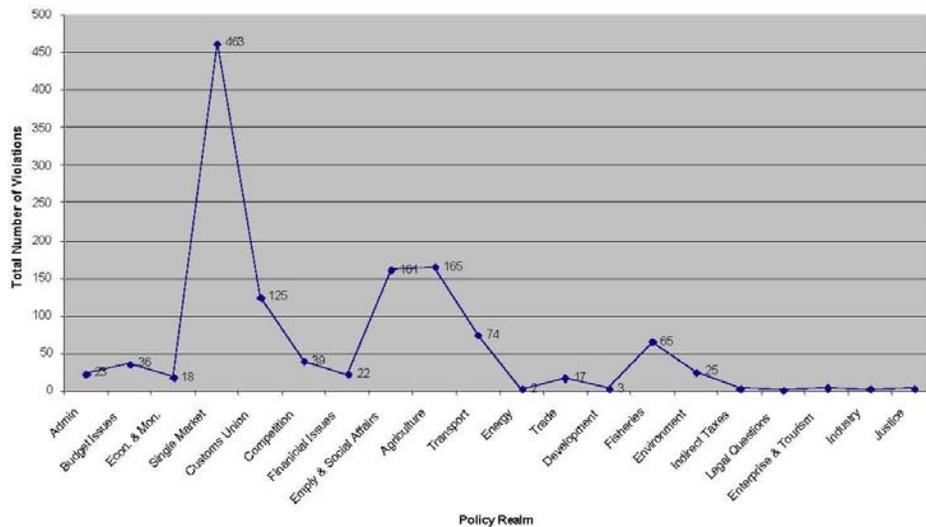


FIGURE 4.5 Policy Areas of the EC Treaty Violated (1982-2002)

The EU’s institutional structure is also much more facilitative of or driven towards negative integration. The Commission and the ECJ enjoy a greater amount of political autonomy when monitoring possible violations in their efforts to remove barriers to free trade, while positive integration requires the consent of multiple actors, including the diverse interests of the European Parliament and the member states through the Council of Ministers. This significantly reduces the probability that a Pareto-optimal rule for all participants will be reached, whether that rule is “market-making” or “market-correcting” (Scharpf 1999, 50-52). Susanne Schmidt’s work on the politics of liberalization powerfully demonstrates how directives are often merely the last resort of the Commission as it attempts to create a single European market without barriers, which only highlights the relative importance of negative integration versus its positive counterpart (Schmidt 1998).

There is now a set of rigorous justifications for focusing on the ECT and associated regulations to assess the relative importance of the substantive versus

procedural dimension in explaining problems of compliance. Article 234 references serve as a poor measure of compliance for several reasons. The Annual Reports published by the Commission provide us with a more direct measure of non-compliance in the EU. Failing to distinguish between the different types of EU law yields not only a false impression about the nature of non-compliance in the EU, but also overemphasizes the role of EU directives. Thus, suspected violations of the EU Treaties and their associated regulations, rules that are immediately applicable, are most the valid sources for assessing the comparative politics of compliance in the EU.¹⁰⁹

III. Measuring Parliamentary Power, Self-Interests and Codification

According to the transnational legal process approach to compliance, the politics of process matter as much as the politics of substance. In particular, in formal settings of dispute settlement political actors must engage with each other, reach a common interpretation of the law, and then internalize it. When a common interpretation is reached, but the targeted actor still does not comply, the behavior outcome can be considered outright refusal. When an interpretation of the law is imposed on the targeted actor such as by an independent court and no financial

¹⁰⁹ While ECT violations are the most valid measures of non-compliance, they are not devoid of some reliability issues. Again, given limited political or economic resources, the Commission may not be detecting all the possible violations that exist. Which cases the Commission chooses to prosecute may also reflect a bias of the Commission to pursue only those cases that will serve its political and institutional interests (Conant 2002). This may lead us to conclude that the Commission will target or favor some states, or even some economic or policy issues, at the expense of others. Yet, the Commission's ability to provide persuasive arguments for complying with the Treaty and the ECJ's credibility and expectation that the member states will follow its ruling depends on at least maintaining a sense of neutrality and objectivity. There are also socialization pressures that drive the actors within supranational EU institutions to identify with the EU and suspend or abandon their national biases. Finally, methodologically, there are some inconsistencies in the way the Commission has collected and published the data, which make cross-time comparisons less reliable, but does not generate any national bias. On the whole, besides some concerns about the reliability of the data, the Annual Reports by the Commission constitute the only statistical source available and no other international organization or state provides such comprehensive information (see Börzel 2003).

penalties are being assessed, the actor is reluctant to comply with its international legal obligations. However, if political actors can come to an agreement before an interpretation is imposed, deliberation leads to successful accommodation. Finally, if states have finally learned what compliance behavior is and internalized rules into their national legal and political systems, then obedience occurs, controlling for whether states were originally opposed to the rule in the first place.

As explained in chapter 2, there are essentially three ways to explain why member states violate EU and have difficulty coming to a settlement with the European Commission over if and how the legislative status quo should be changed. The parliamentary accountability hypothesis suggests that non-compliance with the EU results because national parliamentarians inhibit the national executive from changing the national status quo. Not only do individual parliamentarians oppose changes in EU law for substantive reasons, they also raise significant obstacles to changes in the status quo when changes are required. The politics-of-self-interest-approach suggests that all non-compliance is a function of whether a state or an actor in the national government has a material interest in complying. Only the threat of sanctions will force the opposition to back down and change the status, which occurs after the European Court of Justice issues a definitive ruling.

Unfortunately, each of the perspectives mentioned just now ignores the true nature of an infringement and why different states have difficulty changing the legislative status quo. Non-compliance in the EU results from conflicts associated with the substance of the law. In particular, the European Commission and the ECJ are charged, as guardians of the Treaties, to challenge and remove those laws that discriminate against other member states' products, services, and people. Those national laws rarely have discrimination as their intent. Rather, they are the result of a legislative process that codifies what is and is not a product, service, or person that can

participate in market transactions. While substantive, material interests can be threatened by EU law, these material interests were constructed by national law as it was codified by national legislatures. Many of the economic interests that are threatened by changing demands on the part of EU institutions were established through their codification in national law. Many of the economic interests and motivations for protection that prevent particular groups or states from complying with EU law emerged from the ways in which their national legal traditions constructed and regulated their economies.

Measuring Codification

Quantifying the extent to which the national economy is codified is a difficult task, but not out of conceptual reach. National legal traditions are the result of long historical processes of state-building, settling legal disputes between the state and individual actors as well as among citizens themselves, and years of legal scholarship. Consequently, individual states' legal traditions are unique to how they developed in each particular country and historical context. Still, a central component of every legal tradition is the extent to which the national government has the power or authority to exercise legal force across its territory as well as how that authority is exercised. That legal authority can be measured in terms of the degree and quality by which the national economy is regulated.

The best measure of codification would include the number of laws that exist in a particular policy domain and the degree to which they predefine every object and market practice within that policy domain. However, no set of quantified, comparative data exists. In addition, even if such data existed, it would be a task of extraordinary cost and time to analyze the legislation in every relevant policy or economic domain and collect this data from a sufficiently large number of countries. Therefore, the

researcher must find the best substitute possible that both accurately reflects what is being measured and that can be applied reliably across national contexts. A country's average regulatory quality proves to be more than an adequate measure of the extent to which a state codifies its national economy.

Average regulatory quality, as measured by Kaufmann et al. (2003), serves as a good indicator of the extent to which a national economy is regulated and, therefore, codified by the state (Kaufmann, Kraay, and Mastruzzi 2003). Constructed from a variety of sources, regulatory quality refers to the number of "market-unfriendly" policies a country has, such as price controls and perceptions of excessive regulation in the area of foreign trade and business development. This measure is an aggregation of data from many different sources that are based on the perceptions of market actors. Although this measure may be slightly biased in terms of what laws and regulations business actors consider "unfriendly," it has advantages over simply counting the number of laws on the books. First, businesses and other market actors are in a better position than non-market actors are to know about the number of obstacles that interfere with market activity. Second, their perceptions of just how unfriendly market regulations are include both de jure and de facto barriers to the conduct of market behavior. In some cases, the limitations on market activity cannot be discerned by the law itself, but its consequences for the market for that product or service in general.

Most importantly, the Kaufmann index of average regulatory quality captures the extent to which the national economy is codified. Collected from a variety of reliable sources, average regulatory quality indicates not only how discriminatory the national laws are, but also how predictable the laws are and the likelihood they will change. In addition, it measures the degree to which there is government intervention in the national economy, controls on exports and imports, or burdensome administrative regulations. To the extent that states have a civil code legal system and,

therefore, regulate the national economy, they will produce regulatory regimes that are associated with a high number of regulations and rules with which private actors must comply. In contrast, countries with less codification of the economy such as the UK and Ireland, which depend on a common law tradition in regulatory practices, are guided more by historical precedent as conflicts have emerged through actual market behavior. One could therefore argue that countries with civil law systems are more likely to be rated as having inefficient regulatory practices than are those with a common law tradition.

Of course, business and other market actors do not prefer an anarchic regulatory environment and a completely deregulated economic environment. Legal protection of private property and investments, along with other laws that overcome market failures, must also exist. The index does not measure only the amount of regulation that exists, but also the extent to which the necessary amount of legislation is in place in order for market transactions to take place. Therefore, the index does not simply count the number of laws on the books, but their quality in terms of allowing and fostering market behavior. However, to the extent these laws are “market-making” and not discriminatory against products and service coming from other member states, they should not come under the investigatory purview of the Commission. The Commission is interested in only those laws that unduly prevent market transactions from freely taking place within the European Union. In addition, the number of laws required to create markets must number less than the number of laws used to control market behavior. Thus, one can assume that countries with a civil code system are more likely to have laws of a poor regulatory quality than countries without this tradition. Also, since national parliaments are the key actors in and the primary sources of regulations in a civil code system, it is more likely that parliaments in countries with civil code systems will approve of discriminatory rules than parliaments

in countries without such systems. As regulatory quality improves, the number of violations should decrease and the probability of settlement by the ECJ should decrease as well.

Measuring Interest in Complying

In the European Union, the central motivating goal for further integration is not just political integration for its own sake. Rather, the EU member states, EU supranational institutions, and a mix of private and public actors are dedicated to creating a single internal market based on the four freedoms.¹¹⁰ The internal market is being constructed through a combination of negative and positive integration, with an institutional emphasis on the former. The EU's political institutional design propels negative integration forward much faster than positive integration, and its primary legal source is the EC Treaty and its associated regulations. In addition, through Article 234 references, a mix of private individuals, organized members of civil society, and even other states have sought the removal of trade barriers within the EU. These barriers may be propagated and enforced by states, which is usually the case, or represent discriminatory behavior committed by firms in other member states.

Given these institutional conditions and the main policy direction of the European Union, a state's self-interest in complying with these rules will be a function of either of two things. It might be a function of the nature of the national rules already in place that govern market relations and, thus, the degree to which changes to the legislative status quo must be made. Or, a state's self-interest in complying with the treaty is shaped by the expectations of future gains from intra-European trade. Those future gains are based on the levels of EU trade that existed prior to the establishment

¹¹⁰ These four freedoms are: the free movement of goods, the free movement of services, the free movement of workers or people, and the free movement of capital.

of the treaty. Moreover, as integration continues, there should be a wider divergence in compliance records among states that have a greater interest in securing the gains of free trade than among those that do not. Trade is measured in terms of total trade with the EU relative to the size of the national economy. We should expect that, as EU trade increases as a share of a country's GDP, both in terms of exports and imports, it has an interest in complying with EU law.

Negative integration also challenges the "mixed economy" as it is practiced by Western European governments. Although the mixed economy is crystallized in different ways among EU member states, negative integration constitutes a general threat to numerous components of the mixed economy (Scharpf 1999). The division between having a mixed economy and negative integration reflects the traditional political divide in Western Europe between interventionists or Keynesian policies and neo-liberal policies that focus on limiting the degree of state intervention in the economy. Assuming that negative integration is a neoliberal project in the EU, center-left or social democratic governments are more likely to resist compliance with EU law.¹¹¹ Partisanship is measured as the relative political center of gravity of the governing cabinet, which is the political party's share of seats in parliament multiplied by the party's ideological position according to the Left-Right index developed by the Comparative Manifestos Project (Budge et al. 2001).¹¹²

Instead of being based on the effect of the rules themselves, non-compliance may be a function of who creates the rules. According to Andrew Moravcsik, the European Union is just another international institution that fosters cooperation and

¹¹¹ For strong arguments in support of this thesis, see Kurzer (2002), and Van Apeldoorn (2002).

¹¹² Thomas Cusack kindly provided the data. The ideological dimension is based on Budge et al.'s (2001) CMP scale, which ranges from -100 for very left-wing governments to 100 for very right-wing governments. The ideological dimension was constructed from a composite of twenty-four salience measures of policy positions based on the categorical system of the CMP project. It reflects the degree to which the party's electoral manifesto emphasizes either left or right policy positions.

provides material gains to its members. States' interests are determined by the dominant economic interest groups within the country, those who have the most information and whose preferences regarding a policy are most intense. Governments then bargain with each other until a Pareto-optimal solution is reached. This solution reflects the relative power asymmetry between states. The institutions that the member states are constructing exist to generate credible commitment and discourage cheaters (Moravcsik 1998, chapter 2). Similarly, Geoffrey Garret argues that the decisions made by the ECJ that trend towards an increasingly integrated Europe reflect the latent preferences of the member states, in particular France and Germany (Garrett 1992; Garrett 1995).¹¹³ If either argument is correct, then the smaller states of the EU should violate EU law most often and comply only reluctantly. State strength and size is measured by the number of votes a member state had in the Council of Ministers prior to eastward expansion in 2005.

Political cleavages surrounding compliance with EU law do not just center on the left/right divide. Aside from the left/right divide, a government's decision to comply may also be a function of relative support of the EU in general. In contrast to a vision of a Europe without borders and discriminatory national regulations, some officials at both the national and EU level seek to tame the excesses of modern capitalism by re-regulating their economies at the European level. Yet, this may come

¹¹³ Rational neo-institutionalism in the study of the EU offers a strong critique of the theoretical foundations of Morvavcsik's approach. This research focuses on the everyday politics of the EU and the ways in which the institutional rules structure decision-making in EU (Tsebelis and Garrett 2000). The authors show that the European Parliament's role in EU legislative matters has strengthened considerably through reforms enacted by the Maastricht and Amsterdam Treaties. These conclusions do not, however, challenge my argument. Tsebelis and Garrett argue that political integration will proceed as long as MEPs continue to support integration, while ignoring the demands of the European citizenry. If true, and given that the content of "integrationist" legislation is most often "market-making," there is little reason to suggest that increased powers for the EP and weakened powers for the member states will lead to increased positive integration. Furthermore, since there is such a strong status-quo bias in the EU given its constrictive and complex decision-making rules, there is little to suggest that the legislation that is produced at the EU level would roll back economic or negative integration.

at the expense of national sovereignty.¹¹⁴ Therefore, a new dimension of political space has emerged that structures the preferences of European citizens and political parties that is independent from the Left-Right spectrum at the domestic level.¹¹⁵ Assuming that the European Union and issues surrounding it are salient in national politics, then the likelihood that EU member states not only violate supranational law more often, but also comply only when the ECJ issues a ruling, should increase as opposition to European integration increases.

Support for the EU is measured as the net approval of the EU by individuals in the member states from 1972 to 2002.¹¹⁶ Including individual attitudes towards the EU raises the issue of relevancy with respect to the problem of compliance. A better measure of how EU attitudes affect compliance would include the preferences of those political parties in government. Since extensive cross-national and cross-temporal data is not yet available, however, Eurobarometer responses serve as the best source of cross-national and cross-temporal domestic attitudes towards the EU.¹¹⁷ Citizens' attitudes also help us test the extent to which supranational legislation, and governmental behavior in reaction to it, fails to track with public opinion towards the EU. In addition, testing the relationship between citizens' attitudes and compliance patterns must not imply a direct causal connection. Instead, my purpose here is to test how public attitudes towards the EU are associated with compliance outcomes and

¹¹⁴ In particular, opposition to EU law may result from what scholars and activists suggest is the existence of a democratic deficit in the EU (Scharpf 1999).

¹¹⁵ For a complete survey of research on general European public opinion and political parties' attitudes towards the EU, see Marks and Steenbergen (2004).

¹¹⁶ The specific question asked by the Eurobarometer is: "Generally speaking, do you think (your country's) membership is a good thing, a bad thing, or neither good or bad?" Net approval is constructed as the percentage of people in each member state that view EU membership as a good thing minus those who choose a "bad thing." Most of the data was kindly provided by Richard C. Eichenberg and updated to include Luxembourg.

¹¹⁷ Most surveys of political parties' attitudes to the EU are based on the Leonard survey (Ray 1999), updated by Marks and Steenbergen (1999), but it is limited to quadrennial intervals and does not code for whether a particular party is in government.

whether institutional factors at the state level either ignore or overcome those attitudes.¹¹⁸

An alternative method that can be used to measure the degree to which EU institutions are engaged in a neoliberal project and targeting national regulations is to calculate a country's gross domestic product per capita. According to Moravcsik, as nations become richer, they demand and can tolerate more controls on economic activity (Moravcsik 1998). If so, then the regression coefficient should be positively correlated with both the number of infringements committed and the likelihood of settlement by the ECJ.

Utilizing GDP per capita also allows the researcher to capture the degree to which national administrations have the resources and capacity to meet the EU's legal demands. To some extent, reconfiguring national regulations requires both expertise and training in EU law. In addition, some of the regulations the Council of Ministers passes with the consent of the EP may be forms of positive integration and represent new regulatory standards and specification that even poor member states such as Greece and Portugal must meet. Although the vast majority of violations of the EC Treaty are problems of commission and not omission, measuring a country's wealth serves to indicate how capably a state can respond to supranational legal demands. The regression coefficient, in this case, would be negatively correlated with the number of violations a state commits and the probability of being settled by the ECJ.

Measuring Parliamentary Accountability

The parliamentary accountability hypothesis is composed of two factors: the extent to which the national executive dominates the legislative agenda and the role of

¹¹⁸ If a robust relationship is determined to exist, then further research must determine the mechanisms that connect or disconnect the impact of public attitudes towards the EU and governmental behavior regarding compliance with EU law.

parliamentary committees. A variety of measures of executive dominance exist in the comparative institutional literature. For example, Arend Lijphart measures executive dominance in terms of relative cabinet stability (Lijphart 1999), but this measure fails to capture exactly how and why the national executive dominates the legislature. Herbert Döring, in an exhaustive analysis, created an index of executive power based on the government's ability to guide a bill through the legislative process without influence from parliamentary committees or the opposition (Döring 1995). This is known as an executive's "agenda-setting" power. The legislative process is, however, only one setting in which the executive exercises her dominance over the legislature. Other factors include the executive's relative power in general and the strength of individual members of parliament (King 1994). Alan Siaroff moves beyond previous measures by assembling each of these factors into a single index of executive dominance of the legislature (Siaroff 2003).¹¹⁹ The degree to which the parliament can monitor the executive is measured by both of these indicators.

Finally, the ability of the national executive to change the status quo can be a product of both the institutional mechanisms available to pass legislation through parliament and the degree to which there is partisan opposition to that change. Other scholars have already shown that domestic reforms and the overcoming of domestic veto players is only accomplished by blaming supranational institutions and a state's legal obligations (Radaelli 2000; Schmidt 2002; Stiller 2006). Therefore, as the number of veto players at the national level rises, the ability to transform the national

¹¹⁹ Through factor analysis, Siaroff (2003) determines which variables that constitute the legislative-executive relationship most often group together. His findings suggest that the following variables are most strongly associated with qualities describing the nature of the executive-legislature relationship: government control of the plenary agenda, restrictions on the introduction of private members' bills, when the plenary first determines the principles of a bill, the ability of committees to rewrite legislation, the influence of committee members on party positions, whether passing money bills are the prerogative of government, curtailing of debate before the final vote of a parliamentary bureau or presidium, the recognized leader of the opposition, a single-member electoral system and, finally, the power of the prime minister.

status quo adequately within the timeframe the Commission demands should decrease. Not only should more violations occur as the number of veto players increases, but the probability that the ECJ is required to issue a definitive ruling and thereby put pressure on states to comply should also increase. Veto players are measured by Walter Heinsz's index of political constraints (Heinsz 2000). The index is constructed by the number of independent branches of government, both upper and lower chambers, with veto power over changes to the legislative status quo and the degree to which the preferences of these institutions diverge or coalesce along a uni-dimensional partisan space, namely how far the actors are away from each other on the Left-Right political spectrum. The results are then modified by the extent to which these partisan preferences are homogeneous across the independent branches of government. As heterogeneity within the legislative branches increases, the costs of decision-making increase. This measure of veto players is consistent with the more common measure of veto players used by George Tsebelis, but is far more accurate and encompassing (Tsebelis 1995; Tsebelis 1999; Tsebelis 2002).

As controls for any possible bias in the number of infringements each member state commits, I include the relative power of a member state at the EU level and the number of Article 234 References. The relative strength of a member state to shape the rules is measured as a function of the number of votes a state possesses in the Council of Ministers as it stood before the most recent expansion. Some important caveats about the nature of these variables and their measurement are worth mentioning. First, the scores for regulatory quality are available only for biennial periods starting in 1996, 1998, 2000 and 2002. In order to make use of as much data as possible, the average scores for this variable were calculated and then assigned to previous years in the sample. While this is a slightly questionable technique, there are several good reasons that this is acceptable here. There is not a great deal of variation over time

among these countries. Therefore, there is little reason to expect that a state's relative ranking among other EU member states would change significantly over time. If there are any significant changes over time, one can assume that a country's scores related to government effectiveness have only improved over time. Therefore, any bias produced as a result would work against my hypothesis.

Dependent Variables

Based on the Annual Reports on Monitoring the Application of Community Law, each infringement of the ECT and its associated regulations was coded by the year it occurred and tracked according to the stage at which the infringement was settled. The first dependent variable counts the number of infringements that occurred in 15 EU member states from 1974 to 2001.¹²⁰ The second model then assesses the probability that an infringement will be settled at each formal stage of the compliance process. The process begins at the Reasoned Opinion stage. Then, the Commission can threaten to refer the case to the European Court of Justice if the member state does not respond or disagrees with the Commission's conclusions. Finally, the case will reach the European Court of Justice, which has ruled in favor of the Commission in approximately 99% of cases related to the EC Treaty that have reached this level.

Whether or not an infringement occurred can be determined only if it was reported in the Annual Reports of the European Commission, which was at the reasoned opinion stage.¹²¹ The reasoned opinion stage is the first step in the formal

¹²⁰ Each infringement was coded according to the year in which the Commission began infringement proceedings and not the year at which it was settled. Although the data collected stretches to 2002, so few infringements occurred in that year that it was necessary to drop that year from the data.

¹²¹ This is the case for almost all infringements. There are situations, especially early in the reporting process, when the Commission identified some infringements and sent only a letter of formal notice or when the reports state that an infringement was dismissed without determining at which stage the infringement was settled. Recording an infringement at the Reasoned Opinion stage is the only consistently reliable method for use in counting the number of infringements over the time period covered here.

compliance process. There may be many infringements that were settled through informal discussions or at the Formal Letter of Notification stage without being reported. Yet, there is no reason to suspect there is any national bias as a result.

An infringement also cannot be coded as to how it was detected, whether by an individual lodging a complaint or the Commission initiating its own investigation. However, the Commission relies to a great extent on individual complaints to detect infringements. Therefore, to determine if there is a reporting bias, the number of preliminary references referred to the ECJ under Article 234 ECT per country per year is included in both the count and probability models. If Stone Sweet and others are correct, Article 234 references serve as the best proxy for the role individual actors play in detecting national legal infringements. Summary statistics for the independent and dependent variables are presented in table 4.2 and are broken down by country in tables 4.3 and 4.4.

IV. Data Analysis and Results

A negative binomial count regression model was used to estimate the relative effect parliamentary institutions and executive agenda setting power have on the number of infringements.¹²² The unit of analysis is per country-year.¹²³ Table 4.5 displays the statistical results.

As expected, as regulatory quality improved, the number of violations decreases. Figure 4.6 shows the strong linear relationship between regulatory quality

¹²² I selected a count model because the dependent variable is heavily skewed to the left with frequent values of zero and small, discrete values. A negative binomial regression model, instead of Poisson regression, was used to estimate this count data because the likelihood ratio test on each of the models showed that we could reject the hypothesis that there was no overdispersion in the data.

¹²³ Due the high number of country-specific and constant regressors, the model does not include fixed effects. Rather, random effects were included in the model. Also, auto-correlation is not expected to be a problem given that the decision of the Commission to pursue infringements in one year is independent of the number of infringements a state commits the year before. Nevertheless, inclusion of a lagged, dependent variable did not significantly affect the results.

and the average number of infringements committed per year by fifteen EU member states. Holding all other variables at their mean, the expected number of infringements is 2.93 per year at an average level of regulatory quality of 1.344.¹²⁴ Increasing regulatory quality to its maximum of 1.9075, the level for the United Kingdom, decreases the expected number of infringements of EU law to 1.86, or approximately 36%. The expected number of violations for the country with lowest regulatory quality, Italy, is 4.37, which is an increase of almost 50%. Although the absolute differences in regulatory quality are small among these relatively rich, developed European states, it has both a statistically and substantially significant effect on the number of violations of EU law committed. In fact, if the United

¹²⁴ The expected number of infringements is based on over 1,000 simulated parameters using Clarify 2.0 software (King, Tomz, and Wittenberg 2000; Tomz, Wittenberg, and King 2001). The expected number of infringements excludes “fundamental” uncertainty that arises from randomness in the world. Instead, expected values “average away” fundamental uncertainty and include estimation uncertainty and reducing the total amount of uncertainty.

TABLE 4.2. Summary Statistics of Independent and Dependent Variables

	<u>Codification Parliamentary Accountability</u>			<u>Politics of Self Interest</u>					
Ind. Var.	<u>Ave. Reg. Quality</u>	<u>Agenda Control</u>	<u>Executive Control</u>	Veto Players	GDP per capita	Cab. Ideo. Center of Gravity	Article 234 Ref.	Votes	Total EU Trade (%GDP)
Mean	1.3441	.02467	9.3591	-	+	+/-	-	6.18	28.5
S.D.	0.2943	.3256	5.588					3.05	20.6
Min	0.8550	-.527	3		1164	-28.64	0	2	2.90
Max	1.9075	.6900	22	.7181	47129	30.468	67	10	114
Predic.	-	-	-	+	+				
Dep. Var.	Treaty Violations	Court Decisions	Court Referrals						
Mean	3.511	0.8090	.9870						
S.D.	4.358	1.3830	1.412						
Min	0	0	0						
Max	23	9	8						

TABLE 4.3. Summary Statistics of Independent Variables by Member State

MS	Ave. Reg. Quality	Agenda Control	Exec. Control	GDP per Capita	Veto Players	Cabinet Ideo. Center of Gravity	Net EU Approval	Article 234 Ref.	Votes	Total EU Trade (% GDP)
ÖS	1.411	-.044	6	25960	.429	-1.030	13.31	11.75	4	27.5
DE	1.358	-.126	8	16006	.411	2.6717	47.13	37.33	10	19.0
DK	1.473	-.106	7	19748	.537	2.3570	19.07	2.88	3	25.0
SW	1.357	-.427	4	27742	.481	-7.0010	-2.313	5.50	4	22.0
FI	1.618	-.148	3	24472	.539	-15.235	18.12	2.50	3	17.3
NE	1.688	-.527	3	15720	.495	-9.3330	72.45	16.30	5	46.7
BE	1.079	-.17	6	15262	.660	-1.7880	54.03	14.22	5	67.5
LX	1.552	-.053	9	24058	.498	-18.132	72.24	1.30	2	47.9
FR	0.9905	.333	14.9	15789	.408	-3.2117	48.35	20.89	10	16.8
IT	0.8550	-.219	4	12542	.498	1.3311	66.53	18.81	10	13.2
HE	0.8764	.28	14.5	6810	.362	-3.752	46.46	2.83	5	15.1
PO	1.2299	.147	9	5880	.414	4.5657	45.93	2.00	5	28.5
ES	1.2226	.221	12	8785	.457	-10.320	50.37	8.54	8	12.9
IR	1.5424	.519	18	11643	.431	-6.317	52.60	1.31	3	51.7
UK	1.9080	.69	22	13431	.361	13.457	9.433	9.73	10	16.7

TABLE 4.4: Summary Statistics of Dependent Variables by Member State

Member State		No. of ECT Violations	Opinion	Referral	Court
Austria	Mean	3.125	1.875	1	.125
	Min	0	0	0	0
	Max	7	4	3	1
Germany	Mean	3.871	2.607	1.037	.6
	Min	0	0	0	0
	Max	10	9	4	3
Denmark	Mean	1.033	.5926	.3103	.1333
	Min	0	0	0	0
	Max	4	4	2	1
Sweden	Mean	.5	.0875	.125	0
	Min	0	0	0	0
	Max	2	2	1	0
Finland	Mean	.5	.25	.25	0
	Min	0	0	0	0
	Max	2	1	2	0
Netherlands	Mean	1.548	.9615	.52	.52
	Min	0	0	0	0
	Max	5	4	3	2
Belgium	Mean	4.8064	2.9231	1.2	1.52
	Min	0	0	0	0
	Max	15	9	4	5
Luxembourg	Mean	1.129	.5	.44	1.52
	Min	0	0	0	0
	Max	6	2	5	5
France	Mean	7.7419	4.8571	2.32	1.1852
	Min	0	0	0	0
	Max	19	15	8	3
Italy	Mean	6.871	3.5	2.28	1.92
	Min	0	0	0	0
	Max	19	15	8	3
Greece	Mean	7.8095	3.95	1.905	1.905
	Min	0	0	0	0
	Max	23	14	5	9
Portugal	Mean	2.2778	1.7059	.5	.25
	Min	0	0	0	0
	Max	6	4	2	1
Spain	Mean	4.1111	3.1176	.875	.4375
	Min	0	0	0	0
	Max	12	10	4	2

TABLE 4.4 (Continued)

Member State	No. of ECT Violations	Opinion	Referral	Court	
Ireland	Mean	1.7333	.9643	.52	.28
	Min	0	0	0	0
	Max	7	4	3	2
United Kingdom	Mean	1.7097	1.0714	.48	.36
	Min	0	0	0	0
	Max	8	5	2	2

TABLE 4.5. Initial Results for the Number of Infringements

	Levels of Codification	Politics of Self-Interest	Parliamentary Accountability	Full Model	Full Model with Article 234 Ref.
Average Regulatory Quality	-0.996**			-0.825**	-0.762**
	[0.236]			[0.202]	[0.211]
GDP per capita		-0.000**		-0.000+	-0.000*
		[0.000]		[0.000]	[0.000]
Cabinet's Ideo. Center of Gravity		0.000			
		[0.003]			
EU Trade (% GDP)		-0.033		0.383	0.367
		[0.508]		[0.317]	[0.353]
Net % Believe EU Membership Good		0.003		0.001	0.000
		[0.003]		[0.002]	[0.003]
Votes in Council		0.092**		0.078**	0.077**
		[0.034]		[0.020]	[0.026]
Agenda Control			0.380		
			[1.085]		
Executive's Control of Legislature			-0.023		
			[0.062]		
Veto Players			-1.256+	-0.103	0.121
			[0.720]	[0.519]	[0.556]
Article 234 References					0.003
					[0.004]
Constant	1.503**	-0.811*	1.440+	0.757	0.370
	[0.386]	[0.384]	[0.848]	[0.524]	[0.547]
# of Violations (lagged one year)	0.085**	0.077**	0.078**	0.077**	0.076**
	[0.009]	[0.010]	[0.011]	[0.009]	[0.009]
Time	0.013*	0.061**	0.017*	0.030**	0.047**
	[0.006]	[0.013]	[0.007]	[0.009]	[0.011]
Observations	312	267	312	297	267
Log-Likelihood	-676.61	-574.60	-678.99	-639.10	576.37
Wald X ²	150.91	130.52	97.23	324.97	298.02
Standard errors in brackets;					
+ significant at 10%; * significant at 5%; ** significant at 1%					

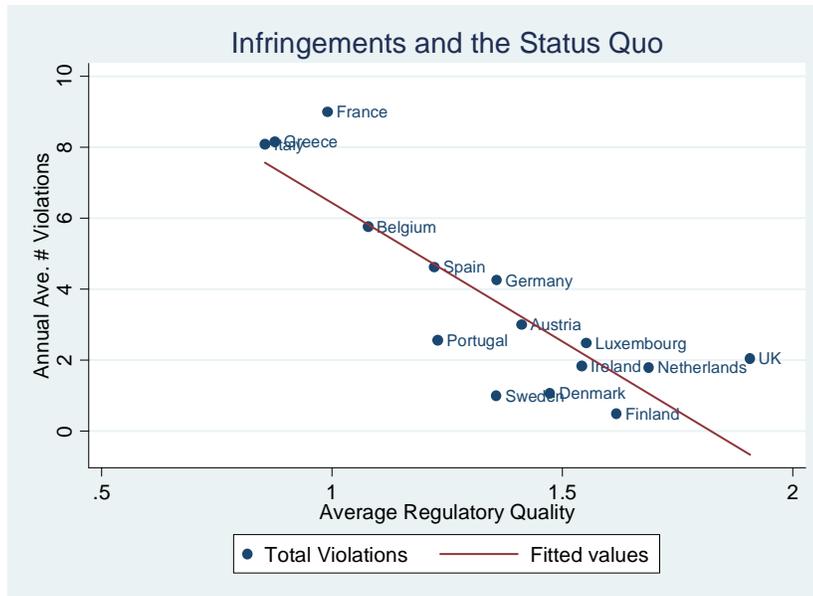


FIGURE 4.6 Infringements and the Status Quo

Kingdom’s regulatory quality is reduced from its high of 1.9075 to that of the lowest held by Italy, holding all other values at the mean for the United Kingdom, the number of infringements expected to be committed is 4.8 rather than 2.02 per year, or an increase of 137%. Similarly, if Italy changed only its regulatory quality, or the degree to which the national economy is regulated and codified, the expected number of infringements decreases from an expected number of almost 8 per year to 3.5, or 56%, keeping all other values at their mean for Italy. As a final example, consider that, when the regulatory quality of Germany, whose score of 1.3575 lies near our overall mean, is increased to that held by the UK, the expected number of infringements committed decreases from 3.7 to 2.37, or approximately 36%. If Germany’s regulatory quality was to decrease as much as Italy’s, the expected number of infringements

would increase to 5.6 per year, again holding all other values for Germany during this period.

While average regulatory quality performs strongly in the model, the number of votes a member state has in the Council of Ministers and its GDP per capita also affect the number of infringements committed per year. Increasing member states' voting power actually increases the expected number of infringements committed. This result contradicts the hypothesis put forward by Moravcsik and others that the laws and regulations devised at the EU level primarily reflect the interests of the largest, most powerful states. In fact, increasing a state's vote in the EU Council from a minimum of 2 to 10, held by the UK, Italy, Germany and France, increased the expected number of violations of EU law by more than 100%, or from 2.0 to 4.2 per year. GDP per capita, a measure of a state's wealth as well as its preference for negative integration, was negatively correlated with the total number of violations states commit. In fact, increasing a member state's GDP per capita from a low of \$2,289, held by Portugal in 1984, to that of Luxembourg's in 1999, or almost \$46,000, the expected number of infringements committed declines from 4.3 violations expected each year to only 1.25, or a decrease of 70%.

Yet, under close examination, there are reasons to be skeptical that GDP per capita explains the cross-national variation in infringements committed as suggested by the statistical model. Figure 4.7 shows a scatter plot of the average GDP per capita of a member state against the average number of violations those states have committed between 1975 and 2002. While a line can be easily fitted to the overall distribution, one can observe a clear funnel shape, in which the variance decreases substantially as GDP per capita increases. States such as Italy and Greece pull the line upwards and to the right, but Spain, Portugal, and Ireland pull the line downwards and to the left, and all of these states are very far away from the predicted values.

Therefore, some caution is advised when claiming that GDP per capita either increases or decreases the total number of infringements.

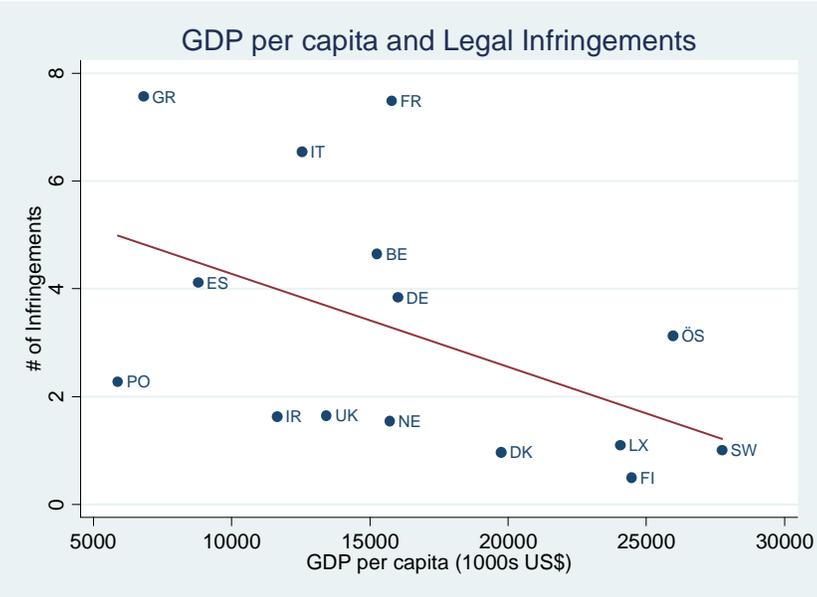


FIGURE 4.7 GDP Per Capita and Legal Infringements

The model proves to be relatively robust. As shown in figure 4.8, there is a relatively good fit between the predicted number of violations of EU law generated by the full model and the observed number of violations, holding values at their mean.¹²⁵ The results presented in table 5 above also show that levels of codification alone can explain the variation observed across countries and time. Neither the parliamentary accountability nor the politics-of-self-interest models performed any better, although the number of veto players was statistically significant in the parliamentary accountability model alone. It was not significant when placed in the full model that

¹²⁵ Because fixed effects cannot be introduced into the model, each country was removed from the model individually to determine if any country was heavily influencing the results. Excluding Italy or Greece affected the ability of the full model to converge, but provided similar results when the control variables of past violations and time were dropped from the model.

included other variables that affected both the dependent variable and each other. Including the number of Article 234 references as a possible control for any possible national bias in terms of which cases the

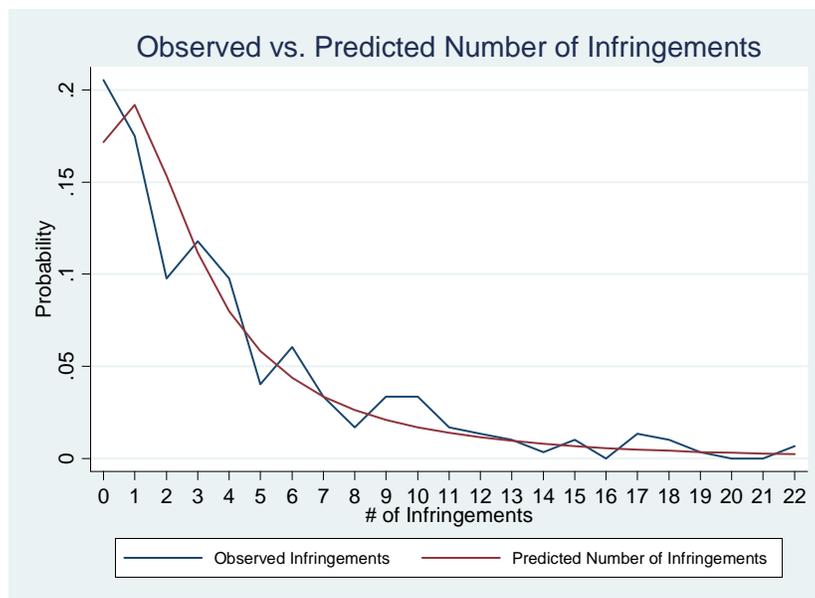


FIGURE 4.8 Observed vs. Predicted Number of Infringements

Commission decides to pursue did not affect the robustness of the statistical results. One final control, time, is included to determine whether the number of infringements increases or decreases over time. When considering just the number of infringements

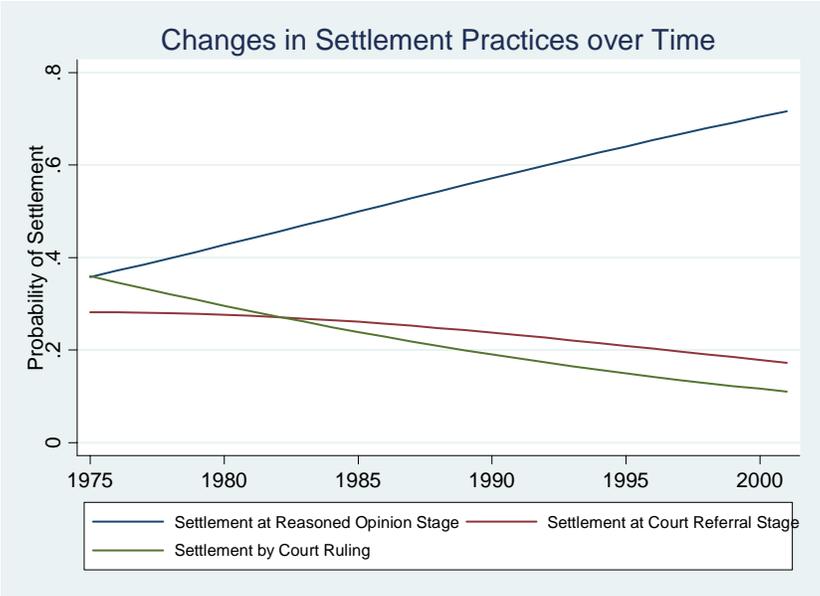


FIGURE 4.9 Predicted Probabilities of Infringements

TABLE 4.6. Results for the Probability of Early Settlement

	Levels of Codification	Politics of Self-Interest	Parliamentary Accountability	Full Model
Regulations of Market Exchange	-0.499+			-0.644*
	[0.256]			[0.287]
GDP per capita		0.000		0.000+
		[0.000]		[0.000]
Cabinet's Ideo. Center of Gravity		0.006		
		[0.004]		
EU Trade (% GDP)		0.283		-0.095
		[0.492]		[0.492]
Net % Believe EU Membership Good		0.004		
		[0.003]		
Votes in Council		-0.046		-0.059
		[0.038]		[0.037]
Veto Players			0.173	0.261
			[0.630]	[0.698]
Executive's Control of Legislature			0.042	
			[0.039]	
Agenda Control			-1.286+	
			[0.701]	
# of Violations (lagged one year)	-0.018	0.018	0.001	-0.010
	[0.013]	[0.013]	[0.011]	[0.013]
Time	-0.038**	-0.058**	-0.036**	-0.057**
	[0.011]	[0.018]	[0.011]	[0.018]
Art234Ref	-0.005	-0.007	-0.006+	-0.002
	[0.004]	[0.006]	[0.004]	[0.005]
Observations	1090	1024	1088	1088
Wald X ²	17.15	24.50	18.75	21.74
Log pseudo-likelihood	-1073.68	-1003.71	-1069.28	-1067.78
Standard errors in brackets; + significant at 10%; * significant at 5%; ** significant at 1%				

states commit each year, it is statistically significant and positively correlated with the dependent variable. As time goes by, states are committing more infringements. However, the role of time proves to be quite different when examining the second model, the stage at which infringements are settled.

The Politics of Settlement

Using ordered logistical analysis, each violation of EU was coded according to the stage at which it was settled. The results are presented in table 4.6. Each model, again, was tested individually. Once again, the best performing model includes variables from each perspective. However, average regulatory quality proved to be statistically significant, decreasing the likelihood that an infringement of EU law would be settled by the ECJ when alone in the model. None of the variables included in the politics-of-self-interest model proved significant. Only the executive's ability to control the legislative agenda proved significant in the parliamentary accountability model, but not in the model used to explain the number of infringements states commit. When using all variables involved in explaining the cross-time, cross-national variation, average regulatory quality proved statistically significant (see figure 4.9). As levels of codification decreased, the likelihood of settlement at the ECJ level decreased. The effects of a state's regulatory quality, once again, proved to be substantial and significant as well. As expected, the probability that a violation will be settled at each subsequent stage in the compliance process decreases from a high of 56% at the Reasoned Opinion stage to approximately 20% at the stage at which the Court must issue a ruling, holding all values at their mean.

This clearly shows that states, in general, will attempt to come to agreement with the Commission over the nature of a violation of EU law and its remedy before the case reaches the ECJ. From the highest level of regulatory quality in the UK to that

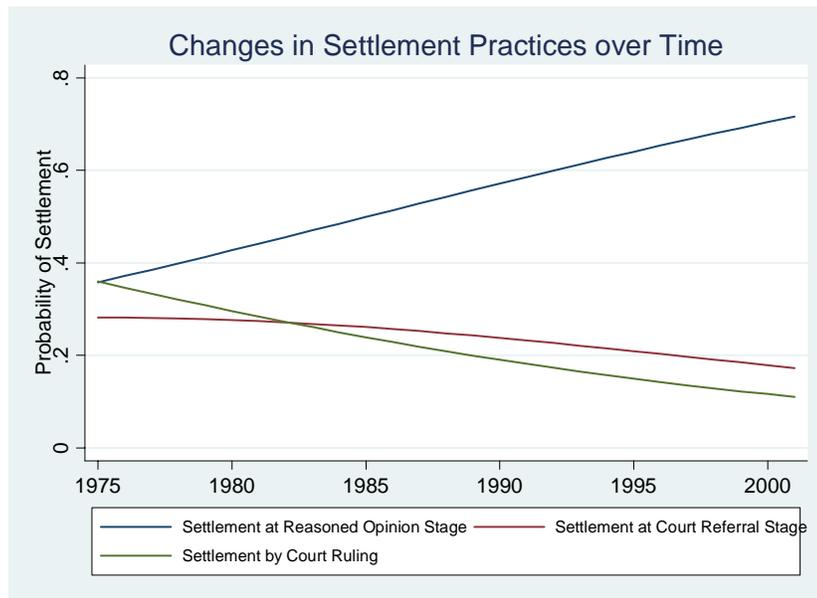


FIGURE 4.10 Changes in Settlement Practice Over Time

of Italy, the probability that the Court is required to issue a ruling in the matter decreases from 23% to approximately 13%.

GDP per capita also proved significant, but in the opposite direction from the count analysis presented above. In this case, wealth is associated with a greater likelihood that a member state will refuse to settle its infringement of EU law. Yet GDP per capita proved not to have a substantially significant effect on the probability that the ECJ was required to rule on a legal dispute between a member state and the Commission. Time had the opposite effect on settlement practice than it did on the total number of infringements committed. In this case, as the number of years went by, the probability of the ECJ's issuing a ruling decreased from 36% in 1975, when data

first became available, to 13% in 2001. As figure 4.10 shows, there was an equal chance that a violation of EU law would be settled at the Reasoned Opinion stage as by the European Court of Justice in 1975, but these probabilities have diverged since then. These results suggest the possibility that EU member states learn over time how to adjust to the status quo when there are conflicts between EU and national law. Because regulatory quality is, however, time invariant in the models here, it is not known whether the EU member states are actually making changes to the legislative status and rescinding laws that discriminate against goods and services entering from other EU member states.

There is however further evidence that states are “learning” how to comply with and internalizing EU law. When the data is truncated to the period before 1990, the number of veto players is the sole determinant of the probability that a violation will be settled at each subsequent stage of the compliance process. All other variables, including regulatory quality, decline in statistical significance. In the years before 1990, the probability that an infringement would escalate to the EU level is as high as 33% when the number of veto players is at its highest, to a low of approximately 20% when veto players are at their lowest. Conversely, the likelihood that an infringement will not advance past the Reasoned Opinion stage increases from 41% to 60% when moving from the maximum to the minimum number of veto players. However, the veto players variable disappears completely when considering the period after 1990, and a country’s regulatory quality returns as the primary explanatory factor for determining the stage at which an infringement will be settled. These results imply that, in general, the average level of regulatory quality explains why states cannot settle their infringements of EU law. But, at least before 1990, the primary reason that states cannot change these laws in time and avoid an ECJ ruling is related to the amount of opposition that must be overcome domestically in order to change the status

quo. Figure 4.11 shows how the probability of a violation of EU law is settled early in the EU legal process will decrease as the number of veto players increases. At the same time, the probability that a violation escalates across the stages of compliance increases as the number of players increases.

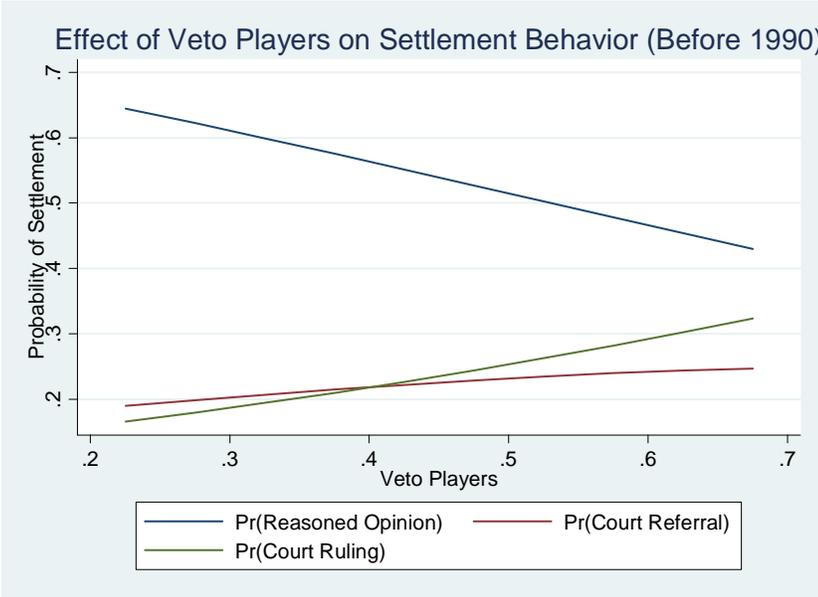


FIGURE 4.11 Effect of Veto Players on Settlement Behavior (Before 1990)

Before 1990, the countries that routinely produced the highest number of veto players included Denmark, the Netherlands, Belgium, Luxembourg, France and Italy. Throughout the 1980s, each of these countries had more than the mean number of veto players. Since Denmark, the Netherlands, and Luxembourg rank so low on the total number of infringements they commit, let us focus instead on the major culprits in non-compliance.¹²⁶ Even in the case of many veto players, there is some evidence that

¹²⁶ Nevertheless, that such a large percentage of infringements that these countries, especially Luxembourg, commit must be settled by the ECJ may be due as much to the number of veto players at

learning is taking place and EU law is becoming internalized into the national status quo. For example, consider the settlement behavior of Belgium, France, and Italy when the number of veto players at the domestic level is greater than the mean for all member states. Before 1990, approximately 35% and 31% of all infractions of EU law were settled by the ECJ when they were committed by Belgium and Italy, respectively. For France, the percentage is somewhat lower, 16%. After 1990, the percentage of infringements settled by the ECJ declines to 20% in Belgium and 11% in Italy, even though they continue to have more than the average number of veto players. In France, the percentage actually increases, but this may be a result of the fact that it is also committing fewer total infractions of EU law. These declines in the percentages of infractions settled by the ECJ are not explained by declining numbers of veto players over the years. Between 1975 and 1990, Italy and Belgium had 14 and 15 years, respectively, with more veto players than the EU-15 average. After 1990, they each had 12 and 10 years of governments with more than the EU-15 average number of veto players, respectively.

Greece is the strange exception to the observation that the number of veto players affects the probability of settlement and has a decreasing effect over time. Before 1990, 25% of all infringements required a final ruling by the ECJ; this figure dropped to 22% after 1990, even though Greece always had fewer veto players than the EU average across the entire time period. In the case of Greece, overall the poorest member state in the sample, relative wealth may explain its inability to learn and change national law. Greece also has, however, the second-lowest level of regulatory quality. The answer to this puzzle will not be known until the model can track actual changes in regulatory quality over time.

the domestic level as to the fact that their high settlement percentages are a function of their committing few infractions of EU law.

Learning and integrating EU law into the status quo is not the only theoretical possibility. Led by the larger member states, positive integration, or re-regulation of the economy at the EU level, may also have occurred, protecting various elements of the national regulatory structure from the Commission's prosecutorial reach. The European Commission's decision in 1985 to achieve the goals of the single market through the use of directives rather than through enforcement by the EC Treaty alone may also explain the relative decline in the number of infringements and the changes in the statistical model. The use of EU directives awards the member states a greater degree of flexibility to achieve EU policy goals by allowing them to use regulatory tools and methods unique to national practices.

Finally, the quantitative analysis tells us little as to what exactly explains an infraction of EU law. It cannot tell us what arguments national governments are using to oppose changes to the status quo, nor what opposition they confront even if they wished to do so. The analysis presented does, however, help adjudicate between these three perspectives and guide us as to where one should be using and applying qualitative methods to determine the answers to these questions.

V. Conclusion

The goal of this chapter is to demonstrate the reasons for which states struggle when deliberating across national borders and whether those reasons are related to why they infringe on the EC Treaty. A country's regulatory quality serves as a reliable indicator of the degree to which the national economy is commodified by state laws. As this quantity increases, levels of codification decrease, the number of infringements committed decrease, and the probability that an infringement will escalate to the bench of the ECJ decreases.

Still, the quantitative analysis of non-compliance has several theoretical shortcomings that need to be addressed. First, the evidence cannot show that states have actually changed their behavior as a result of the imposition of court settlements. While the ECJ has ruled in favor of the Commission in a vast majority of Article 226 cases referred to it, this does not demonstrate that states have actually changed the legal status quo as a result of ECJ rulings. Second, the transnational legal process argues that interpretations of international law are internalized after repeated forms of transnational interaction. Through internalization, state preferences, at the very least, or the identities of state actors (intersubjectively understood) at most, are transformed such that compliance is permanently secured. The application of quantitative analysis here cannot demonstrate the transformation of preferences. Since our central independent variables of interest never change but yet rates of non-compliance have decreased substantially, it remains to explain why these 15 EU member states no longer violate the EC Treaty.

Finally, average regulatory quality tells us little about the precise nature of the conflict between national and EU law in terms of the creation of the single internal market. Therefore, in order to demonstrate the causal mechanisms at work and to address alternative explanations for both the origin of and the decline in the number of infringements, I turn next to the comparative qualitative analysis of these infringements in two member states of the European Union.

CHAPTER 5
COMPLIANCE WITH THE FREE MOVEMENT
OF GOODS IN GERMANY

I. Introduction

Compliance with law beyond the nation state admits of a procedural dimension as well as a substantive dimension. Throughout the compliance enforcement process, national governments and the European commission deliberate with each other over the meaning of the law, its application to particular cases, and what the proper remedy is. The primary reason for an infringement is misfit between the legal norms at the domestic level and the legal reasoning employed by the Commission. In the case of Germany, the norms associated with a Roman legal heritage, that is, with minimum levels of codification backed by basic regulatory principles, non-compliance would occur only if those basic principles were challenged. Even though there are some elements of parliamentary scrutiny of the national executive and often a divided federal government, the primary reason Germany could not settle some disputes in the area of the free movement of goods was the conflict between these principles codified at the national level and the Commission's efforts to remove or supersede them.

This chapter discusses the process of complying with European Union (EU) law in one of the fundamental areas of the single internal market: the free movement of goods. Since the EU's inception, the ability of manufactured items and commodities to move freely across member states' borders constituted a central component in establishing a free market. In order to establish this single market, there were a series of clashes between national modes of regulating these markets and the Commission's attempt to enforce the Treaty Establishing the European Community or

TABLE 5.1 Distribution of Violations for EU and Germany

	Total # Violations	Total # Court Rulings	Percent of Total Violations
EU-15	1,210	233	19.5%
Internal Market	450	79	17.5%
(Percent of EU-15 Total)	(37.2%)	(33.9%)	
Free Movement of Goods (FMG)	294	45	15.3%
(Percent of Internal Market)	(65.3%)	(57.0%)	
(Percent of EU-15 Total)	(24.3%)	(19.3%)	
Germany	124	19	15.3%
(Percent of EU-15 Total)	(10.2%)	(8.1%)	
D-Internal Market	56	8	14.3%
(Percent of German Total)	(45.2%)	(42.1%)	
(Percent of Internal Market)	(12.4%)	(10.1%)	
D-FMG	41	8	19.5%
(Percent of German Total)	(33.1%)	(42.1%)	
(Percent of FMG Total)	(13.9%)	(17.8%)	

Treaty of Rome (EC Treaty). This chapter explores the origins of these violations and considers how national authorities attempt to balance their legal obligations to the European Union while remaining democratically accountable to their national legislators and, thereby, their national constituents.

The two-level game of settling violations of EU law can best be explained by examining the politics of compliance as they occur between the Federal Republic of Germany and the Commission. The German legislative process relies on several formal as well as informal mechanisms of consultation in order to generate consensus over legislative change. In comparison with the British government, the German government does not possess a high degree of executive autonomy. The national executive is constantly monitored through both ex ante and ex post mechanisms of monitoring and accountability to ensure that the legislative agenda pursued follows the

demands of the elected majority. In addition, several legislative mechanisms have been expanded and re-enforced in Germany, as the Bundestag and Bundesrat attempt to adjust to increasing EU legislative and legal demands, adding several additional levels of executive monitoring as a result. It remains therefore quite surprising that only 15.3% of its violations are settled by the European Court of Justice, slightly below the EU-15 average of 19.3% (see table 5.1). In fact, the percentage of German infringements settled by the ECJ is slightly lower than in the case of the UK, even though the UK traditionally has had a more contentious relationship with EU authority and its supranational institutions.

An equal percentage of violations from Germany and the United Kingdom are settled by the ECJ because of their specific legal traditions and levels of codification. As in the UK, the German legal tradition, based on Roman and canon law, outlines only the basic principles of the way in which economic actors are to conduct their activities in the national market. In general, and compared with the way this is done in the United Kingdom, the German state does not predetermine the content and nature of every specific object or service that is bought and sold. When it does, however, these cases will be most difficult to settle as compared with cases in other EU member states with highly codified legal systems. Only when these principles are challenged will infringements escalate to the ECJ ruling stage. In contrast to the UK tradition, German principles are located in the legislative code, not in common law. Even so, the changes in question do not usually require the approval of parliament or agreement among various veto players. Rather, the national bureaucracy must be persuaded by an interpretation of the law by the European Court of Justice.

These results are also puzzling given Germany's unique regulatory traditions. German regulation relies quite heavily on preventive rules and legal procedures to safeguard the health and well-being of the German public. This is in marked contrast

to the decentralized forms of enforcement and reliance on market actors dominant in other countries, such as in the United Kingdom. The German regulatory state emerges from the ideological tradition of the “social market economy,” in which the free market is embedded within a set of social principles that guide its actions. While particular results are neither sought nor determined, market exchange can occur only within a set of predetermined boundaries in order to guarantee both the efficiency of the market and social stability. One of the primary objectives of the state is to set these boundaries while not participating in market exchange itself. Since the European Union now often determines these boundaries legally, it is not surprising that German regulations often come into conflict with EU law. What is surprising is the relative ease with which some of these rules have been transformed without the consent of the governed in Germany.

The seven violations of the EC Treaty that Germany committed through the 1980s and 1990s are traced from start to finish, including one case that is now pending before the ECJ. Using official documents provided by the EU, legislative histories, and interviews with EU and national officials, the process of settling a suspect violation is followed during several important phases of the compliance process. Each of the seven short case studies starts at the point at which non-compliance was detected, showing, where possible, how the detection occurred. The seven cases are a small representative sample of the total number of violations Germany has committed in the area of the free movement of goods, which amounts to close to forty violations. The sample consists of violations of specific treaty articles related to the free movement of goods, namely Articles 28 and 30, with four that were referred to the ECJ for settlement and three that were not.¹²⁷ Neither the degree of domestic

¹²⁷ Although certain sectors of the Germany economy, such as the pharmaceutical and agricultural sectors, were repeatedly targeted by the European Commission for possible infringements, the nature of the product regulation under investigation was unknown until process tracing commenced.

parliamentary scrutiny in the process of compliance nor domestic politics should play a decisive role in determining which cases were settled by the ECJ.

Each case study discusses the nature of the conflict and the national response. If the Commission and the German government could not come to agreement, and the case is referred to the ECJ for settlement, the legal position of each party is outlined and the rationale for the Court's decision then presented. Finally, each case study ends with a description of how and why a violation ended and whether the legislative status quo changed significantly. This chapter concludes with a summary of its initial findings, noting the implications of the findings for understanding the process of compliance.

II. National Legal Traditions and Compliance with the EU

In order initially to chart whether the explanation presented just now has any validity, two large member states, each with vastly different sets of interests, support for the integration process, and legal traditions are considered below. Germany and the United Kingdom provide contrasting portraits of support and interest in the European project. Despite strong support for the integration of Europe and strong interest in an open, barrier-free European market, these considerations do not explain why Germany violates EU law more often than the United Kingdom does. Conversely, despite a largely ambivalent record in support of a supranational European state, pure economic interest cannot explain why the UK demonstrates such a comparatively excellent record of compliance with EU law. Instead, the differences that deserve highlighting and that explain different types of compliance behavior can be traced to their contrasting legal traditions.

The legal and administrative traditions that shape the policymaking process in Germany are well known. First, of primary importance is the role of the Rechtsstaat,

or the notion of a state governed by law. The law in Germany plays a central role in the structuring of institutional arrangements among corporatist actors and the principles that should guide those relationships. As Kenneth Dyson argues, “Law provides the architecture of institutional life. It also provides the language in terms of which policy debate tends to be couched” (Dyson 1992). The Rechtsstaat, for example, serves as the source of independent self-organized corporatist relations throughout the German economy. Whether in the field of industrial relations, finance, or among businesses themselves, almost all sectors of the German economy are dominated by semi-centralized business associations. These organizations exist independently of the state, but are routinely consulted over changes in national regulations, establishing the “corporative market economy” (Abelshauser 1981; Abelshauser 1983).

The Rechtsstaat in Germany does not just produce systems of interlocking political relationships. The importance of the rule of law in the German regulatory system also superimposes the norm of Ordnungspolitik, or the commitment to order, upon market actors. The commitment to order stipulates the need for reliability, predictability, and, above all, the need to protect the general population from the risks generated by market behavior. Ordnungspolitik connotes the set of policies, norms and rules in which market activity is embedded. Rooted in the German legal tradition of Roman law, regulatory norms in Germany limit the types of market products and behavior permitted. The proper role of the bureaucrat is to use the law as the primary means of protecting the general population from products or selling arrangements that may be unhealthy or disruptive of the social order. Economic activity is pursued with considerable freedom, as long as the fundamental principles are not being transgressed.

When market practices and demands conflict with the norms of maintaining social order or public health, the traditional role of the German bureaucrat is borne out. Kenneth Dyson is correct in that German bureaucrats emphasize the development of technical rationality across the economy such that market transactions can take place as efficiently as possible (Dyson 1977). But the regulations that these Beamte help draft and enforce, whether at the federal or, more likely, at the Land level, also stipulate the social values that should be upheld and hold primacy vis-à-vis the market. Bureaucrats regularly use their training in the law to balance the need to have a standardized economy with maintaining social order and preventing harm to the consumer. As a result, a vast majority of German regulations related to product composition and selling arrangements are pre-emptive in nature. Comparatively, German regulation therefore occupies the middle ground in terms of the extent and depth to which it regulates the economy. The German state neither defines nor governs all economic behavior, as the regulatory state does in France, but it also does not leave the development of regulatory standards to the marketplace, as in the United States or the United Kingdom

III. The Two-Level Process of Compliance with EU law in Germany

The process of complying with EU law involves a series of intensive deliberations between national and EU officials. In marked contrast to the legislative process, complying with EU law does not involve making trade offs or providing side-payments, nor can one side use its influence or power against another to secure a better result. Instead, in the debate between a member state and the Commission over a case of non-compliance, only the better “argument” will be able to convince the other either to discontinue the case, change the legislative status quo, or bring the

dispute before the ECJ. This section briefly sketches the process of complying with EU law that must be carried out between EU and German officials.

Infringement findings under EU law can begin through several different processes. They can be initiated through the Commission's own investigations, actions taken by individual citizens, an inquiry from a member of the European Parliament, or at the initiative of other member states.¹²⁸ Most infringements reported to the Commission involve individuals or firms or result from the Commission's own investigations. Member states are extremely reluctant to utilize Article 227 in fear that other states will retaliate with infringements launched against them.¹²⁹ However, the Commission, as the executive body charged with guarding the EC Treaty, has far fewer resources than a nation state for fully enforcing the law. Therefore, the Commission will often rely on private actors, either individuals or firms, to notify them of possible cases. In such cases, we might expect the distribution pattern of infringements to mirror that of Article 234 or the use of the preliminary reference procedure by national courts. At first glance, the national distribution of Article 234 references resembles that of the cross-national distribution of infringements (see figure 5.1). The larger member states, especially Germany, France, and Italy, all commit the highest number of infringements and their national courts actively employ Article 234, as national firms or individuals are supposedly employing EU law to challenge national law. Clifford Carrubba and Lacey Murrah have found empirically that levels of transnational activity, public support and type of national legal culture explain why some countries' courts make use of Article 234 more than others do (Carrubba and

¹²⁸ While members of the European Parliament can request that investigations of possible non-compliance take place, they are excluded from the infringement process and do not affect the Commission's decision to bring a country before the Court.

¹²⁹ Article 227 is most often employed in disputes between France and the United Kingdom, such as in 1979, when France brought actions against the British the government for failing to enforce fishing net size limits (Case 141/78). More recently, Belgium sued Spain for limiting the ability to mark wine as produced in the La Rioja region of Spain (Case 388/95), a case that Belgium eventually lost.

Lacey 2005). The use of Article 234 or EU law in general to challenge the national status quo is also a factor in determining the degree to which national groups are both informed about EU legal developments and can mobilize resources to fight long court battles (Conant 2002).

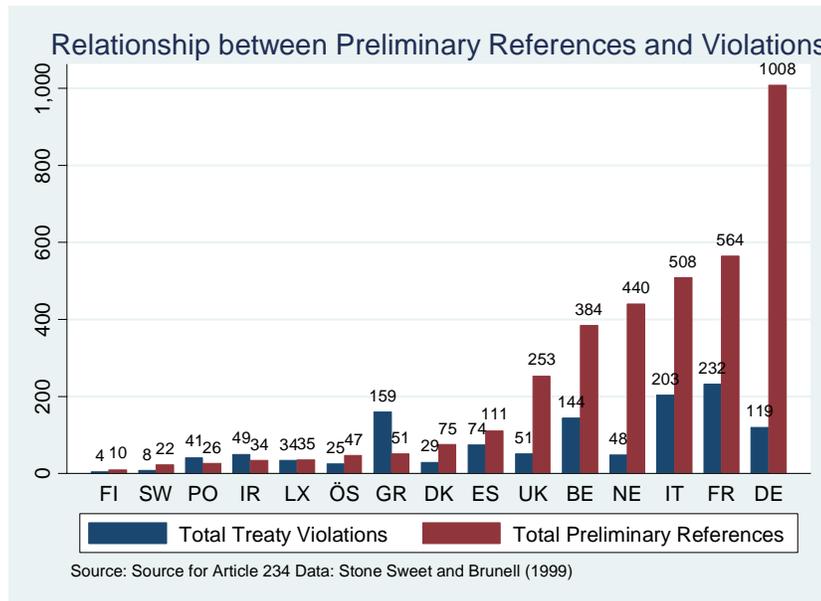


FIGURE 5.1 Relationship Between Preliminary References and Violations

There are, to be sure, several reasons to be skeptical of the claim that the cross-national distribution of infringements is biased in terms of the extent to which interest groups exist or are politically mobilized rather than resulting from state behavior. First, Article 234 is used by national judges when they are uncertain about the implications of EU law for a particular case, but they are not obligated to use it. Second, we know relatively little as to why these questions of EU law are being raised. Are national firms challenging their own governments, other firms, or even other countries in their own national courts? Third, if so, we know relatively little about

what impact a preliminary ruling will have on the national status quo without knowing the context of the ruling and whether national judges chose to apply the decision made by the ECJ regarding the EU legal principle in question. Finally, we also found in chapter 3 that Article 234 references are not positively associated with infringements committed by member states. Therefore, the most accurate source for the cross-national distributions remains the Commission itself.¹³⁰

Aside from our lack of knowledge about the nature of Article 234 References, there are additional reasons to conclude that the cross-national distribution of infringements is not related to any factor other than differences between the national legislative status quo and the demands of EU law. First, given scarce resources, the Commission must determine which cases are worth pursuing according to the impact possible violations have on the complete functioning of the internal market. Only cases that significantly hamper the establishment of a common market are pursued by the Commission. Thus, some sectors of the European economy may receive greater attention than others do, such as automobiles, foodstuffs and construction.¹³¹ In these sectors, the problem most often cited by Commission officials is the absence of any harmonized regulatory standards.¹³²

Second, the Commission and member states understand this process as a legal one and not a political one. Preferring not to confront member states, the Commission works in a deliberative atmosphere with officials from other member states. As one Commission official remarked, “We are there to help the member states, not govern

¹³⁰ The data used in chapter 4 could not be sorted according to their possible source. Therefore, the number of Article 234 References per country per year was inserted as one possible control.

¹³¹ Interview with Commission Official 2 at European Commission Headquarters, November 2004. This is only in the case of infringements related to the EC Treaty and its associated regulations. The Commission actively monitors the transposition of directives, precluding any bias generated by possible political mobilization.

¹³² Interview with Commission Official 4 at European Commission Headquarters, November 2004. While large battles over regulatory standards have taken place early in the history of the free movement of goods, many cases now center on specific technical differences among the member states, in which scientists and other experts are attempting to draft EU-wide legislation to further harmonization.

them.”¹³³ While the relevant Directorate General takes the lead in prosecuting a suspected infringement, the Legal Service of the Commission exists to provide legal analysis and ensure that all procedures are being followed in a neutral manner. For example, the Formal Letter of Notice is used only to gather information from a member state in order to determine if further pursuit of an infringement is necessary. Only if a Directorate General is not satisfied with the national government’s response will every Directorate General inside the Commission then gather together in a meeting, held four times a year, and determine whether sufficient legal justification exists to bring the case before the European Court of Justice.¹³⁴ Finally, only if the member state fails to provide a sufficiently convincing legal argument or scientific evidence to justify a particular claim will the Commission as a whole decide to pursue the case before the European Court of Justice.¹³⁵

The process of dealing with an infringement at the national level in Germany is also one of deliberation, but excludes any member of the Bundestag, Land officials or even individuals from the Chancellor’s office. Once a Directorate General determines that a possible infringement exists, a Formal Letter of Notice is sent to the Permanent Representative of Germany in Brussels, who then forwards the notification to the Federal Ministry for Economics and Technology. Although almost every federal ministry now contains an office to deal with EU affairs, the Economics Ministry contains the Europaabteilung, which not only deals with all matters related to

¹³³ Interview with Commission Official 3 at European Commission Headquarters, November 2004.

¹³⁴ One Commissioner emphasized that if a Commissioner is suspected of defending his or her own member state from prosecution for any reason other than that the state has either chosen to comply or provided adequate legal justification for a particular practice, a Commissioner’s credibility will be called into question and possible penalties may result, such as loss of rank in the bureaucracy. In turn, a Commissioner may also be penalized for pursuing infringements against a particular member state unwontedly or unjustifiably.

¹³⁵ If a member state is suspected of infringing the Treaty, cases will terminate only when convincing scientific evidence is brought forward or convincing legal arguments are made. One Commission official admitted, however, that bargaining takes place in a limited number of cases, especially when the Commission experiences intense political pressure from individuals and member states or when the violation is of little legal or policy importance.

infringement procedures but also major EU policy realms, such as the single internal market and structural and cohesion funds.¹³⁶ Once notice of an infringement is relayed, the ministry responsible for the subject matter, which could number more than one, formulates a reply to the Commission's inquiry. If the Economics Ministry approves of the reply, the government's response is forwarded on to the Secretariat General of the EU and the responsible directorate general through the German Permanent Representative.¹³⁷

Just as the Commission hopes to maintain a cooperative relationship with the member states, governmental officials in Germany strive for a cooperative relationship with EU officials. While an extensive hierarchy exists in the German bureaucracy, a cooperative relationship is always maintained among German officials and between different levels of governance, from the sub-national or federal to that of the European Union. When infringements take place, both sides make substantial efforts to settle the infringement as soon as possible, which occurs in two-thirds of all cases. Since these infringements are usually of a very technical nature, there is often very little political interference.¹³⁸ Because it is difficult to understand many infringements in the area of the free movement of goods without a great deal of expert knowledge, the level of participation by non-experts, such as parliamentarians, is low to non-existent. In fact, one German official remarked that they actively sought to avoid any participation on

¹³⁶ Between October 1998 and October 2005, the Europaabteilung was located in the Finance Ministry, as then-Finance Minister Oskar Lafontaine wished to expand his influence over policymaking, especially in foreign and EU-related affairs. The "Europe Department" remained in the Finance Ministry until October 2005, when restructuring of the ministries took place under the new Grand Coalition government.

¹³⁷ In the rare circumstance that there is disagreement between the Economics ministry and the leading ministry, the matter could be settled first by the heads of the respective divisions or, even more rarely, by the Cabinet itself. However, German officials interviewed could recall no situation in which this has occurred.

¹³⁸ Again, this is in reference mainly to violations of the EC Treaty and associated regulations. The transposition of EC directives may induce more or less confrontation among different parties or levels of governance within Germany.

the part of officials from the political arena.¹³⁹ Their greatest fear is that the process will escalate for reasons that are independent of the legal dispute between Germany and the EU. If EU officials make a convincing legal argument in terms of why the legislative status quo violates EU law, national officials are willing to comply, independently of any political pressure.

The sub-department for external European Affairs is also charged with representing Germany before the Court of Justice. This agency is solely responsible for deciding whether or not to comply with the EU's demands. No parliamentary official or other elected official affects the process. The only condition under which a case is referred to the European Court of Justice, one national official argued, is when the EU has laid out to national officials a sufficiently convincing legal argument as to why the status quo must be changed. As a result, the source of greatest difficulty, and the most likely cause of infringement escalation, is the normative fit between German and EU law. In particular, the legal traditions the German state has historically employed to regulate the market may explain why some cases are settled by the ECJ and others not. The case studies presented below demonstrate when these conflicts have occurred and why they are or are not solved prior to the point at which the European Court of Justice issues its ruling.

Case Studies: Cases Settled by the ECJ

Over the past thirty years, Germany has often clashed with the European Commission over the purpose and legality of its regulations related to manufactured items and the means by which they are sold. Some scholars have suggested that since Germany has the largest economy in Europe, economic actors

¹³⁹ Interview with German Official 1 at the Bundesfinanzministerium, July 2005.

TABLE 5.2. Policy Distribution of Infringements

	ÖS	DE	DK	SW	FI	NE	BE	LX	FR	IT	GR	PO	ES	IR	UK	Total
Administrative Matters	0	3	0	0	0	1	11	1	2	0	1	1	3	0	0	23
Budget Issues	0	6	2	0	0	2	5	0	3	7	2	1	3	1	2	34
Econ. & Mon. Affairs	2	0	0	0	0	0	4	0	3	1	3	1	2	0	1	17
Internal Market	17	56	9	3	1	13	49	11	105	82	46	10	24	13	11	450
Customs & Ind. Taxation	1	8	5	2	0	5	11	3	16	15	18	8	8	8	6	114
Competition	0	1	2	0	0	1	4	0	6	10	3	5	1	2	2	37
Fin. Issues and Taxes	0	0	1	0	0	0	4	0	4	7	1	0	0	4	0	21
Emp. & Social Affairs	4	18	2	0	1	6	40	11	27	18	17	1	10	3	3	161
Agriculture	0	17	1	0	0	5	1	3	23	41	39	2	6	5	11	154
Transport	0	6	1	0	0	3	7	3	9	16	10	8	6	2	2	73
Energy	0	1	0	0	0	0	0	0	1	0	1	0	0	0	0	3
Trade Policy	0	1	0	0	0	1	0	0	4	0	8	1	0	1	1	17
Development	0	0	0	0	0	0	0	0	0	1	1	0	1	0	0	3
Fisheries	0	0	5	2	1	7	5	5	15	3	3	2	7	6	9	65
Environment	0	2	1	0	0	1	3	3	6	1	2	1	1	3	3	25
Legal Questions	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	3
Business Policy & Tourism	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
Industrial Policy	1	0	0	1	0	0	0	0	0	1	2	0	0	0	0	4
Justice	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	2
Statistics	0	0	0	0	0	0	0	0	0	0	2	0	1	0	0	3
Total	24	119	29	8	4	46	144	34	226	203	159	41	74	48	51	1,210

have significant financial incentives to develop their products according to Germany's practices and traditions. Moreover, if Germany plays a central role in the European integration process and because of its power is able either to influence the decision-making process of the European Commission or to avoid prosecution by the Commission entirely, then not only should the number of infringements Germany commits be comparatively low, but also the number of times those infringements are referred to the Court of Justice for settlement should be low. In contrast, if levels of codification explain non-compliance, then the German government will refuse to settle those violations that directly conflict with the principles that govern the social market economy.

Comparison with fourteen other member states of the EU shows that only France and Italy have infringed in the area of the free movement of goods more often than Germany (see table 5.2). Approximately one-fifth of these infringements underwent the judicial process, which is a comparatively smaller proportion than in cases involving many other member states. Only 6 of 39 infringements were referred to the European Court of Justice for settlement between 1978 and 2002. In spite of the relatively high degree of control and the limited amount of delegation to the national executive, the number of infringements committed by Germany that are settled by the ECJ is comparable to the number settled in that way in the case of the United Kingdom. The goal here is to determine the origins of these infringements and to infer which perspective on compliance most accurately explains why some of these violations are settled by the ECJ and others are not. The analysis that follows explains why the European Commission suspected Germany of violating a treaty article related to the free movement of goods, how Germany responded, and the contents of the ruling made by the ECJ. Of the 39 infringements of EU law in the area of the free movement of goods, seven cases were selected for closer empirical analysis. These

seven were selected because they were violations of only one article of the EC Treaty, the prohibition on quantitative barriers that inhibit trade within the EU and any measure having equivalent effect. By selecting only violations that conflicted with Article 28 and not any other regulation, one can compare violations committed within a member state and across all member states. The cases selected also came from throughout the twenty-five-year time period for which data was available. Four were escalated to the level of being settled by the ECJ and three were not. For each infringement of EU law, the origins of the infringement are discussed and, when possible, the reasons behind the Commission's decision to prosecute Germany and the German government's reaction to possible charges are reviewed. In some cases, a great deal of publicity surrounded these infringements. In such cases, newspapers from around this time period were used to further explain the reasons behind the infringements. Except for one case, however, most officials responsible for dealing with an infringement were no longer available to discuss a case personally. As a result, much of the process of tracing cases relies on the legislative and official record made available by the Parliamentsarchiv in Berlin and Commission documents. Through these records, the deliberative process of settling an infringement could be traced from beginning to end.

Beer Purity Law

After the ECJ's ruling in *Cassis de Dijon*, one of the first cases to emerge on the European Court of Justice's docket in the area of the free movement of goods dealt with the *Reinheitsgebot* for beer in Germany. The Beer Purity Law stands as one of the oldest regulations in the world regarding the content and marketing of food and other consumable products. The original Beer Purity Law dates to 1516 and Archduke Wilhelm IV of Bavaria, whereby all beer brewed in Bavaria could contain only malted

barley, hops, yeast and water.¹⁴⁰ In 1952, and again in 1976, the Reinheitsgebot became codified federal law under the Biersteuergesetz.¹⁴¹ Under Article 9, all beer produced and marketed in Germany was required to have these four ingredients. Furthermore, under Article 10, although any beer imported from outside of Germany would be permitted to enter the German market, it could not be marketed to the German public as “beer” unless it contained only these four ingredients.¹⁴²

In the early 1970s, the European Commission attempted to begin the harmonization of laws related to the free movement of foodstuffs within the Community. The draft brewing directive proposed the inclusion of more than these four ingredients in the marketing of beer. According to Simon Bulmer, the usual actors and institutional linkages worked in Germany in order to reject this draft directive (Bulmer 1986). Interest groups mobilized within the brewing industry to form an “action committee” that led public opinion against the draft directive. In addition, the Bundesrat raised its opposition to the planned directive, given the plethora of small breweries there. Partly as a result of all this national opposition in Germany, the draft directive was taken off the EC’s agenda.

Although Germany had obtained a temporary reprieve from harmonization imposed from above through European legislation, the European Court of Justice and the Commission increasingly assumed responsibility for maintaining the engine of economic integration. Because of economic crises and increasing protectionist policies among member states in the early 1970s, EC officials feared that the goal of

¹⁴⁰ It is now confirmed that the Bavarian Reinheitsgebot is not the first such beer purity regulation in Germany. Rather, the first such regulation was discovered in 2001 in the state archives of Weimer, dating back to 1348. While often cited as one of the world’s earliest health laws, another persuasive rationale for the law argues that wheat was formally excluded to save it for bread production (Opinion of Advocate General Slynn in Case 178/84, see below).

¹⁴¹ See §§ 9-10 of the Biersteuergesetz (BStG) BGBl 1952, p. 149.

¹⁴² Any beer that did not contain these four ingredients or additional ones besides these four was required to be labeled an “alcohol-containing fermented soft drink.” Frankfurter Rundschau, May 10, 1986, p. 5.

establishing a common market was in jeopardy. Therefore, when another opportunity arose to assert the importance of EC law and the development of a common market, the ECJ and Commission seized it.

In 1982, a French exporter of beer, Brasserie du Pêcheur, notified the Commission that Germany had fined its German distributor under the Biersteuergesetz for importing beer without paying the necessary duties that are assessed on alcoholic beverages that are not truly beer. Frequent administrative actions in Germany led Brasserie to discontinue all exports of French beer. Once the Commission was notified, it initiated Article 226, or infringement procedures, against Germany. The Commission issued a Formal Letter of Notice with a Reasoned Opinion, both of which went unanswered. Finally, in 1984, the Commission brought Germany before the European Court of Justice for settlement.

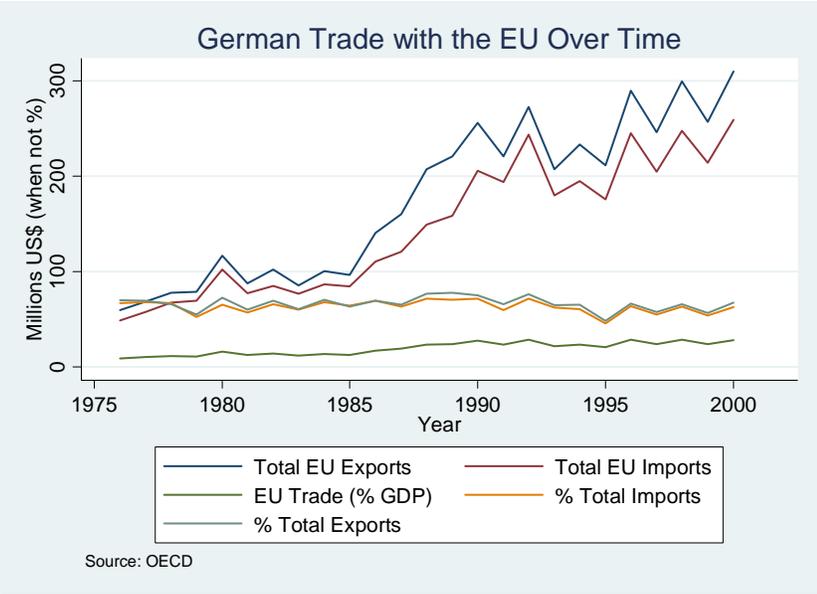


FIGURE 5.2 German Trade with the EU Over Time

This case reached the ECJ for numerous reasons. First, the law was clearly protectionist, as least in the eyes of the Commission. In its case before the ECJ, the Commission argued, “The Beer Purity Law’s only purpose is to maintain the current structure of the German brewing industry and to protect it from competition from other member states.” In 1986, imported beers marketed under the Reinheitsgebot accounted for only 1% of total German consumption of beer. Germany has always possessed a strong trade advantage in beer exports (see figure 2). Total imports of beer have always lagged behind exports from EU member states, enjoying a strong favorable balance of trade. In fact, the German balance of trade reflects Germany’s overall trade with the European Union. Although trade with the EU only reaches close to 50% of its total economy, German imports and exports constitute a large share of Germany’s total foreign trade (see figure 5.2). Therefore, one would expect that Germany would comply more often than not, given its interest in an expanding European market.

Besides the health justification for the Reinheitsgebot, the Commission was questioning whether this law was effectively preventing the free entry of beers brewed in other member states. Opposition by the Länder, in particular from Bavaria, was also fierce. In a series of articles that appeared in the *Süddeutsche Zeitung* between 1983 and 1987 during the court process, Minister President Franz Josef Strauß of the Christian Social Union party sought not only to protect the hundreds of small breweries in Bavaria, but also the German consumer, from beer of a supposedly lesser quality.

Because the Reinheitsgebot originated in Bavaria, it is not surprising that opposition to changes in the federal law was fiercest there. The beer purity law stood for ages and served as the marker of high-quality German beer for centuries. Bavaria was also, however, experiencing a significant decline in the size of its brewing sector

during the 1970s and 1980s that continues to this day. As a result of both European and international economic pressure, the number of breweries in Bavaria has been declining rapidly. Between 1956 and 1980, the number of breweries shrunk from over 1600 to just over 900. Although other Länder were also experiencing some decline in this sector, the condition was nowhere as severe as in Bavaria.¹⁴³ In addition, Bavaria has always possessed the highest number of small, family-run breweries with less than twenty employees. These small family breweries relied on the Reinheitsgebot not only to protect them from cheaper, more diverse varieties of beer from outside Germany. The purity law also served as a hallmark of their industry, distinguishing their products from the mass-produced beers of large, consolidated brewing companies. Thus, while the Commission's investigation challenged powerfully entrenched norms governing how beer should be marketed and produced, powerful economic incentives existed as well, at least in Bavaria, to delay complying with EU law.

Although opposition to compliance was quite vocal in Bavaria, there is no evidence from the empirical record to suggest that the Bavarian government influenced the federal government's decision to oppose rescinding the Reinheitsgebot. From the point at which the infringement was detected to the onset of the settlement process, Germany was governed by a coalition of the Christian Democratic Union and the Free Democratic Party, under the chancellorship of Helmut Kohl. In addition, the CDU had a controlling majority in the Bundesrat. Politics—either the domestic variety within the governing coalition or across the institutions of governance—cannot explain why Germany refused to settle the violation. While it is true that the CDU and its sister party the CSU are strongly committed to the principles of the social market economy and Strauß could expect strong support from the national government for his

¹⁴³ Source: Deutscher Brauer-Bund, e.V., 2006. The fact that revenues have continued to increase in Bavaria while the number of breweries have decreased illustrates the effect of consolidation.

position vis-à-vis the Commission, Chancellor Kohl was also a strong supporter of European integration and hesitated to allow infringements of EU law to delay the consolidation of the European market. In fact, the numerous non-tariff barriers to the free movement of goods that prevent the completion of the single market motivated Kohl and the Commission, under Jacques Delors, to move European integration forward through the Single European Act (Moravcsik 1991). In addition, although Prime Minister Strauß ruled the most powerful and populous Land and could be expected to exercise a great deal of influence on the political process, there is no evidence that he influenced the bureaucratic process of complying with EU law. The compliance perspective based on the politics of self-interest cannot explain why this violation was not settled.

Instead, the arguments that Strauß was making about why such protections of the German consumer were necessary paralleled those used by the government. The government in Bonn defended the law on the basis that it was protecting the public health and safety of its citizens.¹⁴⁴ First, the German government argued that any imported beer that did not meet the criteria set under Article 9 BStG would contain additives and, thus, be subject to the rules set out in the Law Concerning the Trafficking of Food Stuffs, Tobacco Products, Cosmetics and Other Consumer Goods (LMBG). According to the LMBG §11, it is prohibited to market or sell any food product with additives that have not been previously authorized by the government. According to the German government, the prohibition of additives under the BStG existed to protect the health of German consumers. One core aspect of the German government's argument was that marketing a product as "beer" that did not conform to the Reinheitsgebot would mislead consumers into believing that the product did not

¹⁴⁴ Germany did not defend the BStG under Article 30 (ex Article 36), because it argued that the law did not violate Article 28 of the EC Treaty.

contain additives and, thus, might be harmful to their health. Since all beers could be marketed and sold in Germany that met these criteria, there was no violation of Article 28 of the EC Treaty.

The Court rejected Germany's claims on several grounds. It conceded that, in the absence of EC legislation, member states could place restrictions on the free movement of goods as long as the rules are proportionate to the aim being achieved. According to the Court, however, the goals of protecting the consumer could be achieved equally effectively through less restrictive practices. First, under the principle of mutual recognition, if a specific additive were judged to be safe in another member state and allowed to be included in the production of beer, an outright ban would be unnecessary. Moreover, Germany did not provide any scientific evidence that the additives included in foreign beers endangered the public's health.¹⁴⁵ Second, Germany argued that any importation of beer from other countries under such a label would confuse consumers. The Court argued, however, that "consumers' conceptions are likely to vary from one member state to another and to evolve in the course of time within a member state. Hence, the legislation of that state cannot crystallize certain national consumer habits so as to consolidate an advantage acquired by national industries in the state of concern to comply with them. Secondly, such a generic designation may not be restricted to products manufactured in accordance with the rules in force in that member state."¹⁴⁶

As a result of the Court's decision, both the Biersteuergesetz and the Lebensmittel-und Bedarfgegenständegesetz (LMBG) required significant changes. Three years after the Court's decision, the Federal Ministry for Youth, Family,

¹⁴⁵ Furthermore, Germany's argument about the need to protect its citizens' health was not viewed as credible given that it allowed beer exported from Germany to other member states to contain additional additives, thereby insinuating that the health of other Europeans was less important than that of the health of its own citizens.

¹⁴⁶ Court Opinion, Commission v. Germany Case 178/84, [1987] ECR 1227.

Women, and Health published a new “Bierverordnung,” or beer regulation, that now permitted the importation of beer with additives as long as it possessed a label written in German detailing all ingredients. Beer importers from other member states were required to obtain a special license to import beers that contained additives that were not on a pre-approved list. As an administrative regulation, the new law required no discussion or approval of the Bundestag. The Bundesrat’s own committees on consumer protection and agriculture inserted minor amendments, but ultimately approved the regulation, as required by the Grundgesetz, without any major discussion. As a result, the parliamentary accountability hypothesis also fails to explain why the infringement took place and why the German government refused to settle the violation.

Therefore, despite major opposition across Germany, especially in Bavaria, an almost 500-year old law was changed without major discussion approximately three years after the Court’s decision. Yet, the strategies that Germany devised to comply with the ECJ ruling proved insufficient. The beer regulation of 1990 continued to receive scrutiny from the European Commission.¹⁴⁷ In 1990, an additional infringement procedure was initiated against Germany that targeted Paragraph 47A of the LMBG, which placed additional cumbersome regulatory procedures on beers imported from outside Germany.¹⁴⁸ Consequently, an additional regulation was issued by the Federal Ministry for Health in cooperation with other ministries in 1993 that required Germany’s labeling law to comply with the labeling directive passed in the meantime by the Council of Ministers.¹⁴⁹ According to the EC, the new regulation still discriminated against beer imports by forcing only non-German breweries to list

¹⁴⁷ Verordnung des Bundesministers für Jugend, Familie, Frauen und Gesundheit, Drucksache 277/90, April 18, 1990.

¹⁴⁸ European Commission, Infraction fiche: 19900414.

¹⁴⁹ Verordnung des Bundesministeriums für Gesundheit, Drucksache 378/93, May 27, 1993.

ingredients. Although there were repeated meetings between German and EU officials, the government did not change the law until 1994, while the Commission initiated Article 228 proceedings against Germany, which could have led eventually to the application of economic sanctions. The label required all manufacturers from outside Germany to indicate whether a beer followed the guidelines of the Reinheitsgebot. The Commission argued that this label was still discriminating against beers from outside Germany. Finally, in December of 1995, the Bundesrat acted upon a regulation recommended by the Federal Health Ministry that permitted additional ingredients in products with less than 1.2% alcohol by volume to be marketed as beer as well.¹⁵⁰

Still, the effort to protect German beer did not end with the transformation of national law. As the pace of European integration increased in the second half of the 1980s and 1990s, interest groups and trade associations began to reorganize themselves transnationally within Europe (Greenwood 1997; Greenwood, Grote, and Ronit 1992). The small increase in beer imports after the Beer Purity Law decision indicates that some parts of the German market's demand for foreign beers was not being met because of the Reinheitsgebot. However, once these products were allowed in, the market appears to have become satiated and the amount of beer being imported into Germany leveled off (see figure 5.3).

¹⁵⁰ Verordnung des Bundesministeriums für Gesundheit, Drucksache 749/95, November 3, 1995.



FIGURE 5.3 German Beer Trade with its EU Partners

Despite the absence of any flood of imported beers, national lobbying groups, such as the Deutscher Brauer-Bund, began to form transnational lobbying organizations and alliances to place greater political pressure on officials in Brussels to protect their markets through supranational legislation. Pamela Camerra-Rowe documents this process as it occurred in the beer-brewing sector (Camerra-Rowe 2004). As the brewing industry began to consolidate in Europe, the largest European brewing companies began to lobby Brussels directly rather than petitioning their national governments for harmonized taxes on alcohol products. Most importantly, in cooperation with breweries and food organizations across the EU, food and drink related to specific national traditions could also be protected. Under the European Parliament and Council Decision of 1997, national regulatory agencies were permitted

to exclude certain additives from goods defined as “traditional foodstuffs.”¹⁵¹ Thus, in spite of efforts to harmonize foodstuff regulations at the European level, successful lobbying combined with the interests of national governments themselves led to the protection of German beer and other traditional national products, although European legislation was required to do so.¹⁵²

The beer purity law strongly confirms the hypothesis that countries will defend the status quo, or at least refuse to comply, when key elements of how it defines economic activity are put into question. While the beer purity law is exceptional to the German legal tradition in terms of the degree to which a product is defined in advance, it confirms Duina’s (2006) claim that problems of non-compliance will occur when the legal interpretation of economic reality generated by the Commission conflicts with that of the member states. By stipulating that “beer” is only the four ingredients mentioned above, there is almost no room for flexibility. Moreover, although there were powerful economic and political reasons to support the status quo, especially in Bavaria, the reasons for which the German government refused to comply can be traced back to the actual method by which beer is regulated and the legal norms that underlie it.

The Medicinal Products Cases

Many of the cases the Commission brought forward against Germany in the area of the free movement of goods relate to Germany’s desire to protect the health and well-being of its citizens. In 1979 the Commission brought forward an

¹⁵¹ EC Decision 292/1997. The list of “traditional national specialties” includes beer, chocolate, confectionary, pasta, pre-cooked meals, prepared condiment sauces, soups or broths, beverages made from plant extracts, and ice creams or sorbets.

¹⁵² While the German Reinheitsgebot obtained protective status at the European level, a brewery in Frankfurt an der Oder successfully sued officials in Federal Administrative Court in the Land of Brandenburg in 2005 so that it could continue to produce and sell beer that did not comply with the Reinheitsgebot (Suttgarter Nachrichten, February 25, 2005).

infringement against Germany for prohibiting the sale of pharmaceuticals by businesses that did not have a place of business or headquarters in Germany. Once again, there is little evidence to support the hypothesis that Germany opposed the Commission's initiative in order to protect their pharmaceutical companies. Germany has one of the largest pharmaceutical industries in the world with production increasing from DM23 billion to DM36 billion between 1988 and 1999, fourth behind the US, Japan and France.¹⁵³ Germany has until the last few years been a net exporter of medicines to the world (see figure 5.4), and possesses a significant share of the German market for pharmaceuticals. The argument that Germany opposed the Commission's efforts to allow foreign companies to sell pharmaceuticals directly to German consumers and pharmacies for protectionist reasons would be reasonable only if the German industry's primary competitors for this market were the United States and Switzerland, non-EU member states.¹⁵⁴ Instead, the government's opposition to complying with the Commission's demands focused solely on the possible consumer health ramifications of such a change in German law, as a result of co-member states' selling their products in the European Union.

¹⁵³ Der Bundesverband der Pharmazeutischen Industrie (BPI), Annual Report, 2000.

¹⁵⁴ In 2000, the German share of the German pharmaceutical market amounted to 40.5%, with the United States and Switzerland following with 22.0% and 10.7%, respectively.

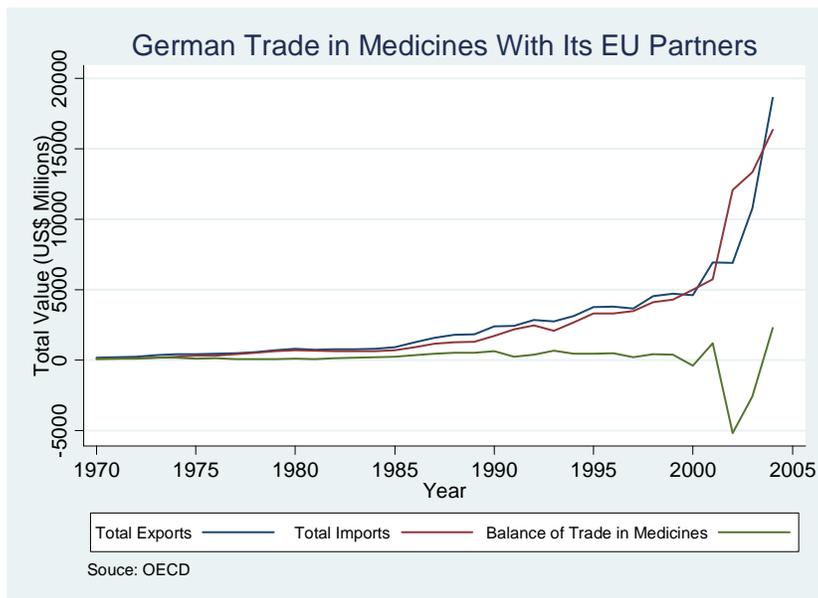


FIGURE 5.4 German Trade in Medicines with its EU Partners

The violation reached the Court of Justice rather rapidly in 1981. Germany justified these restrictions on the basis of Article 30, or public health grounds, for two reasons. First, given the need to constantly monitor the safety of pharmaceutical products and possible risks to the public, German officials argued that the highest degree of public safety can be ensured only if firms are located within Germany. In emergency cases, German officials wish to be able to contact manufacturers and obtain the necessary documents. Moreover, given that Länder governments are responsible for enforcing health regulations and pharmaceuticals could be imported from any member state, most Land governments do not possess the resources or language capacity to communicate with firms from across the European community. Second, the German government also required firms selling pharmaceutical products to have a place of business in Germany in order to attach criminal and civil liability.¹⁵⁵

¹⁵⁵ See *Commission v. Germany*, Case 247/81 ECR I 1984 1111.

In line with its decision in *Cassis de Dijon*, the Court reaffirmed its view that, in the absence of harmonized regulations at the European level, when less restrictive regulatory alternatives exist, the introduction of a product from another member state must be permitted. The Court argued that every firm that wishes to sell a medicinal product must first obtain authorization from a member state's government, which includes the name and address of the person responsible for placing the product on the market. If a danger arises regarding a particular medicine, then the national authorities could easily contact authorities in the product's country of origin. Difficulties regarding translation, the Court argued, "can be resolved by the undertakings and by the administrations in the same way as in every other field of trade," which must refer to employing nationals or other persons who have knowledge of a particular language of the country to which they are marketing their pharmaceuticals.

The restrictions on the selling of pharmaceuticals were changed by the Second Law Regarding Changes to the Medicinal Products Legislation (*Arzneimittelgesetz* or *AMG*) in August of 1986. Drafted by the Federal Ministry for Youth, Family and Health, the primary goals of the law were to improve medicinal product safety, meet international standards of regulation, and transpose several EU directives related to trade in pharmaceuticals.¹⁵⁶ The offending part of the law, Section 9, Paragraph 2, was changed such that medicinal product safety applied not only to firms with places of business in Germany, but also to those with establishments in any other member state of the EU. The German government expressed its general support for mutually recognizing the approval process of medicinal products in other countries and agreed with the Commission that a central agency responsible for medicinal product

¹⁵⁶ Typical to the German legislative process, the Economics Committee, the Committee for Nutrition, Agriculture and Forestry, and the Committee for Labor and Social Order also contributed to the drafting of the law.

supervision for the single market was necessary.¹⁵⁷ Although a great deal of debate did ensue among the political parties over the implications of the law, there was observed, during readings at either the committee or the plenary stage, almost no discussion of the demands of the European Court of Justice.

Support and opposition for changes in the Arzneimittelgesetz followed the usual partisan fault-lines in German politics. While responsible for transposing a series of EU directives related to the pharmaceutical industry, the CDU, which held a majority in the Bundestag with the FDP, wished to improve regulation of the industry by increasing the amount of information available to the consumer, but also to encourage the research and development of pharmaceuticals in Germany. The SPD and Greens were allowed to present their alternative legislative drafts in both committee and plenary sessions. While the SPD argued that members of the medical industry should be required to notify the health ministry of any unintended side-effects or interactions with other medications as well as completely forbid certain modes of self-medication, the Greens attacked the entire legislation as a windfall for the pharmaceutical industry for producing unwanted and poisonous medications and sought greater state control over drug research as well as stricter controls on the production of medications and their marketing in Germany. In the Bundesrat, whose legislative approval was required, the SPD-governed Länder of North Rhine-Westphalia, Bremen, Hesse, Saarland, and Hamburg, similarly attempted to amend the legislation but were ultimately defeated by a CDU-led majority of the Bundesrat. The governing CDU/FDP majority in the Bundestag ultimately approved the Second Arzneimittelgesetz on May 16, 1986. Thus, although the usual debates based on party affiliation occurred once a decision had been rendered by the European Court of

¹⁵⁷ “Bericht über Erfahrungen mit dem Arzneimittelgesetz,” Drucksache 9/1335, February 2, 1982, pp. 20-1.

Justice, the explanation of the infringement lies in the misfit between the legal principles underlying German laws protecting the consumer and the European Court of Justice's determination to fulfill the doctrine of mutual recognition.

Two subsequent court cases in the area of the free movement of goods also challenged the German government's style of preventing any possible human and health risk. The case began when the Hessische Finanzgericht sent a case to the European Court of Justice for a preliminary ruling in 1987. A German resident sued the main customs agency of Frankfurt am Main for not allowing him to import by mail medicinal preparations that he had purchased in Strasbourg, France. Under Paragraph 73, Part 2 of the AMG, only pharmaceutical companies, wholesalers, veterinarians, or pharmacists were allowed to import medicinal products. The Commission learned of the case and invited the German government to comment as to whether this provision of the AMG complied with Article 28 of the EC Treaty.

The German government argued that medications purchased from abroad from doctors and pharmacists located in another member state are inherently unsafe and unhealthy. First, the label and usage instructions are usually in a foreign language. Second, the remoteness of the doctor and pharmacist who prescribed the medication creates the danger that the product would be misused. The government argued further that it was not possible to ensure that the amount of drugs imported did not exceed the necessary amount for personal use without violating a person's privacy or medical confidentiality. Once again, as in the Reinheitsgebot case and the first Arzneimittelgesetz violation, the German government believed it was not possible to ensure the higher level of safety and protection that German law provided. And, once again, the Court responded by stating that the goals that Germany seeks to achieve can be reached through less restrictive methods. In terms of the risk that fundamental rights might be violated, while the Court agreed that there were legitimate concerns,

Germany provided no substantial evidence that such situations either have occurred or are very likely to occur. This case illustrates once again the preventive nature of German regulatory policy.¹⁵⁸

Although Germany presented arguments to the Court it had used before, the empirical record also shows that the German government seemed convinced of the arguments made by the Commission and was already taking steps towards changing the law. Before the ECJ handed down its ruling on August 4, 1992, meetings took place between the Commission and German officials on April 24, 1989. German officials were open to the suggestion of allowing the import of not more than a three-month supply of medications. German officials then announced in October of 1989 that steps would be taken to revise the Arzneimittelgesetz according to the Commission's demands. However, little action was taken by the federal government to comply with the law until after the ECJ issued its ruling.

The federal government first sent a notification to all Länder governments as well as customs officials that importation of medications was allowed until changes to the law could be made.¹⁵⁹ Then, revisions to the AZM began in August of 1993, when the Bundesrat drafted the Fifth Law towards Changing the Arzneimittelgesetz. This law would not only transpose more than ten directives related to human and veterinary pharmacological substances, but also raise safety standards for medications used in clinical trials and general medicinal product safety.¹⁶⁰ In particular, Section 73, Paragraph 2, Number 6a was changed such that citizens of EU member states could receive medications by post from other member states, as long as they were prescribed by an authorized doctor and distributed by an authorized pharmacy in that country.

¹⁵⁸ Commission v. Germany, Case 1990/62 ECR I-2575.

¹⁵⁹ Infraction fiche, 19880061.

¹⁶⁰ Bundesrat, Drucksache 565/93.

The new law once again involved consultation with major interest groups and through numerous committees in the Bundestag. The legislative record in the Bundestag shows that once the Bundesrat's final draft was sent to the Bundestag on December 21, 1993, three different committees held hearings and attached amendments to the law. Several business associations representing the pharmaceutical industry were consulted during the legislative process. For example, both the Federal Association for the Pharmaceutical Industry (Bundesverband der Pharmazeutischen Industrie or BPI) and the Association of Research Medicinal Manufacturers (Verband Forschender Arzneimittelhersteller or VFA) inserted various amendments to the draft legislation.¹⁶¹ The VFA argued that consumers are not likely to understand the directions on a package or the pamphlet indicating proper usage. The BPI argued that since pharmaceutical companies may be liable for damages that result from misuse of prescription drugs, only those changes that were absolutely necessary to comply with the ECJ's decision are to be made, i.e. allowing a small amount of imported prescription drugs.¹⁶² The reasons for these groups' limited support of legislative changes may be due to their shared understanding and support of German legal norms or they may simply be an attempt to prevent German consumers from importing drugs from other member states where prices were significantly lower. After several conference committee meetings to reconcile different versions approved by the Bundesrat and Bundestag, the Fifth Law towards Changing the Arzneimittelgesetz was passed by the CDU/FDP majority on June 30, 1994 and by the Bundesrat on July 8,

¹⁶¹ The BPI represents around 250 businesses and institutions in Germany in the pharmaceutical sector on the national and international level, especially in regards to the approval and marketing of pharmaceuticals. In turn, the VFA represents 39 of the largest pharmaceutical companies in the world and their subsidiaries and concentrates its lobbying efforts in the area of drug development research.

¹⁶² Letter, dated March 4, 1994, to Dr. Dieter Thomae, Chairman of the Health Committee in the Bundestag, from Prof. Dr. Frank E. Münnich, Chief Business Office, VFA.

1994, two years after the Court's decision and more than seven years after the initial violation took place.

Given the procedures employed by the German government as well as the EU, it is difficult to determine the precise reasons for which some violations of EC law are settled by the ECJ and others are not, besides those listed in the infraction fiches. Decisions about whether to comply with the Commission's reasoned opinion are made by lawyers working for the responsible ministry in cooperation with the official in the Economics Ministry, in which all work products and communications remain highly confidential. In most cases, neither the public nor parliament is informed that discussions over a violation are taking place. Internal documents related to these infringements during the pre-Court stage at the national level are not accessible. The Commission provides materials if the case was closed. Yet, in an attempt to test alternative explanations, one violation of the free movement of goods was investigated that had been referred to the ECJ but that has not yet been settled.

One of the most recent cases the Commission has pursued against Germany involves the marketing of medicinal capsules containing garlic. In all member states, garlic products containing the active ingredient allicin are marketed for their supposed ability to lower blood cholesterol and relieve symptoms of the common cold. The market for herbal medicinal products in Germany is relatively large, constituting approximately one-third of all over-the-counter medicine sales and amounting to almost €2.0 billion.¹⁶³ German consumers spend more than €252 million alone on herbal remedies for cardiovascular complaints, for which garlic is primarily recommended. Over 80 garlic medicinal products are sold in Germany (Kroes 2006).

¹⁶³ Bundesverband der Arzneimittel-Hersteller e.V., "Market Role and Acceptance of Herbal Medicinal Products," [available at <http://www.bah-bonn.de/arzneimittel/index.html>, accessed July 10, 2006.]

The sale of garlic capsules by one of Germany's largest distributors of such products exceeds 3,144,000 packages, or approximately €30 million.¹⁶⁴

Laws governing the regulation and marketing of pharmaceutical products, including herbal and homoeopathic medicines, are extensively harmonized within the EU. Under Council Directive 2001/83, when such products make claims regarding cancer, neurodegenerative disorders, diabetes, HIV/AIDS, or are developed using biotechnological processes, authorization for marketing and usage must be obtained from the European Agency for the Evaluation of Medicinal Products. When such claims are not made and are of a herbal nature, Article 10(a)(ii) of the Council Directive allows their sale if a general consensus exists in the scientific literature that such a product has a well-established medicinal use with a reasonable level of efficacy and safety without having to present the results of clinical or toxicological tests. The Traditional Herbal Medicinal Products Directive allows herbal medicines to be marketed as long as they are safe and have been used as traditional medicines for at least 15 years within the European Union. Herbal products are required to be sold over the counter and without consent or control by a health professional (Kroes 2006: 734S).

To date, however, no garlic medicinal product is currently authorized through centralized, European procedures and, therefore, national procedures govern their regulation.¹⁶⁵ In contrast to standard practice in most other EU member states, herbal medicines are not considered in Germany to be alternatives to modern drugs, but rather they are considered to be regular drugs. A committee of national experts surveys the literature to determine whether a drug, including herbal products, should

¹⁶⁴ These calculations are based on the average cost of a package of Kwai garlic supplements, around €10. Sales figures provided by a Klosterfrau AG official, July 2006.

¹⁶⁵ The European Food Supplement Directive applies only to supplements containing vitamins or minerals and not garlic.

be approved, and then allows the product to be sold only in pharmacies and with indications that it is only mildly therapeutic for a limited number of conditions.¹⁶⁶ As a result, if garlic appears in any other form in Germany than in its typical use as a foodstuff, it is regulated as a medicinal product or medical supplement. Yet, every other member state allows garlic in capsule form to be marketed as a foodstuff alongside other garlic supplements. The Commission considers the German regulatory procedure a “disproportionate and unnecessary obstacle to the free movement of goods” in the EU. “In addition, the German position seems to demonstrate an insufficient understanding of the borderline between food supplements and medicinal products as defined in current European legislation.”¹⁶⁷ As a result, the Commission brought Germany before the European Court of Justice in March 2005.

It is not clear from the empirical record how this case was detected. Reports of the Commission’s initiating Article 226 proceedings occur in February of 2003.¹⁶⁸ Once the Court case was made public, few national or EC officials were willing to discuss the case either privately or publicly. However, one lawyer in the Federal Agency for Consumer Protection and Foodstuffs Security defended Germany’s position on several grounds. First, given the substantial medical effects of garlic sold in capsule form, normally containing up to 900mg of pure garlic, it is necessary to protect the health of the German consumer. The German official underlined the interaction effects that high doses of garlic could have for those taking medications for

¹⁶⁶ This is known as the “bibliographic” procedure to drug approval. The success of the German system led to its application at the EU level through the European Scientific Cooperative on Phytotherapy, which compiles information on the effectiveness of medicinal products with the help of national experts and universities across the EU. Under the alternative, simplified procedure, drug producers can make limited medicinal claims about particular herbs or plants that already exist on a national approved list.

¹⁶⁷ Press Release, European Commission, IP/05/335, March 18, 2005.

¹⁶⁸ The infringement fiche describing the source, reasoning, and process by which a violation was detected and settled remains confidential until the case is closed. However, reports that a Reasoned Opinion was sent to Germany regarding this violation appear in an industry newsletter dated February 18, 2003: <http://nutraingredients.com/news/news-ng.asp?id=37332-italy-germany-have> [accessed June 18, 2005]. These trade publications both in Germany and at the EU level are valuable sources of information for lobbying groups, who actively monitor the Commission’s activities.

diabetes and especially for AIDS patients and the medications they use. Second, the official remarked that although Germany is often able to successfully convince the Commission that its regulations are necessary for the protection of the German consumer, German regulation often comes into conflict with EU law because of the Commission's perceived preference for removing barriers to the free flow of goods and services over the safety and health of consumers.¹⁶⁹ Depending upon the level of public awareness there is about an infringement and on the degree to which groups are organized, interest groups can mobilize to support or oppose the Commission's efforts to change national policy (Conant 2002). In the garlic capsule case, interest groups, such as the pharmaceutical associations above, were made aware of the dispute only after a press release was issued regarding the issue, but they have supported the Commission's efforts to reduce the number of regulatory barriers to the sale of garlic in their own national markets.¹⁷⁰

Most importantly, however, the interviewee emphasized the preventive nature of the German regulatory style. German's traditional regulatory style is to prevent easy access to products on the marketplace if they pose a possible risk to the consumer. It is the task of the German state to determine which products are safe for the consumer, rather than allowing the individual to assume such risks. Any item that could possibly disrupt the social order and pose a danger to the consumer is automatically and preemptively removed from the general marketplace. The Commission's position, on the other hand, reflects the doctrine of "majoritarian activism." When a significant majority of other member states have a different regulatory standard and the member state under investigation cannot convincingly demonstrate that the regulatory status

¹⁶⁹ Interview with German Official 3 by phone, July 2006.

¹⁷⁰ Support for the Commission's position among pharmaceutical companies is strong, given that the largest manufacturer of garlic supplements, Lichtwer Pharma GmbH, is located in Germany and controls approximately 40% of the German market (Eben Shapiro, "After Granola, What?" The NY Times, April 5, 1992).

quo is justifiable under exceptions allowed by Article 30, i.e. for the protection of health, safety, security, or the traditional character of a member state, then the Commission will prosecute that state and rely on the European Court of Justice to support it if the case escalates to the ECJ level.

Most national politicians appear to have accepted the German government's decision to defend the law. First, most political appointees are very disinterested and actively avoid involvement in such cases for several reasons. If the public officials become involved in a violation, the Commission raises suspicions that the member state "doth protest too much" and begins to investigate whether the same law is generating additional infractions that should be prosecuted. In addition, if a politician actively opposes the Commission's efforts to enforce the EC Treaty, she runs the risk of generating national opposition that is not only disproportionate to the actual infringement at hand, but also cannot be easily controlled or switched off. As a result, latent opposition to the European Union and its policies in general begins to grow within the general public.¹⁷¹ Finally, both national governments and the Commission perceive these infractions as disputes over the meaning and intent of the law. Both sides agree that only legally legitimate and sound arguments will be effective in persuading the other to change its position and, thereby, either cease the offending behavior or drop the case. Any attempt to politicize the environment by pointing to either institutional or group opposition to comply with the law only poisons the relationship between the two sides and does little to halt the Commission's decision to prosecute a case. Thus, given the low amount of publicity these infringements receive, the confidential nature of the process, and the frequent desire of politicians to avoid conflict with the EU, possible violations, such as in the garlic capsule case, can best be

¹⁷¹ Interview with Commission Official 3 at European Commission Headquarters in Brussels, November 2004.

described as clashes between deeply entrenched regulatory norms and traditions at the national level and the Commission's efforts not only to enforce the EC Treaty, but also, when doing so, to satisfy the European Court of Justice and Commission's demands to create a harmonized regulatory environment within the EU.

In summary, the cause of a violation of EU law is a discrepancy between how a nation's regulatory tradition defines a particular object or practice and the European Commission's definition. The cases that were most difficult to settle involved both the material interests of particular industries or states and traditional norms. However, those material interests and comparative advantages are constructed by the German legal order. What constitutes a garlic supplement, beer, and even a safe and secure means of distributing pharmaceuticals is predefined by the German regulatory state. Although there were political debates over compliance after the European Court of Justice issued its ruling, they did not focus on whether or not to comply with its ruling. Rather, a ruling by the ECJ merely set the stage for debates to take place over additional steps towards integrating the European market. Yet, not every infringement of EU law Germany commits is referred to the ECJ for settlement. It is to these cases that we now turn.

Cases Settled Before ECJ Settlement

Each of the four violations discussed above involved deep conflicts between Germany's legal tradition and the Commission's desire to complete the single European market by establishing harmonized standards. As was demonstrated in the quantitative analysis and confirmed by the four case descriptions above, the primary reason that a violation took place was the "quality of market regulation," or what the World Bank authors defined as the use of unfair competitive practices, price controls, and discriminatory tariffs. In short, the extent to which a member state maintains non-

tariff barriers to trade that the Commission perceives as distorting the free movement of goods plays the most significant role in establishing a violation of EU law. But not every violation must be settled by the European Court of Justice. If the degree of “institutional misfit” explains why infringements occur, why do the member states find it easier in some cases than in others to comply with the Commission’s demands and change the status quo?

It has been shown that officials in national parliaments play little role in the decision-making process as to whether or not a case is settled by the ECJ. Could it be that some norms are “deeper” than others are? For instance, are states able to devise strategies of adjustment to Commission demands in order to maintain regulatory traditions in some cases and not in others? If so, why are these strategies viable in some circumstances and not in others? This final section answers these questions by demonstrating how infringements are referred to the European Court of Justice only if they challenge particular legal principles entrenched in the German legal order. If not, and the German government is allowed to find other specific means by which to fulfill those principles, then the case is easily settled.

The Lebensmittel- und bedarfsgegenständegesetz (LMBG), or Consumer Products Law, which has been mentioned, lies at the center of Germany’s regulatory efforts to protect the consumer from unhealthy and dangerous consumer products. It carries out a significant amount of trade with the EU in this area (see figure 5.5). When the standards that Germany employs differ from those set by other member states, or the means by which those standards are achieved are perceived as discriminatory by the Commission, the Commission demands changes to national law. However, the changes needed to comply with EU law do not always imply a fundamental conflict over a norm or standard between a member state and the EU. Violations can also be settled through cooperative deliberation between multiple-

levels of governance (Hooghe and Marks 2001). In the three cases discussed below, the relationship between the Commission, tasked with enforcing the EC Treaty, and a member state's government is not always confrontational. As long as information can easily be shared across these levels and the suspected infringement does not lead to the fundamental removal or reform of consumer protections, an infringement can be easily settled and a Court ruling avoided.

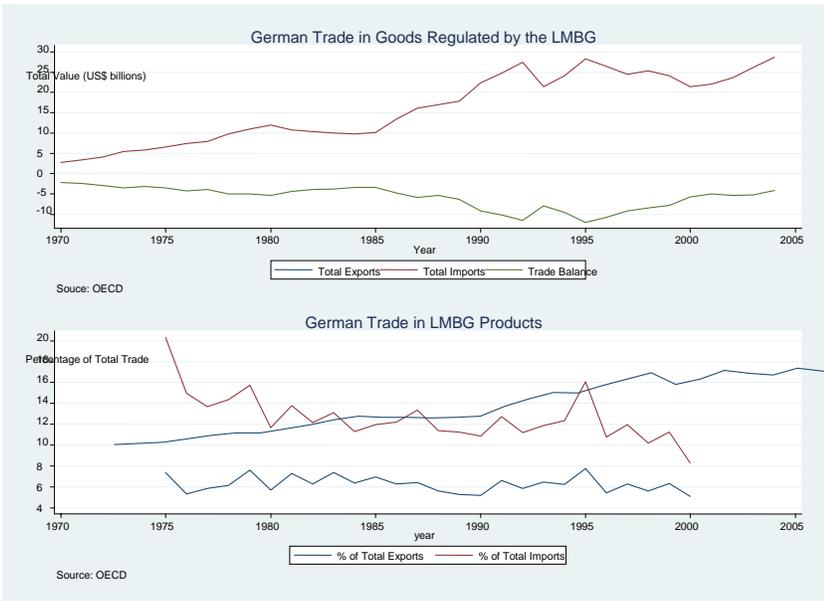


FIGURE 5.5 German Trade in Goods Regulated by the LMBG

The Consumer Products Cases

Shortly before the Reinheitsgebot was decided, the government changed the LMBG in order to allow products from other EC member states to freely enter the German market. According to Section 47, Paragraph 1, all goods produced and sold in another member state may freely enter the German marketplace, despite the possibility

that such goods would not meet Germany's regulatory standards. The Commission actively monitors the degree to which member states have complied with this decision, albeit with limited resources.

In 1986, after the *Cassis de Dijon* ruling, the Commission continued to monitor whether the German government was making the necessary changes to the LMBG. In 1986, the Commission launched another Article 226 proceeding against Germany for failing to comply with the EC Treaty. As Section 47, Paragraph 1 then stood, goods were permitted to enter the German marketplace if they were “produced and marketed” in “another member state of the [European] Union.” The Commission demanded either that “and” be replaced with “or” in the text or that the last clause simply be removed. The Commission argued that a manufacturer could presume that an item was required to be both produced and marketed to enter the German market. The German government first reported back to the Commission in August of 1992 without having changed the law. Under Directive 189/83, the Commission sent an additional notice. Finally, on December 23, 1992, the Federal Health Ministry published a notice in the federal legal register, the *Bundesanzeiger*, that the rule should not be interpreted as having this dual requirement, and the Commission closed the case.

This does not mean that the changes the Commission demanded failed to draw the attention and consternation of German politicians. In the first half of 1994, the federal government began to revise the LMBG. The law transposed several directives that had been approved by the Council of Ministers.¹⁷² At its core, the Second Law towards Reform of the LMBG created an independent monitoring system and agency responsible for securing the health and safety of all foodstuffs, including those

¹⁷² They included: Directives 89/622, 92/041, and 035/93 as well as changing national law such that it complied with EC Regulation 2377/90.

entering the German marketplace from abroad. Most debate between the political parties centered on the effectiveness and scope of the agency's monitoring capacities and on the role of the Länder in the new system. However, the draft version of the law proposed by the CDU emphasized the need to harmonize German law with supranational law, minimizing any claim that Germany was being overwhelmed with products from other member states that were not meeting its higher health and safety standards.¹⁷³ The CDU's primary concern was increasing the amount of transparency related to these regulations and the amount of information available to the consumer. The SPD presented its own draft legislation, at the committee and plenary stages, which sought more extensive regulation of the foodstuffs sector. Although the SPD party faction in the Bundestag admitted that the threat from foodstuffs, cosmetics and other items that are consumed from other EU member states was relatively low, their proposal sought the strengthening and clarification of criteria by which imported products were free to enter, such as requiring documents describing entailed contents either in German or in a "credible" translation and other items necessary to keep the consumer informed.¹⁷⁴ Even though the CDU/FDP controlled the federal government and the SPD was the majority party in the Bundesrat at the time, the law was easily approved once it went through a conference committee.¹⁷⁵

Before the Second Law towards Reform of the LMBG was drafted and approved, the European Commission launched another infringement proceeding against the German government in 1989. As a result of the Commission's close

¹⁷³ Beschlussempfehlung und Bericht des Ausschusses für Gesundheit, June 15, 1994, Drucksache 12/7929.

¹⁷⁴ SPD Empfehlung, June 15, 1994, Drucksache 12/7938.

¹⁷⁵ Plenary Protocol, Bundesrat, September 23, 1994, p. 512A. Interestingly, while the SPD faction in the Bundestag emphasized that the government's draft version did not adequately protect the German consumer, especially from products imported from states with supposedly lower regulatory standards, the Bundesrat did not call for such changes in the law, even though they had a majority in the second chamber.

monitoring of Germany's compliance with Cassis de Dijon and other rulings related to the free movement of goods, it continued to detect what was perceived as discriminatory practices against goods from other member states. According to Article 14, Section 1 of the LMBG, it is forbidden to import foodstuffs that possess traces of pesticides, fertilizer, or other plant chemicals or preservatives that exceed a pre-determined amount. Under Article 15, Section 1, the import of foodstuffs of animal origin is also not allowed when they contain substances that have a pharmacological effect in amounts exceeding pre-approved levels established by the Health Ministry. Violations of this law would be prosecuted under what were, at that time, Articles 51 and 53 of the LMBG, which applies to both consumers and importers of such products. Under German law, however, importers and distributors of foodstuffs that contained such prohibited substances could be prosecuted for negligence—based on the legal standard of a lack of precautionary measures having been taken, which, according to the Commission, amounted to gross negligence, a standard far higher than is observed in other member states—and, thus, for discrimination against exporters of fruits and vegetables from other member states.

Discussions between EU and German officials took place three times between April 1989 and January 1991, and a Reasoned Opinion was issued by the Commission on July 15, 1994. The German government argued not only that there was a clear difference between the level of protection that existed in Germany and that which was applied in other member states, but also that this higher level of consumer protection could not be achieved through less strict measures. Because Germany failed to present any new evidence to support its argument, discussions then took place within the Commission between Directorate General III, assumed to be the Internal Market Commissioner,¹⁷⁶ and the Commission's Legal Service to determine whether the legal

¹⁷⁶ The numbering of the Directorates General changed frequently between 1980 and 2000.

situation justified bringing Germany before the European Court of Justice. According to the infraction fiche, the Commission contacted the original complainant, who argued that Germany's law treated importers as the "functional equivalent" of large distributors and not as national producers. In March of 1996, the Legal Service met once again with other Directorates General to discuss the case. In the meantime, the ECJ ruled in a preliminary reference case from a French national court that whatever provisions member states employed to guarantee the health and safety of products and the punishments associated with violating them were allowed under the condition that they did not disproportionately discriminate against imported products.¹⁷⁷ As a result of the decision in *Bouchara*, Commission officials concluded that the legal argument outlined in the Reasoned Opinion to Germany could not be maintained, and the case was closed.¹⁷⁸

The infringement case above reveals how legal developments during an infringement process can change the legal environment in which both the Commission and member states are acting. The amount of time necessary to solve such cases, sometimes between four and five years, creates the opportunity to make changes in the law itself independently of the case at hand to influence the success or failure of a particular legal strategy employed by either the Commission or the member state. These legal changes can emerge from several different sources. As demonstrated in the case above, these changes in the legal environment can result from shifts or clarifications made on the basis of recently decided ECJ case law. Although much less common, directives approved by the Council of Ministers through either co-decision or consultation with the European Parliament can also transform the legal environment

¹⁷⁷ Preliminary Reference, Case 25/88, *France v. Esther Renee Bouchara & Norlaine SA*, May 11, 1989, ECR I 1105.

¹⁷⁸ In fact, the Commission then began to investigate the complainant who first notified the Commission of the possible discriminatory German rule. However, due to issues of confidentiality, it is not possible to determine who this agent was or the outcome of the investigation.

such that state practices are no longer in conflict with EU law. Changes in EU law to protect traditional national food products demonstrate such a successful strategy. However, the directive to protect traditional foods also illustrates the general difficulties that are encountered in passing legislation in the EU within a short period of time. It is therefore highly implausible that a member state with a suspected EU legal violation will be able to change EU law so promptly and redefine the legal basis for the Commission's prosecutions. It is also unlikely that the law regarding a particular case will change at such a propitious time for a member state's government. The Commission's decision not to continue to prosecute a member state due to a lack of legal justification demonstrates the standard by which it decides to investigate and prosecute a suspected infringement. As reflected in a number of interviews, the Commission does not prosecute states for political reasons. Prosecutions are based only on whether a strong legal argument can be made.

Germany faced one final challenge to the LMBG by the Commission in 1998. According to Article 47A of the law, imports of foodstuffs that do not satisfy German regulatory standards may enter the German marketplace by obtaining permission from the Health Ministry. According to ECJ case law, this procedure could not apply exclusively to an entire category of products. Furthermore, when this procedure is employed, a decision must be reached within 90 days. The Commission issued a Reasoned Opinion against Germany when it found that this process lasted more than 90 days, although Germany defended the length of the process as necessary to guarantee the safety and health of the German consumer. On November 11, 1999, however, the Legal Service sent a letter to the DG responsible for investigating the infringement stating that insufficient evidence existed to prove that this process lasted longer than 90 days. After a series of delays, the German government informed the Commission on May 7, 2001 that the duration of the procedure decreased from 563 to

171 days between 1997 and 2000 and only four cases lasted longer than 90 days in the first six months of 2000, due mainly to incomplete documentation. In October of 2001, the federal government finally presented statistics to the Commission, which demonstrated that the approval process for products lasted no longer than 90 days and the case was closed.

IV. Summary

Although the case studies presented above are only a small sample of the total number of violations Germany has committed since 1980, each of the cases described illustrates why some cases are referred to the ECJ for settlement. A summary of the infringements, their origin, and judicial results appears in table 5.3. While the extent to which a law discriminates against the free movement of goods is the driving motivation of the Commission, disagreements over state practices and European principles are easily solved through the exchange of information and dialogue between officials. When the basic legal foundations and principles of a law are challenged, by the way an object or activity is codified in the EU legal order, however, it is highly unlikely that settlement will be possible. In Germany and in regards to the area of the free movement of goods, these disputes arose most often as a result of a clash between the German government's priority of protecting the consumer from what are perceived to be unsafe or unhealthy products and the Commission's goal of removing both qualitative and quantitative barriers to the free movement of goods within the EU.

TABLE 5.3 Summary of Violations Committed by Germany

Case #	Law	Subject Matter	Origin	Start Date	End Date	Court Decision
022/79	Arzneimittelgesetz (AZM)	Establishment Requirement for Marketing Pharmaceuticals	Commission Investigation	1979	1986	Yes
005/82; 414/90; 306/90	Biersteuergesetz & Lebensmittel- und Bedarfgegenständgesetz (LMBG)	Beer Purity Law	Complaint to Commission	1982	1995	Yes
518/86	LMBG	Location Requirements	Commission Investigation	1986	1992	No
061/88	AZM	Importation of Medications for Personal Use	Preliminary Reference	1987	1994	Yes
082/89	LMBG	Fruits and Vegetables	Commission Investigation	1989	1996	No
2199/98	LMBG	Importation of Foodstuffs	Commission Investigation	1998	2001	No
4806/2000	AZM	Garlic Supplements	Commission Investigation	2003	---	Yes

Yet the legal disputes that result do not necessarily arise from conflict over the relative importance of free trade versus social protections. Rather, they often center on the proper means by which to protect the consumer without disproportionately affecting the ability of EU goods to enter the German market. The Commission or the ECJ task has not been to explicitly or formally deregulate the European market in reference to the free movement of goods, but rather to identify practices in other countries that achieve the same goal without discriminating against imported goods from other member states. Nevertheless, the German government's traditional regulatory practice of relying on the state to determine in advance what products are permitted to be bought and sold is always the primary cause of the violations themselves.

German regulatory culture relies on a set of basic consumer protection principles to guide and frame market behavior. Only in rare circumstances, such as in the case of the beer purity law, have these activities become codified to the extent that

they define exactly what an item is and specifically how it must be manufactured. While political and economic interests may overlap at times in favor of maintaining the status quo, these interests were formed by the regulatory tradition that exists in Germany. For example, the numerous small family-run breweries in Bavaria relied entirely on the Reinheitsgebot for their economic viability as well as their competitive advantage in the European beer market. While the Reinheitsgebot is an extreme example of German regulation, in which a specific item is predefined by the legal order, it is also an excellent example of the way in which non-compliance occurs when these items must be redefined or reformed. The cases that were not settled by the ECJ demonstrate that as long as these legal principles do not discriminate against products from other countries and are limited in the extent to which they predefine what is allowed to exist and how market transactions take place, then compliance is more likely to occur before the European Court of Justice issues a ruling.

As each of the cases demonstrates, the degree to which German law codifies particular objects in the German economy determined why the ECJ was eventually required to overturn the national law. Without direct supervision or monitoring by the Bundestag, and despite massive opposition from one of Germany's most powerful states and Land prime ministers, a five-hundred-year law was overturned in a matter of months. While veto players could have acted behind the scenes in persuading national officials to fight the Commission's interpretation of EU law, no evidence exists in the empirical record to confirm this hypothesis. Instead, German lawyers relied on the principles contained in the tradition of the Rechtsstaat. And, because legal arguments and logic inform—not material incentives or coercive force—national traditions can be easily transformed.

CHAPTER 6

THE UNITED KINGDOM AND THE EU

I. Introduction

In the pursuit of a single European market, the Commission has sought to eliminate any possible regulatory barriers that prevent the free movement of goods among member states. In so doing, it has established a new political order such that national modes of regulation are now subordinate to European legal principles. When those modes of regulation conflict with the basic legal principle of proportionality, as defined by ECJ case law, the Commission has shown it will not hesitate when attempting to remove or change national norms of regulation, based on a civil code system. In Germany, this has meant frequent challenges to its preventive model of regulation. As long as the Commission did not seek to undermine the basic norm supporting the Germans' efforts to protect the consumer from harmful products or selling arrangements, they would not fight the Commission's efforts. However, when the Commission's legal analysis determined that Germany's method of regulation exceeded that which was employed in a majority of other member states and sought its complete removal, Germany refused to change the status quo until the ECJ made its ruling. Given the political challenges of re-regulating at the EU level, attempts at democratically overriding ECJ decisions are difficult and relatively rare.

Thus, although the German government possesses several methods by which it can hold the national executive accountable and the latter's legislative agenda-setting powers are relatively weak, such accountability has been sought only rarely. The Bundestag primarily reacts to the Commission's and ECJ's legal decisions. Although the UK has committed half the number of infringements Germany has, approximately the same percentage, 19%, were settled by the ECJ, slightly below the average of

22%. These results are surprising in several ways. Compared with similar situations involving other member states, the percentage of cases settled by the ECJ should be much higher in Germany, if there is a direct correlation between the number of laws codifying economic space and the ability to settle an infringement. The German government is able, however, to settle more of the suspected violations it commits because its regulatory traditions pertain only to specific goals and principles that should characterize economic activity. German law does not define all of social and economic reality in advance. Are there other factors that produce these results, such as Great Britain's historical hostility to EU governance? Indeed, even though the UK and Germany lie on opposite sides of the spectrum in terms of general support of the EU, their settlement records are generally the same.

The analysis that follows covers the general record of non-compliance committed by the United Kingdom over the last thirty years. Although the UK historically has had, at best, an ambivalent relationship with the EU and, at worst, a conflict-ridden one, neither of these factors can explain its record of non-compliance. In addition, in marked contrast to the Federal Republic of Germany, the *ex post* and *ex ante* mechanisms that hold the national executive to account in the UK are comparatively weaker. The UK is not, however, immune to the Commission's efforts to integrate the European economy. Even though it has the highest level of regulatory quality as defined by the authors of the World Bank study, across the fifteen EU member states considered here, it has on occasion violated EU law.

To trace the process of compliance in the UK, four legal cases involving regulatory practices that violated EU law in the area of the free movement of goods were selected for case study analysis, two of which were settled by the ECJ and two of which were not. These cases were selected from the approximately twenty the UK committed, all of which violated Article 28 of the EC Treaty, which prohibits all

quantitative or quantitative barriers and their equivalent among the member states. The findings show that levels of codification do explain why some countries violate the EC Treaty more often than others. Again, the motives underlying case selection here are similar to those used in the qualitative analysis of Germany's infractions of EU law. Each infraction is related only to Article 28 of the EC Treaty and selected from across the entire time period to determine if the reasons for the infringement remain constant or change over time.

The low level of regulatory codification in the UK explains why so few infringements occur, but this does not mean that conflicts over objects or market transactions are not predefined in British law. The common law legal system does predefine economic behavior through the use of the precedent system. Yet, these precedents are shaped by the particular disputes that have occurred within the British realm. Because these standards are set without the participation of the national legislature, or Parliament, it becomes more difficult to change the status quo. Changing a legal norm requires overturning a precedent in British law, not alterations in the state's legal code. In addition, because of the dualist notion of international law held in the UK, changing these rules is more difficult there. The infringements that the UK has committed have protectionist roots, but the government has complied immediately when the Commission has detected laws or regulations that discriminated against goods from other member states.

The evidence in chapter 4 shows that the sources of many of the Commission's complaints regarding EU law involved the type of consumer protection that exists in Germany, not necessarily the level of protection. A series of ECJ rulings established the doctrine of majoritarian activism (Maduro 1998). When national regulatory practices would attempt to achieve goals through more restrictive practices than exist in a majority of other member states, the Commission would cite Germany for

violating the EC Treaty and Germany would, in turn, refuse to settle these violations until the ECJ issued its ruling. The origins of such disputes between the Commission and German authorities lay in the traditional practices the German government used to protect the consumer from potentially harmful products or selling practices. These traditional practices arose from the legal rules based on an *Ordnungspolitik*, or commitment to maintaining public order. In the United Kingdom, these legal traditions are vastly different.

The United Kingdom shares a set of national policy legacies and legal traditions that distinguishes it from its co-member states on the Continent (Dyson 1980). However, these distinctive traditions have less to do with the content or principles of regulation in the UK than with the means by which the market is regulated. As has been noted in the literature, the British regulatory state underwent a profound transformation through deregulation and privatization (Bishop, Kay, and Mayer 1995; Foster 1992; Wright 1994). The neoliberal reforms that began in 1979 and continued through two Major-led governments coincided with efforts being made at the EC level to create a single market, whereby market mechanisms rather than state controls are the preferred means of delivering essential services and administering the state. Yet deregulation and privatization in the UK do not necessarily imply the absence of a state role in running the economy. Quite the opposite, and in marked contrast to the way its Continental peers operate, the state and civil society or market actors in the UK are thoroughly interconnected in order to achieve the most efficient means of regulating market activity.

The history of state development and the political economy of the United Kingdom are marked by the lack of any separation between state and civil society. Some scholars have even insisted that Britain is a “stateless society” (Nettl 1968) and a “government by civil society” (Badie and Birnbaum 1983). For example, even when

Britain nationalized particular industries, these industries remained separate from the state bureaucracy and were organized as private companies in the public trust.

Therefore, instead of observing sharp boundaries between them, state and civil society or market actors cooperate openly. Firms and other social actors work directly with officials both in Parliament and Whitehall (Vogel 1986). Instead of determining particular independent principles under which market behavior is allowed to take place, British civil servants work with societal actors to develop solutions that are most practical and allow national markets to operate more efficiently. Private actors have a great deal of trust in civil servants to respond to their concerns given their high levels of professionalism and general neutrality (Bulmer 1988).

Against the backdrop of these administrative and legal traditions, British infractions of EU law are likely to emerge for two reasons. First, because of close connections between British firms and the national bureaucracy, there is an increasing likelihood that some state regulations act as a patent form of protectionism vis-à-vis European competitors. In Britain, it is more likely that regulatory agencies will be “captured” by special interests that are suffering the consequences of freer markets (Stigler 1971).¹⁷⁹ In a pluralist system such as Britain’s, there is open competition for the benefits the state provides. Assuming that the benefits of free trade with the EU are relatively diffuse and the costs are highly concentrated among a few actors, it is more likely that firms most affected by trade liberalization with the Continent will seek protection from the state. Pluralist systems of governance are more susceptible to such

¹⁷⁹ There are two methods by which a regulatory agency could be captured. In one scenario, a firm or group of firms force an agency to develop a standard, providing it with a market-distorting product advantage. In a second scenario, a regulatory agency seeks to protect an endangered sector or firm that is a powerful minority constituency of the government (McGowan and Seabright 1995). In either scenario, the regulatory standards developed may unlawfully discriminate against goods imported from the EC and lead to a violation of the Treaty of Rome.

problems because the costs of adjustment cannot be distributed among political actors more evenly or compensation easily provided to the losers (Katzenstein 1985).

The second major cause for a violation based on the “misfit” between British and European regulations is the regulatory standard eventually developed through state-civil society cooperation. That the British state supports practical, market-based policy solutions does not imply that those standards will not exceed what exists among a majority of other EU member states. Even if British regulatory officials, in cooperation with market actors, develop an optimal standard for their own national market, this standard may not be optimum now for a market consisting of 25 countries. Furthermore, under the EC Treaty, the Council of Ministers can develop a standard for the entire EU through a regulation that is directly applicable to a national context. Therefore, if the United Kingdom enforces a regulation that does not meet EU standards, an infringement process against it may ensue. Most legal infringement processes launched against the member states throughout the 1980s and 1990s dealt with actual barriers to the free movement of goods, however, and not standards that were too low. Therefore, there is little reason to suspect that these cases constitute a significant percentage of Britain’s violations of EU law (see table 6.1).

The standards by which trade in manufacturing takes place emerge not only from close cooperation between the state and the firm, but also from the process through which they have become defined through years of case law. Common law exists to adjudicate disputes among civil actors, and the meaning of a text or regulation emerges through inductive logic. The standards or established

TABLE 6.1 Distribution of UK Infringements

	Total # Violations	Total # Court Rulings	% of Total Violations
EU-15	1,210	233	19.5%
Internal Market	450	79	17.5%
(Percent of EU-15 Total)	(37.2%)	(33.9%)	
Free Movement of Goods (FMG)	294	45	15.3%
(Percent of Internal Market)	(65.3%)	(57.0%)	
(Percent of EU-15 Total)	(24.3%)	(19.3%)	
<hr/>			
United Kingdom	51	10	19.6%
(Percent of EU-15 Total)	(4.2%)	(4.3%)	
UK-Internal Market	11	2	18.2%
(Percent of UK Total)	(21.6%)	(20.0%)	
(Percent of Internal Market)	(2.4%)	(2.5%)	
UK-FMG	9	2	22.2%
(Percent of UK Total)	(17.6%)	(20.0%)	
(Percent of FMG Total)	(3.0%)	(4.5%)	

interpretations of these standards can come into conflict with legal doctrine through case law that has emerged out of rulings passed down by the European Court of Justice. One of the first instances in which an interpretation of British law was challenged in European courts was *Regina v. Henn & Darby*.¹⁸⁰ In 1979, the British House of Lords, in its first Article 234 referral to the ECJ, requested assistance in determining whether the ban on selling erotic materials, including those imported from Denmark (within the EC), constituted a violation of Article 30 of the EC Treaty. The case emerged because various regions and territories within the United Kingdom interpreted and enforced the ban on the sale of erotic items differently. While the European Court of Justice ultimately upheld the British ban on the sale of erotic materials, it had asserted its power to adjudicate what constituted a legitimate prohibition on the free movement of goods on the grounds of public morality. More

¹⁸⁰ Case 34/79, [1979] ECR 3795.

importantly, however, Henn & Darby also illustrates that the UK may be enforcing regulations that exceed the majoritarian standard, just as other states do.

The origins of British regulatory standards, and thus possible infringements of EU law, emerge from the particular meaning constructed through conflict between domestic firms over the meaning of a statute; they are not based on the implementation of civil code. Thus, although Britain strives to find market-oriented solutions to regulatory problems and the quality of its regulations is the highest among the countries considered in this study, it does not preclude the possibility that some British regulations will disproportionately discriminate against goods from the EC when attempting to achieve those ends.

II. The Two Level Process of Compliance in the UK

The following four case studies explore the origins and process of settling violations of EU law that Britain committed between 1978 and 2002. Using documents provided by the European Commission, including internal correspondence from within the British government and with officials from the European Union, four British violations of EU law in the area of the free movement of goods are traced from the point at which they were detected to the transformation of the status quo. In two cases, the European Court of Justice issued a ruling to settle the dispute and in two it did not. The goal is to determine the causes of a violation in Britain and show why some infringements require ECJ settlement. The source of the infringement is expected to result when standards employed by the UK located in its common law legal tradition conflict with those employed by the EU. If a particular firm or industry has succeeded in capturing a regulatory agency, then the politics-of-self-interest hypothesis should explain why an infringement has occurred. Once the violation is discovered, however, changes in the law should proceed with ease. Across the four

cases, the process of settling the infringement should not be determined by the nature of the infringement, if the null hypothesis is correct.

Court Cases

Indirect Discrimination by Origin

In December of 1981, the European Commission issued a Reasoned Opinion against the United Kingdom in relation to a law designating the marking of origin of products. The Commission initiated Article 226 procedures against the UK in relation to the Trade Descriptions Act of 1972. In particular, it targeted Statutory Instrument 1981, Number 121. Under this Act, all clothing, domestic electrical appliances, footwear and cutlery were required to indicate the country of origin in which the product was manufactured. While the Commission began the formal procedures under Article 226 in 1981 and a court ruling was eventually issued in 1983, the history of this case begins as early as Britain's initial entry into the European Economic Community.

Extensive discussions over the Trade Descriptions Act (TDA) started as early as 1973, shortly after the law had been approved by Parliament. On April 23, 1973, the Financial Times reported that the Dutch Economics Minister was requesting that the European Commission investigate whether the TDA violated the Treaty of Rome. In response to questions posed by two members of the Liberal Party in Holland, the Dutch Economics minister suggested that the TDA discriminates against goods from other EEC member countries when it requires products made there to carry a mark of origin, even if it contains a brand name in use in Britain or could be perceived as a British brand name.¹⁸¹ Reaction from British firms began almost immediately. On April 27, 1973, The National Wool Textile Export Corporation wrote the Department

¹⁸¹ "Dutch and U.K. 'brand names' Act," Financial Times, April 23, 1973.

of Trade and Industry (DTI) asking for its comment on this report.¹⁸² On May 18, 1973, the British Government, through the Permanent Representative of the United Kingdom to the EC, reported that the Commission believed the TDA violated Article 28 of the EC Treaty.

Almost immediately after the British government was notified that the Commission might take action against it, officials in agencies across Whitehall began to coordinate a common position in response. The defense the British government used to justify the law began to take shape. David Smith's task at the UK Permanent Representative's office included informing officials of developments at the EU level and explaining how that would affect the legal and, therefore, policy position of the United Kingdom. Officials involved included the Cabinet Office; the Ministry of Agriculture, Food, and Fisheries (MAFF); the British Embassy in the Netherlands; the Foreign and Commonwealth Office; and DTI, which took the lead in the case.

Opposition to the UK's regulatory practice in this area was already solidifying among other EC members. For example, a Directive was being considered by the Council that would prohibit markings of origin on chocolate made within the EEC, a battle that the UK had already lost. Upon British entry, other member states devised a list of possible incongruities between British practice and EU law, including these regulations.¹⁸³ As a result, the UK was forced to decide whether to fight for markings of origin product by product or try to "change the mind of the Commission."¹⁸⁴

The British position coalesced in the fall of 1974. The Commission argued that marking the origins of goods would lead consumers to purchase similar products from elsewhere. However, the British government did not see this as a restriction on the sale

¹⁸² Letter, dated April 28, 1973, British Archives.

¹⁸³ For instance, one firm in Belgium was having trouble selling "Advocaat," a sweet liquor, due to the lack of a marking of origin.

¹⁸⁴ Letter, dated August 16, 1973, from David Smith to Miss M.J. Lamont, British Archives.

of imports, but only as a possible reduction in their consumption. The lawyers from the Treasury Solicitor's office deemed the Commission's legal case weak. But the lawyers also may have defended the law based on how "origin" was defined in English law.

British case law began to define the purpose of trademarks as fulfilling particular rights consumers have regarding the origin of the product (Moyes 1984). In a case dating from 1893, the House of Lords employed the definition of Bowen L.J. in stating, "The function of a trade mark is to give an indication to the purchaser or possible purchaser as to the manufacture or quality of the goods—to given an indication to this eye of the trade source from which the goods have come, or the trade hands through which they pass on the way to the market."¹⁸⁵

Beginning with this case, the purpose of a trademark was to inform the consumer about the specific quality of a product. When trademark law was first formally codified in 1938 through the United Kingdom Trade Marks Act, a trademark was defined as ". . . a mark used or proposed to be used in relation to goods for the purpose of indicating . . . a connection in the course of trade between the goods and some person." As both the Act and case law began to make clear, trademarks were meant to tie the quality or worth of the product to the identity of the seller. The consumer was entitled to, and the manufacturer awarded the opportunity to, benefit from the reputation of the seller. The case law, however, says little about the need to identify the geographic origin of the product.

Developments in European case law indicated that the British conception of the purpose of a trademark would eventually come into conflict with EU law. In particular, the Court did not view a trademark as a feature on a product from another EC member state that should necessarily be indicated. For example, in 1977 the

¹⁸⁵ Re Powell's Trade Mark, [1893] 2 Ch. 388.

British government presented their argument in its observations concerning an important trademark case before the European Court of Justice. The UK defended the use of trademarks as protecting the consumer by identifying the product's manufacturer.¹⁸⁶ While the ECJ agreed in its ruling that trademarks serve to identify the manufacturer, the use of the trademark could not be mandatory. Moreover, additional ECJ case law stipulated quite clearly that a trademark was meant only to determine the proprietor of a product, not its geographic origin.¹⁸⁷

Despite these rulings, the British government refused to change the status quo. Because the UK employs a dualist understanding of international law, the government did not perceive it as necessary to change the status quo. There was, therefore, no reason to fear that an Act of Parliament would have to be repealed.¹⁸⁸ Although changes to the status quo could be achieved through the simple issuance of an order under Section 2(2) of the European Communities Act of 1972, Whitehall increasingly perceived the Commission's legal case as weak. Despite its interests in completing the single market, the British government defended the legal status quo and the purpose of trademarks under British law.

The United Kingdom's stance against complying seems to have formed around the end of 1974. However, tumultuous political events in the UK postponed dealing with the violation by the Commission until the early 1980s. First, Prime Minister Heath called early elections in 1974. While he won a plurality of the vote, the Ulster Unionists refused to sit with his party and a minority Labour government came to power under Harold Wilson, who was later replaced by James Callaghan. The Labour Party's leaders remained strongly opposed to Britain's joining the EC and sought now

¹⁸⁶ Case 102/77, *Hoffman La Roche & Co. AG v. Centrafarm* [1978] ECR 1139.

¹⁸⁷ Case 12/74, *Commission v. Germany "German Sparkling Wines"* [1975] ECR 181, and Case 3/78, *Centrafarm BV v. American Home Products Corporation* [1978] ECR 1823.

¹⁸⁸ Letter, dated October 2, 1973, from C.B. Robson to Miss M.J. Lamont, British Archives.

to “renegotiate” the terms of entry. The referendum on joining the EC was approved in 1975, but with anti-European members of the Labour party still asserting their strength and a dire economic situation at home, further cooperation with Europe was put on hold until the arrival of Margaret Thatcher as Prime Minister in 1979.

The level of political instability at the time in the UK might account for the lack of movement in this case until 1981. Meanwhile, a similar case went before the Court a year before involving Ireland’s Merchandise Marks Order of 1971.¹⁸⁹ In the “Irish Souvenirs” case, the Irish government prohibited the sale of souvenirs with motifs symbolic of Ireland manufactured elsewhere unless they were clearly marked as originating from outside Ireland. The Commission attacked the law as protectionist. In this case, the Irish Attorney General conceded that they would most likely lose in Court because their case was so weak. The Irish government chose to fight the law, however, in order to make the law clearer in this area.¹⁹⁰ Once the ECJ issued its ruling, British officials traveled to Dublin to determine what they could learn from the case. Like Britain, Ireland hoped to argue that markers of origin were put in place in order to protect the consumer, mainly from misleading or false articles. But the Irish government also acknowledged that there was no consumer protection movement within Ireland to defend the regulation and “that trade interests generally were in favor of extended marking because they thought this would have an effect on import penetration. And it was not too far from the front of our [the Irish government’s] minds that extended origin marking might fulfill this psychological need and so ease political pressure on Ministers.”¹⁹¹ The British government ultimately declined to

¹⁸⁹ Case 113/80, *Commission v. Ireland (Irish Souvenirs)*, 1981 ECR 1625.

¹⁹⁰ Memo from Mrs. Denza, Legal Advisor to UKREP, July 7, 1981.

¹⁹¹ Memo from C.A. Ford (DTI) to Unknown, 1981, regarding a meeting he held with his Irish counterparts. By “Ministers,” the author must be implying Prime Ministers in each country. The letters also demonstrate a high level of cooperation between the British and Irish officials. While perhaps unique to Britain and Ireland or this case, the correspondence and meeting between government officials, such as the sharing of official, confidential documents, had reached a remarkable level.

intervene on Ireland's behalf, perhaps knowing they would soon confront the Commission over the same issue a few years later.

In December 1981, the Commission once again restated its position in a Reasoned Opinion sent to the British government. The Commission was not targeting the TDA per se, but the effects on trade it could generate. In its letter to British officials, the Commission argued that the statutory order under the TDA required British retailers to notify the consumer of the geographical origin of a product. According to the Commission's logic, retailers would eventually pass the costs of origin marking on to the manufacturer. The exporting manufacturer would be forced to mark the product in order to retain his customers, thereby increasing the costs of the imports as a result, another example of how the Commission determines that a distortion of trade exists based on the logical implications of a law and not its actual, measurable impact.¹⁹² The UK, in part, responded that the marking of origin provided necessary information to the consumer that guaranteed the authenticity of the product being purchased. In short, the British position held that the same goods, perhaps carrying the same brand, could originate from several countries. The marking of origin would help the consumer distinguish between high- and low-quality products. Even if the argument in favor of consumer rights was dismissed, the UK government argued that the law applies to imports and domestically produced items alike and, therefore, is not discriminatory in its intent or application.

As expected by the British officials themselves, the European Court of Justice was not persuaded. First, the Court argued that origin marking has the logical effect of distinguishing between foreign and domestic goods. The goal of the Treaty of Rome is

¹⁹² The Court however cites in its judgment that the French Domestic Appliance Manufacturers' Association informed the Commission that they were required to systematically mark their products in order market them in the UK as a result of pressure brought to bear by their British distributors.

to create a single internal market for goods throughout the Community. The Court wrote:

Within such a market, the origin-marking requirement not only makes the marketing in a member state of goods produced in other member states in the sectors in question more difficult; it also has the effect of slowing down economic interpenetration in the community by handicapping the sale of goods produced as the result of a division of labor between member states.¹⁹³

The Court also ruled that the consumer protection argument the UK provided was inherently discriminatory. By forcing importing manufacturers to mark their goods, the consumer is made aware of a distinction that should not matter, perhaps leading consumers to choose nationally-produced goods over imported items. If a particular country is associated with a particularly well-produced good, such as Italian shoes, the Court rightly answered that manufacturers in these countries would proudly do so voluntarily. Britain only had to guarantee that false markings of origin were illegal. Almost twelve years after initial suspicions regarding the TDA's marking requirements were expressed by Dutch officials, a ruling had been reached. It received little attention in the UK.¹⁹⁴ The Order requiring origin marking was removed one year later through the use of a negative statutory instrument on February 17, 1986, and the case was subsequently closed.

Besides the one question raised by a Member of Parliament, there is no evidence that strong opposition emerged against compliance on the part of either MPs or the retail businesses likely to be affected by the change. The primary motivation of

¹⁹³ Case 207/83, *Commission v. United Kingdom of Great Britain and Northern Ireland (Markings of Origin)* 1985 ECR 1201.

¹⁹⁴ One written question in both the House of Commons and House of Lords was posed to the government upon the publication of the ECJ's ruling. In each case, the Secretary of State for Trade and Industry responded, "The Government will be carefully considering the judgment and its implications for the future of the Order, and will consult bodies representative of those affected as soon as possible."

British authorities in defending the law was, first, the absence of any Community law that addressed the issue. While the violation occurred because firms and politicians from other member states detected a possible protectionist law, Britain's refusal to comply stemmed from a different understanding and interpretation of the purpose behind a trademark that is steeped in British common law. Certainly, the Trade Descriptions Act's requirement of origin marking clearly appears to be a device used to benefit domestic manufacturers at the expense of foreign firms. Yet, at the same time, the government raised legal arguments against complying with the Commission's demands based on their understanding of the meaning of a trademark. Britain's justification of the law accurately followed the legal principles then entrenched in the domestic legal order. The British government and its lawyers felt it was their duty and their right to guarantee that the products consumers purchased specified their point of origin.

Compulsory License Case

The second major court case in the area of the free movement of goods in the United Kingdom deals with another element of British law that had only theoretical protectionist implications. States traditionally encourage economic growth and industrial competitiveness through the issuance of a compulsory license. Compulsory licenses are granted by national authorities to third parties when one firm that holds a patent on a particular product or manufacturing process cannot fully exploit the market for a newly invented good. In some cases, however, compulsory licenses can also be used to protect national markets from imports of similar products. While several EC member states had such laws on their books, only the British version received the attention of the Commission.¹⁹⁵

¹⁹⁵ Other countries joined the case later.

This case illustrates several interesting features related to compliance with EU law. First, the origin of an infringement can occur not only through the Commission's own investigations, but also through the Article 234 Preliminary Reference procedure, as seen in the German case related to the import of personal medications. Second, this case and the Trade Descriptions case also show that the British government will choose to go to Court when the law concerning a particular practice is still unclear at the EU level. Finally, the compulsory licenses case also demonstrates how complex international relations within Europe have become in the past twenty years. Not only has International economic cooperation accelerated over the last few decades, but also the types of actors involved in international negotiations have led states to sign on to multiple, often overlapping agreements. These agreements made through different institutional settings have significantly increased the complexity of the legal environment in which government must act.

The second case involving non-compliance by Britain began in 1985, when the House of Lords, England's court of final appeal, referred a case to the ECJ for a preliminary ruling regarding a matter of EU law. In *Allen & Hanburys v. Generics (UK) Ltd.*, the plaintiff sought a temporary injunction against the defendant from selling a patented medicine in the UK.¹⁹⁶ *Allen & Hanburys* held that the British patent on the manufacture of salbutamol, a medication used to counter asthma attacks, violated Article 28 of the EC Treaty. A compulsory license was granted to British manufacturers in order to meet the supposed unmet demand for the drug. A Dutch and a British firm sought a license to market the drug, but wished to manufacture it in the Netherlands and Italy, respectively. Under the Patents Act of 1977, the UK Comptroller-General of Patents may determine the conditions under which these licenses are to be granted. Section 48 of the law specifies that one of the conditions for

¹⁹⁶ Case 434/85, *Allen & Hanburys Ltd. v. Generics (UK) Ltd.*, ECR 1988 I-1245.

the issuance of compulsory licenses is that demand for the product is “not being met on reasonable terms or is being met to a substantial extent by importation.” In addition, Section 50(1)(c) of the law states that “interests of any person for the time being working or developing an invention in the United Kingdom under the protection of a patent shall not be unfairly prejudiced.” The goal of the law is clearly to promote the development of UK industry and protect it from foreign competitors. The House of Lords determined that the comptroller had the right under British law to limit the terms of the license to British manufacturers, but they also realized that this decision might conflict with Articles 28 and 30 of the EC Treaty and referred the case to the ECJ for an advisory opinion.

Before the establishment of a liberal trading regime after World War II, patents were used frequently to develop and protect nascent domestic industries from foreign competition. If the patentee produced the item abroad, the license would be revoked. The Paris Convention for the Protection of Industrial Property of 1883, one of the first international agreements in this area, prohibited such patents. The Convention did not, however, forbid the practice of granting compulsory licenses to national third-parties if the original patentee could not satisfy domestic demand (Demaret 1987). The economic impact of these licenses is questionable. Compulsory licenses are rarely granted, and the direct impact of forbidding imports under such circumstances is extremely hard to detect. Nevertheless, such practices run directly counter to the European Court of Justice’s statement in *Dassonville* that any state provision that “is capable of hindering, directly or indirectly, actually or potentially intra-community trade” is illegal under the Treaty of Rome. The ECJ ruled as such in its preliminary ruling. The ECJ stipulated that national courts were forbidden to grant injunctions or relief when the terms of such relief violated the Treaty of Rome. Through Preliminary

Judgment, the Commission was notified of the British law and initiated infringement proceedings against the United Kingdom in 1989.

On March 20, 1989, the Commission notified the British government that Section 49 of the Patents Act of 1977 violated the EC Treaty. The Commission questioned the legality of the UK's law for two basic reasons. First, it repeated the Court's decision in *Allen & Hanburys*, whereby the conditions of receiving a compulsory license in the UK discriminated against imports from another member state. By granting compulsory licenses solely to foreign firms, Britain violated Article 28 of the EC Treaty by placing a qualitative restriction on the free movement of goods. In addition, the Commission also argued that such practices threatened the patents held by firms in other member states. If an EC-based firm marketed a product in the UK and a compulsory license was granted to a British firm to meet unmet domestic demand, the foreign firm could lose the right to exclusive use of the patent. From the Commission's standpoint, the British law was clearly illegal. Similar infringement procedures had already begun against Italy. The Commission had notified Denmark, Greece, Ireland, Portugal and Spain. Italy later joined the case, and Spain and Portugal intervened on the United Kingdom's behalf (Hodgson 1992).¹⁹⁷

The United Kingdom raised several objections to complying with the Commission's demands. In total, the British government cited seven reasons why Section 48 of the Patents Act did not violate the EC Treaty. Both Italy and the UK argued that such laws were permissible under Article 30. Under Article 30, the member states can justify restrictions on imports from other member states on the grounds of "public morality, public policy or public security . . . or the protection of industrial and commercial property." The purpose of compulsory licenses is to allow other firms to exploit pent-up consumer demand that the original inventor cannot

¹⁹⁷ See Case C-235/89, *Commission v. Italy* [1992] ECR I-777.

meet. In the case of pharmaceuticals, the need to satisfy national demand for a particular drug, such as a newly developed vaccine or medication, may be quite realistic, even vital. Under this scenario, there is little doubt the state is serving the public interest. However, as the ECJ ruled, there is no need to discriminate against foreign firms in order to serve the public interest in these situations. In fact, by forbidding imports of patented products, the government may be limiting supply to such an extent that it is only making the situation worse than it needs to be. Thus, as in previous rulings, the Court rejected this part of the UK's argument.

Yet, the British government's defense of Section 48 went further. Under Article 295 of the Treaty of Rome, the "Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."¹⁹⁸ Moreover, given that this area of law has not yet been integrated into EU law, national legislatures have the power to determine the conditions and rules under which patents are granted, the British government argued.¹⁹⁹ Other sources of international law, such as Article 5 of the Paris Convention, explicitly granted states the power to award compulsory licenses (Murray 1992). While the ECJ granted these facts, it is still not permissible for national legislatures to adopt measures that would conflict with the free movement of goods and a state's obligations under EU law. In spite of the many attempts of the UK to justify the law, the ECJ ruled it was illegal and ordered the legislation removed or changed such that it complied with EU law.

Despite the ECJ's rather decisive judgment, another seven years passed before the British government eventually complied with the ruling. The first draft of a

¹⁹⁸ Although the meaning behind this amendment remains rather unclear, it was inserted in 1963 to exclude the possibility that a socialist supranational organization would appropriate national or private property, as well as to reaffirm the member states' commitment to free market economies. At the beginning of the Cold War and with strong communist parties in Italy, France and elsewhere, these principles were not undisputed.

¹⁹⁹ While the Luxembourg Convention or Community Patent Convention existed since 1975, it had not yet come into force.

regulation changing this law appeared on January 16, 1997, but had not yet been adopted. After receiving a formal reminder from the Commission, the UK government responded on June 23, 1998 that the delay resulted from several causes. First, meetings were required to be held with affected groups. Second, significant legal uncertainty developed in terms of the legal basis for a law, given that the competencies for such laws were shared between the member states and the EU. Finally, the summer break taken by Parliament in 1998 again delayed action on the law. After a second reminder by fax on October 26, 1998, the British government once again met with Commission officials to discuss the case. However, a draft of the necessary statutory instrument was not approved until September 1999. Using the negative procedure, the Patents and Trade Marks (World Trade Organization) Regulations 1999 were approved by Parliament, which discontinued the granting of compulsory licenses if the patented invention is being manufactured abroad and demand in the UK can be met by its importation from another WTO member state, which includes all EU member states.²⁰⁰

Unfortunately, there is a relative dearth of evidence in the empirical record to explain why the British government chose to contest this law before the European Court of Justice. Overall trade patterns fail to yield any observable relationship between Britain's patterns of trade with the EU and its desire to protect, or at least to foster, British industry. Overall trade with the EU between 1975 and 2000 is robust, slightly more than 50% of Britain's total exports and imports. However, trade in goods only with the EU never exceeds more than 25% of gross domestic product (see figure

²⁰⁰ The infraction fiche, which details the process of how an infringement is settled, states that the British government faced some Parliamentary opposition. As a result, several amendments to the law were proffered, accounting for part of the delay in compliance. Correspondence with current officials in the UK Patent office yielded no additional information regarding the legislative process. In addition, since the government employed the negative procedure to comply with the ECJ's ruling, and no amendments are allowed, it is unclear when this opposition occurred or what its nature was.

6.1). The picture does not change when examining the pharmaceutical sector, one important sector of the economy for which compulsory licenses were used. Since 1975, the UK has enjoyed a net trade surplus in pharmaceuticals both vis-à-vis the world and in relation to the EC-12, although the gap has narrowed recently regarding the latter (see figures 6.2 and 6.3). There are no clear protectionist reasons based on the analysis of trade data, unless the government’s motivations lie with protecting this advantage. The government’s desire to consult first with those firms or industries affected by changes in the Patents Law hints at this possibility.

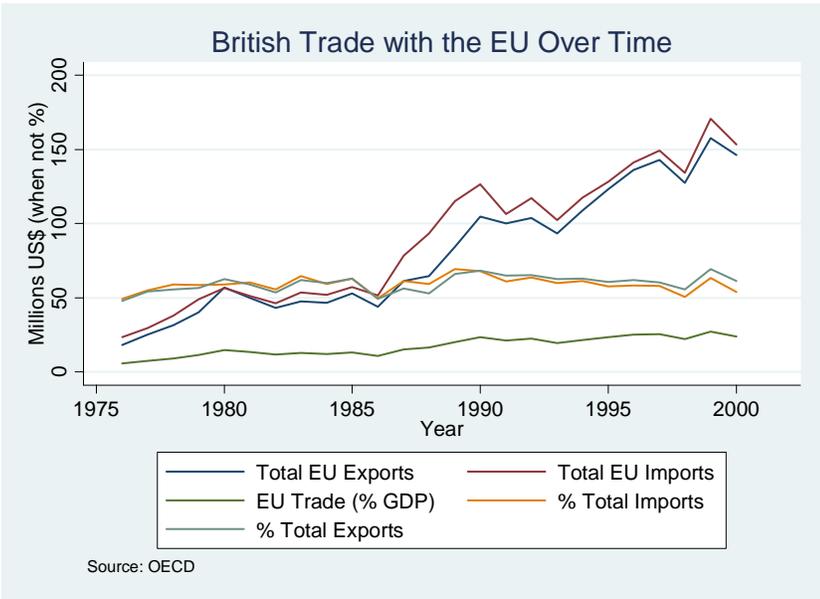


FIGURE 6.1 British Trade with the EU Over Time

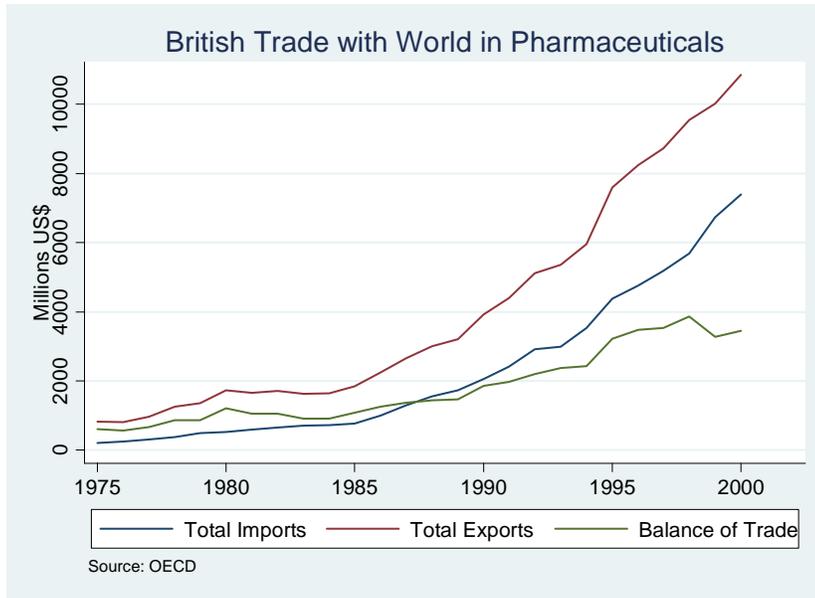


FIGURE 6.2 British Trade with World in Pharmaceuticals

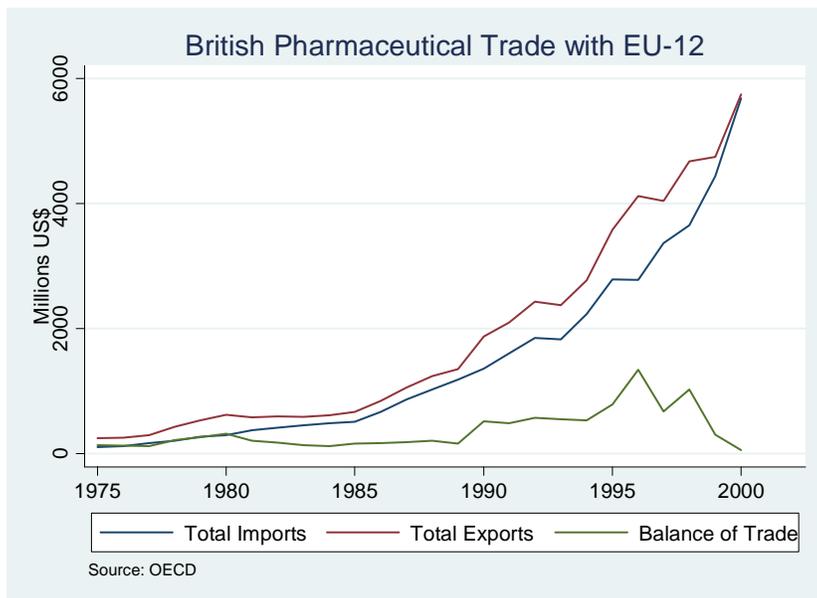


FIGURE 6.3 British Pharmaceutical Trade with EU-12

Instead, what accounts for the British government’s defense of the law is its desire to defend national practices when supranational legislation in a particular economic sector does not exist. As in the case of origin marking, the British

government's main legal defense in these cases was not just to protect the consumer. It also believed that national legislation in these areas should remain undisturbed until the member states negotiate a proper solution at the EU level. If true, then this fact would also support the argument that a key source of conflict rises from the dualist tradition of international law in Britain. A state's rights and obligations under a treaty can affect the domestic legal order only to the extent that legislation must specifically be altered in order to comply. There are no indirect effects or unintended consequences of a state's treaty obligations, and treaties are not granted immediate effect within the domestic legal order. Unless the state has explicitly changed the status quo in order to comply with an international treaty's obligation, those international rules cannot extend beyond what the texts of these treaties have explicitly intended. These hypotheses can best be tested by turning to those violations that were not settled by the European Court of Justice.

Avoiding Court Settlement

Of the nine violations the United Kingdom committed in the area of the free movement of goods, only two were referred to the European Court of Justice for settlement. The comparatively small number of violations the UK has committed in the last twenty years is due in large part to the quality of Britain's regulations. Compared with those established in other member states, particularly Germany, its regulatory practices place few conditions on the nature of market practices or on how transactions can take place. When conflicts have taken place, such as in the cases of origin marking and patent law, they have centered on the few protectionist policies the UK has remaining in place.²⁰¹ Yet, despite having several policies in place that were

²⁰¹ This is in reference only to manufacturing or the free movement of goods. Other areas of the economy, such as financial services, may have other regulations in place that distort free trade with other EU member states.

suspected of discriminating against goods from the EU, not all cases were settled by the ECJ. This section briefly discusses two of these cases. In each case, some of the factors that cause an ECJ referral as illustrated above are absent. Although relatively less information is available regarding these infringements, the evidence leads to some general conclusions about the process of compliance in the UK.

Export-Credit System

In 1982, the Commission initiated Article 226 proceedings against the UK for unlawfully supporting domestic exporters. In particular, the British government had in place a special program to protect British manufacturers and other export industries from the volatility of world markets. Under the Export Credit System, if the price of delivery or some other cost increased between the time at which a contract was signed and the time at which the product was finally delivered to a foreign entity, British exporters could enroll in a cost-insurance scheme provided by the government that covered such price escalations. In this case, the Commission was not targeting the plan because it served as a barrier to the free movement of goods as defined in *Dassonville*. Instead, the Commission argued that firms from other member states could not benefit from the risk-insurance scheme and that, therefore, it operated as an illegal support of British exports.

On January 5, 1984, the British government responded to the Commission's request, informing the Commission that this scheme required an extension by Parliament every year. As of March 26, 1984, the law had expired and would not be renewed. As soon as written confirmation was relayed to Commission officials, the case was closed. In addition, as a result of the Commission's actions, France also ended such policies.²⁰² Unfortunately, little evidence exists that speaks to the origin of

²⁰² Case 291/83 was removed the ECJ case register on October 3, 1986.

this scheme or why the Commission chose to place it under scrutiny in 1982.²⁰³ The ability of the government to bypass both Parliament and consultation with affected interest groups eased the process of settling the infringement. The removal of the special insurance scheme also did not require the re-interpretation of basic national legal principles. The government understood clearly that the program as an unlawful subsidy and promptly ended its operation, and British officials readily complied. Nevertheless, much of this stands as mere speculation. The most likely reason for its quick settlement is that it required no positive action on the government's part.

Parallel Imports of Pesticides

One of the last violations the United Kingdom committed in the area of the free movement of goods occurred in 1999. The British government settled a possible infringement before it reached the European Court of Justice, but only after British law was changed first. On March 11, 1999, the ECJ issued a preliminary ruling in a reference sent by the High Court of Justice, Queen's Bench Division. In order to implement Directive 91/414/EEC on the use of plant pesticides, the British Government passed the 1994 Control Arrangements, which allowed the import of pesticides from firms residing in either the EU or EEA (European Economic Area) and additional firms if the product is identical to one already approved for marketing in the UK. A foreign firm may export a pesticide to the UK if the active ingredient already appears on a "master list" of approved pesticides and the approved formulation is not dangerous or harmful to humans or animals. In essence, the 1994 Control Arrangements merely provided a simplified procedure for parallel imports of pesticides. British Agrochemicals, a company representing more than 39 members of

²⁰³ Any officials with knowledge of this case have long since left office, and a search for documents in the National Archives proved fruitless.

the agrochemical manufacturing industry, argued that the 1994 Control Agreements were illegal under the Directive. Rather than employing a speedy procedure of approval, the Directive required extensive tests, analyses and trials before allowing a new pesticide to be marketed in the UK. The Court ruled that the Directive did apply, but it provided the flexibility available to officials to permit parallel imports.

Although the Court had ruled in favor of the British government in the Preliminary Ruling, the Commission initiated infringement proceedings against it in early 1999. Several firms from outside the UK had complained that the procedures for approving the parallel import of pesticides lasted too long (17 weeks). The British government agreed that the process in place required a significant amount of time to determine whether a particular pesticide was identical to one already approved. The government agreed to streamline their procedures on November 12, 1999. However, before another meeting with the Commission on October 17, 2000, the British government observed that the UK High Court had interpreted “identical” as meaning exact equivalence in all respects. Any variation in the formulation of the pesticide was not acceptable. In addition, the responsible regulatory agency would contact officials in other member states to gather more information, which only added to the delay.²⁰⁴ As additional complaints were registered with the Commission, the government remained reluctant to comply and a Reasoned Opinion was issued.

On November 9, 2001, the British government avoided another court case regarding the parallel import of pesticides when the UK Court of Appeal overturned the decision by the High Court. This allowed the government to loosen the restrictions it had placed on the parallel import of pesticides. Regulatory procedures that were in accordance with the ECJ original preliminary ruling and that reduced the amount of time necessary to gain approval for importation were put into place as of November 1,

²⁰⁴ Infraction fiche 1998/5023.

2002. None of the firms that raised their complaint to the Commission opposed or questioned the changes the British government issued. Some members of the Commission continued to raise questions about the arrangements for granting approval of parallel imports until 2003, at which point the matter was finally closed.

The parallel import of pesticides illustrates an interesting feature of supranational law. As legal integration takes place, national governments become susceptible to pressures to change the status quo from different directions. First, domestic firms actually employed EU law in order to protect the national market from the importation of competing products. By suggesting that EU law itself required extensive safety tests before a product from the EU could be imported, British firms were trying to find a way to reduce the number of parallel imports of pesticides entering the UK every year. Trade in pesticides and other chemicals totals almost \$2 billion, with the UK enjoying a significant export surplus. However, trade in these goods began to level off and decline in the last ten years (see figure 6.4). The attempt by British Agrochemicals to prevent the easy entry of foreign-made pesticides may have been an effort to maintain their trade advantage.

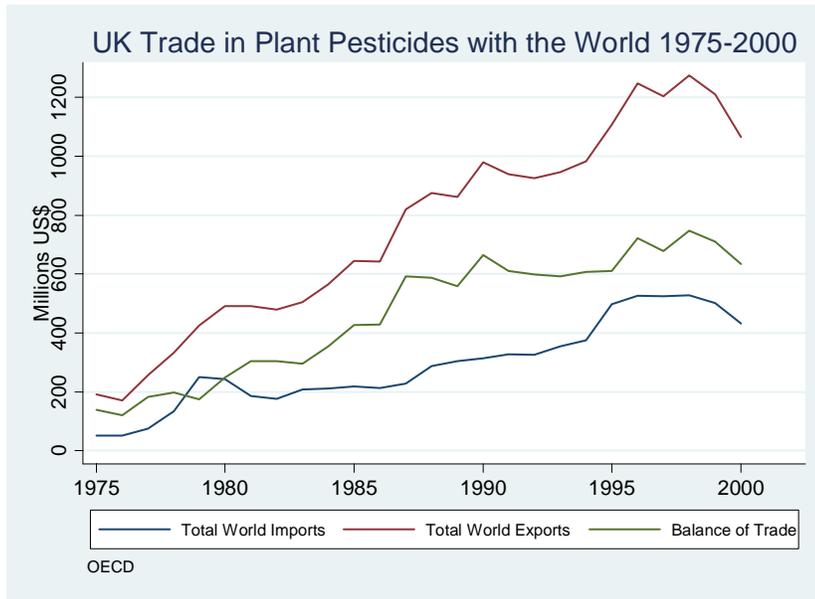


FIGURE 6.4 UK Trade in Plant Pesticides with the World 1975-2000

At the same time, firms from outside Britain can contact European officials and pressure national officials for not having a sufficiently flexible system in place to allow the free flow of these imports. In addition, the case illustrates the British government’s continued preference for following interpretations of the law given by national courts. The ECJ’s ruling failed to provide sufficient legal authority in order to transform the status quo and permit the parallel import of pesticides. In contrast to the compulsory licenses case, however, the national courts were in this case able to develop an interpretation of the regulation that was congruent to the Commission’s demands and Britain’s legal obligations before the case was referred to the ECJ. The parallel pesticides case therefore demonstrates two key features concerning the compliance process in the UK. First, many infringements of EU law begin as the result of extant protectionist measures and either domestic firms’ attempting to maintain them or outside firms’ seeking their repeal. Second, because of its dualist international

legal tradition, the process of compliance in the UK is shaped by the degree to which international law is integrated into the domestic law by national courts, not just by the national legislature. Only when national courts have thoroughly adopted the meanings of international rules into the domestic legal order will legislative and regulatory institutions follow.

III. Conclusion

Tracing the process in these four cases of British non-compliance with EU law demonstrates the key factors that led Britain to violate the EC Treaty and shows why some cases were settled by the ECJ. A summary of the violations, their origins, and outcomes appear in table 6.2. First, the origins of these violations are comparable to those committed by Germany. If national regulations discriminated against goods' being imported from other EC member states, either intentionally or unintentionally, this raised the suspicions of the European Commission and investigations were initiated. The British cases differed from German violations in that they had a clearer intent of protecting the domestic market from foreign goods. While the British government attempted to justify these laws in terms of consumer protection, their arguments often failed to persuade the Court or the Commission. In contrast, German laws and regulations targeted by the Commission also discriminated against imports, but were chiefly intended to organize market activity in concordance with the norm of preemption. The German government would use its authority to predetermine which products and modes of marketing were sufficiently safe. To the extent that these rules discriminated against goods from within the EC, the Commission would initiate Article 226 proceedings.

TABLE 6.2: Summary of UK Violations in the Area of the Free Movement of Goods

Case #	Subject Matter	Origin	Start Date	End Date	Court Decision
267/81	Markings of Origin	Dutch Complaint & Commission Investigation	1973	1986	Yes
032/82	Price Guarantee for British Exports	Commission Investigation	1982*	1984	
034/89	Compulsory Licenses	Preliminary Reference	1985	1999	Yes
5023/98	Parallel Imports of Pesticides	Individual Complaints	1999	2003	
*Date in which a Reasoned Opinion was Issued (Discussions Over the Infringement Precede the R.O.)					

Thus, both Germany and the UK violated the EC Treaty because of the extent to which it prohibited the free movement of goods from other EC countries, or what has been called “the quality of market regulation.” Still, the protectionist measures were the result of the codification of basic legal principles that were developed through years of legal precedent. Eventually, the British Parliament codified some of these legal principles. Some cases escalated to the ECJ level also because of a “misfit” between EC law and the domestic institutional status quo, but for slightly different reasons. In both countries, cases that fundamentally conflicted with the traditional normative institutions at the national level, particularly when the conflict arose out of how the domestic legal order was arranged, were referred to the ECJ for settlement. Nevertheless, how these principles and methods come into conflict with EU law differ in important ways. In the case of Germany, the state determines the appropriateness of products and their selling arrangements based on the legal standard of maintaining social order. Both products and selling arrangements are subservient to the norm of maintaining a stable social market economy. Germany would delay compliance only in those cases in which this order was being challenged regarding a particular product

or selling arrangement. In these situations, the standard that the German government maintained exceeded that of other member states. When only the means by which Germany achieved this regulatory goal, and not these principles themselves, were fundamentally challenged, was the German government able to avoid an ECJ decision and settle its infringement quickly.

Whether a violation by the UK was settled by the ECJ or not was also determined by the degree to which it conflicted with institutionalized legal norms, but in this case the outcome was expressed quite differently. The British government would refuse to settle those violations when national courts had not yet integrated EU legal principles into the domestic legal order. The first condition for a case resulting from a British infringement to reach the court is the absence of any EU law or regulation that specifically addressed the legal issue at hand. Without a specific rule at the international level that Parliament has explicitly approved, the British government proved reluctant to comply. In both the Trade Descriptions and Compulsory Licenses cases, protectionist pressures did exist to maintain the status quo. Yet, the government would not make any changes in the regulatory status quo unless developments in British case law altered the legal status quo. As soon as particular principles were embraced by British courts, the government would comply. Thus, in general, because of Britain's dualist approach towards international law, some violations would be referred to and settled by the European Court of Justice.

Contrary to the expectations derived from both the original theory and quantitative analysis, the ability of the national executive to easily transform the status quo did not determine whether or not a case was settled by the ECJ. In each of the four cases covered here, the British government could have easily altered the legislative status quo. While some political uncertainty in the late 1970s may have affected the ability to comply in the Trade Descriptions case, the national executive faced little

difficulty changing national laws once it agreed with the Commission's perspective or the ECJ issued a ruling. In each of these cases, the government made use of a particular legislative procedure that, while it did not bypass Parliament entirely, reduced the chances that any political opposition would prevent its adoption. Given the weakness of committees in Britain either to exercise oversight or to propose legislation of their own, the national executive controls the agenda. While high levels of Euroskepticism, shaped by a strong normative conception of Parliamentary sovereignty, exist in the UK, the evidence suggests that this factor did not play a role in explaining why European Union law was so easily integrated into British policy practices. In fact, the general absence of parliamentary scrutiny of the EU institution in an ex post manner raises continued questions about the democratic legitimacy of the European project.

CHAPTER 7

THE EMERGENCE OF A NEW IUS COMMUNE

I. Summary of the Findings

Compliance with international law is a process of deliberation over legal principles and solutions across two levels of governance. As in most other areas of international politics, national governments must balance the pressures and opportunities provided by the international system with the demands and interests of political actors at home. Compliance with international law is an area of study that allows us to gain a better understanding of the ways in which the institutional structure of the state, openly defined, affect a national government's ability to adjust to these demands. The European Union is one of the most legalized international regimes in the world, so it serves as an excellent laboratory in which to test various theories of compliance and determine the origins of non-compliance.

One reason the EU is such an excellent laboratory in which to explore issues of compliance with international law is the broad variation observed. This variation is expressed not only in the dependent variable, but in the independent variables as well. In the European Union, compliance does not vary across only time and space or policy areas. It also varies according to types of laws being enforced and the degree to which particular policy areas are legalized. In addition to the number of violations committed, compliance behavior varies in terms of whether or not states are able to settle infringements of EU law when they do occur. Extensive research and analysis answers these questions through the application of both qualitative and quantitative methods.

The first contribution this dissertation makes to the literature on international law is to include the notion of process into the politics of compliance. The literature to

date in the area of EU studies treats compliance simply as a dichotomous variable. I argue that compliance involves an entire range of behavior on the part of member states that starts the moment an infringement is detected and continues until the point at which it is settled. Once a suspected violation occurs, deliberation takes place between national and international officials over the nature of the infringement, the meaning of relevant international rules, and the proper remedy. Non-compliance occurs only when this deliberative process fails and there is no mutually agreed-upon understanding by the respective parties as to whether or not a state's policies were compliant with international law. In the EU, the failure of the process of deliberation means that an interpretation of international law must be imposed on the member states. When an international regime possesses an independent, neutral arbiter and a member state still refuses to comply, then we have a case of true non-compliance. With some rare exceptions, complete non-compliance with EU law does not occur in the EU because EU law becomes fully accepted as superior to national law and legitimized (Alter 2001).

Research studies from the fields of international relations and the European Union have attempted to account for these cross-national patterns of the number of infringements. Much of the international relations literature focuses on the cost-benefit analysis states face. Unless the international regime possesses a strong instrument of deterrence in the form of sanctions or provides substantial forms of aid, this position in the literature argues, non-compliance is quite likely. If a treaty actually calls for changes in the national status quo, then only the application of tools that affect a state's utility when complying will change its behavior. Yet, as seen in the case of the EU, almost all states comply every single time even before sanctions become a credible threat. In addition, while aid is given to particular member states in policy areas in which they lag behind other member states or in terms of meeting specific

standards, financial, technical or legal assistance is not offered when laws and regulations exist in the domestic status quo that discriminate against products from other EU member states. Thus, neither mechanisms of punishment nor assistance is necessary to obtain compliance with the EU in regards to the EC Treaty and its associated regulations.

Research in the area of compliance with EU law therefore takes into account how domestic institutions, broadly defined, affect the compliance process. Three alternative visions are offered to explain the origins of non-compliant behavior. The parliamentary accountability perspective centers on the relative autonomy of national executives and their ability to settle an infringement of supranational law independently of parliamentary interference. As in the case of setting monetary policy, several scholars suggest that executives require some degree of independence when conducting foreign affairs. According to the parliamentary accountability hypothesis, national parliamentarians affect the process of compliance in two ways. First, their interests tend to be more short-term and parochial than those of the national government. On the international stage, government leaders are more aware of their states' relative negotiating positions compared with those of other states as well as of what agreements are deemed feasible. They are also often more interested in the long-term effects of international cooperation than in the short-term costs. Second, as the power of individual legislators increases, they are more likely to influence the process of changing the national status quo. Most cases of non-compliance with EU law require the transformation of national law. If elements of the opposition and legislative committees are required to approve such changes, they are more likely to avoid making them until the European Court of Justice issues a final ruling.

A second vision of non-compliance uses rational institutionalism as the basis for its analysis (Dai 2005; Downs and Jones 2002; Downs, Rocke, and Barsoom 1996;

Goldsmith and Posner 2005). This line of research argues that non-compliance is the result of the cost-benefit calculus conducted by powerful actors within these countries. Rather than assuming that all domestic political actors prefer the status quo, it argues that some actors may benefit from compliance while harming the interests of others. Political groups that perceive compliance as having deleterious consequences for their material interests might therefore simply block compliance with law beyond the nation-state. Others will support the implementation of EU law, as it gives these groups a chance to upset the domestic political balance of power or support their policy preferences. If there is domestic opposition to the ECJ, only a ruling by the European Court of Justice will force such groups to suspend their opposition. Continued opposition would unduly risk the state's reputation and place substantial financial burdens on it. Moreover, in a highly legalized environment such as that of the EU, both the ECJ and the law itself are viewed as legitimate and superior to EU law. As long as this condition holds, states will almost always comply.

Finally, the institutional misfit hypothesis argues that infringements and the inability to settle them result from the degree of "fit" between the national status quo and the policy or rule of an international organization. Several iterations of the misfit argument have appeared in the literature. While some focus on the specific content of the law, others argue that if an EU law fails to conform to national styles of policymaking, non-compliance is more likely. This approach suffers from at least two shortcomings. First, what 'institutional misfit' means varies across several studies of compliance with EU law. Little agreement exists over what the source of misfit should be and how actors react to it. Using sociological institutionalism as their point of departure, one group of scholars argues that compliance is a function of how deeply embedded particular ideas or norms are (Börzel and Risse 2003; Duina and Blithe 1999; Green Cowles, Caporaso, and Risse 2001). In contrast, other studies employed

the logic of rational institutionalism and evaluated the degree to which EU laws would open up or close off new opportunities or gains for specific actors at the national level (Héritier 1995; Héritier et al. 2001; Knill 1998). The weak empirical results pertaining to the misfit argument when tested also hinder our ability to better understand non-compliance in the EU context.

One major difficulty in adjudicating the relative validity of these approaches has been the use of different methodologies and the limits associated with each. Researchers studying the implementation of EU directives have mainly employed qualitative methods to test their theories. While rich with empirical detail, these studies focus on a few directives being implemented in a small set of countries, very rarely exploring implementation outside northwestern Europe. For these reasons, it has been difficult to test whether these theories are applicable or valid in other country or policy contexts. Case selection, when a justification is presented, is usually conducted in order to illustrate the mechanisms at work, while often sacrificing comparability.²⁰⁵

In order to generate more methodologically rigorous and comparable studies of compliance, quantitative methods using medium-to-large-N datasets are increasingly employed to test specific hypotheses (Lampinen and Uusikyla 1998; Mastenbroek 2003; Mbaye 2001). The advantages of these studies are clear. They produce findings that allow one to generalize across the EU member states or policy areas, while controlling for possible confounding variables. But while quantitative studies have their strengths, their weaknesses are also apparent. First, the process of adapting to EU law is often more complex than can easily be taken into account using quantitative methodologies. The variables at play include the individual nature of particular directives, the particular response of policy elites, and, most importantly, the countervailing political and economic pressures policymakers constantly face today in

²⁰⁵ See Mastenbroek (2005) for a complete review of the literature.

Europe. For example, while an EU directive may lead to the deregulation of a particular policy area and weaken the interests of particular groups, the pull of belonging to Europe or supporting the project of European integration is of greater importance, especially among the members who have only recently joined the EU (Richardson 1996). One other major difficulty quantitative approaches face is the dearth of reliable data. Many worthwhile studies of the compliance and implementation of EU directives are inhibited by the immense costs in time and labor necessary to compile datasets across policy areas and now twenty-seven member states.²⁰⁶

This study of EU compliance moves beyond the current literature, therefore, in several ways. First, it combines quantitative and qualitative methods in order to generate comparability, methodological rigor, and empirical validity. Using a database of over twelve hundred infringements of EU law, it tests each vision of non-compliance that exists in the literature. The quantitative analysis yields interesting results. It is clear that the degree to which the national economy is codified a priori determines the extent to which state regulations discriminate against transnational economic transactions with the EU. Regulatory quality, or the degree to which economic actors perceive that irrational, discriminatory and inefficient barriers prevent market transactions from occurring, serves as an adequate proxy for the level of codification that exists within a nation's regulatory regime. The degree to which particular objects and manufacturing processes are regulated and codified in the national legal order has most often determined whether a case would be referred to the European Court of Justice for a final decision. Thus, the degree to which a national economy is codified by law determines both whether an infringement takes place and

²⁰⁶ There are some projects underway that are tackling this deficit. Thomas König and his associates are constructing a database to quantitatively assess the transposition time of EU directives.

whether the ECJ must to step in and settle the legal dispute between the Commission and the member state.

Yet, a closer examination of the data, combined with disaggregating the data into two parts—data gathered before and data gathered after 1990—demonstrated that the number of veto players proved to be the primary reason that an infringement was referred to and settled by the European Court of Justice. The role of veto players in the first half of the EU's compliance regime confirms some important claims about the nature of compliance. First, compliance with international law contains a procedural and substantive dimension. State violations of the law are related to the degree to which the economy is predefined by the state. The ability to change the status quo, however, is not a function of the levels of codification but of the number of points at which consent must be granted for changes in the legal order and the range of preferences for maintaining the status quo at those points. Nevertheless, because the statistical and substantive significance of veto players disappeared after 1990 and the proportion of cases referred to the ECJ among those countries with historically numbers of veto players decreased, there is some indirect evidence of learning taking place. Until levels of codification and regulatory quality can be measured across time, we can conclude from the results that legal deliberation and argumentation are effective methods that can be used to persuade actors to change their preferences and learn how to comply.

In the comparative qualitative analysis, the unit of analysis is a violation of international law, not particular institutional contexts, and cases are selected based on whether or not they were settled by the European Court of Justice, which parallels the approach used in the large-N study. A comparative analysis of infringements in Germany and the United Kingdom shows that the degree to which the national economy is codified determines not only whether an infringement occurs, but also

shapes their settlement patterns. Thus, there is variation in terms of both the dependent and the independent variables in the case study analysis.

The case studies of EU infringement lead to several interesting findings. First, the analysis shows how regulatory quality and legal traditions are closely related. The dataset that Kaufmann, Kray, and Mastruzzi (2003) produced reflects the perceptions of market actors. It attempts to measure the degree to which discriminatory laws or inefficient regulations are perceived to exist. Given that civil legal systems attempt to define all of market reality, from what constitutes a commodity to the proper means by which that commodity can be bought and sold, there will be more laws that are perceived as discriminatory or inefficient compared with what exists in countries with a common law tradition. Thus, regulatory quality, as a measure of codification, explains both the cross-national distribution of infringements (to a large extent) and why some cases are settled by the ECJ and others are not.

In each country, various protectionist measures have challenged EU law. Variations explaining why some infringements were settled by the ECJ were, however, based on the relationship between the domestic legal order and EU law. Cases were referred to the ECJ for settlement only when they challenged fundamental regulatory principles that existed at the national level. For example, opposition to compliance in Germany emerged whenever the EU argued that similar regulatory standards existed elsewhere within the EU but used methods that were less onerous or discriminatory. In contrast, British officials would refuse to comply until specific legal principles had been incorporated into the national legal order by their own courts. As reflected in their general political support of the EU, the British government did not oppose the standardization of national regulations. They are strong supporters of the single market. Nevertheless, if these new regulatory standards were not present in

British law, officials would refuse to comply until they were. Comparing the process of settling infringements in other countries offers additional support for this thesis.

II. Compliance across the Member States: A Short Tour

The quantitative analysis of compliance conducted compared violation and settlement patterns of the fifteen EU member states before the latest eastern expansion. When tracing infringements from their origin to the point at which they were settled, the case studies demonstrated that there was at best a minuscule role for national parliaments to play. In contrast, deliberations over the meaning of the EU and its impact on national regulatory traditions took place predominately between unelected bureaucratic officials in Foreign Ministries or other national agencies and the European Commission. In none of the suspected violations discussed was a member of parliament notified or her opinion sought in determining how to respond to the Commission's demands. Some cases were referred to the ECJ for settlement primarily due to the degree to which national economies were codified under national law but also because of the Commission's desire to redefine or eliminate those definitions.

Since the case studies are limited to two countries with two very different legal traditions, it may be difficult to generalize these findings to other countries. National legal traditions are just that, unique to the historical and political development of each country. A state therefore might violate a particular law because of specific features within its legal tradition that come into conflict with EU law. Only a comparative analysis of each violation from start to finish can account for why national and supranational laws clash and why the European Court of Justice must settle some of those infractions. Yet, there remains a strong linear relationship between regulatory quality and the number of violations that states commit. EU states with strong civil code traditions or high levels of codification, such as France, Italy, Belgium and

Greece, lead the way in number of infringements. They also form the group with the highest number of infringements settled by the ECJ.²⁰⁷

The results of a survey of government officials across the EU confirms that legal tradition represents one of the greatest difficulties these governments face in adjusting and adopting to EU legal demands. A questionnaire composed of three parts was sent to officials located in governmental units responsible for communicating with the Commission regarding legal infringements.²⁰⁸ The respondents replied in varying degrees of detail and completeness, but their answers still shed some additional light on both the origins and the process of settling violations of EU law.

The Major Violators

Responses from some of the major violators of EU law shared common elements. One thesis regarding compliance in the EU is that, as the ability of the national executive to control the policy agenda increases, a state will have less difficulty settling an infringement of EU law. Officials in France, Belgium and Luxembourg all stipulated, however, that national parliamentarians had no role to play in the process. Who was consulted regarding a violation varied according to the type of law at issue, which was the answer received from across the respondents. In France, all deliberations over the meaning of EU law occurred between ministerial officials inside a special committee, le Secrétariat Général des Affaires Européennes (SGAE). The SGAE acts as the chief coordinator over all issues related to the EU. Both the

²⁰⁷ The pattern shifts when considering the percentage of infringements that are settled by the ECJ. For example, Luxembourg and Denmark now rank highest, while France's comparative ranking moves downward. The higher ranking of these two is certainly a result of the fact that these countries have committed so few violations. However, since having a certain type of legal system seems to be a necessary condition for an infringement of EU law and shapes the legal politics of settlement, it is more important to focus on the raw rankings.

²⁰⁸ Questionnaires were distributed to fifteen member states that inquired about the process of settling infringements of EU law, the typical reasons a violation is committed in their country, their perceived reasons for their country's ranking vis-à-vis other countries, and whether the process of compliance could be improved. Responses were obtained from 14 of 15 member states, as Italy alone did not reply.

formulation and implementation of EU policy rests with this body, which is answerable to the prime minister. The SGAE, together with the Foreign Minister, prevents any input from members of the national parliament (Thiébaud 2003, 344). The only other officials consulted in the process were local officials; consultation occurred on a case-by-case basis.

The dominance of the Foreign Ministry in the process of compliance was reflected in responses from both Belgian and Luxembourgian officials. In the Belgian case, however, the process of coordination is made more complex by the need to consult groups at the regional level as well as representatives of various corporatist institutions, depending on the nature of the infringement. In fact, the need to coordinate with so many federal and non-federal institutions was cited by the Belgian official as one cause of the high rate of ECJ settlement. The two-month period between each stage of the infringement process did not provide these officials with enough time to consult all the necessary actors. This problem was considered to be a significant factor in accounting for why so many infringements were settled by the ECJ. A court decision assisted compliance in Belgium in two ways. An ECJ ruling would provide the necessary impetus to overcome domestic political inertia as well as provide national officials with an increased amount of time to coordinate and draft the legislation needed to comply. In these three countries and across the EU, the primary method of responding to an infringement of EU law was also through the issuance of a regulation rather than an act of legislation.

Yet, each of these countries shares, together with Greece and Italy, a high level of regulatory codification. France, the historical origin of the code civil, has repeatedly come into conflict with the EU because the entire economy is regulated. As in other states with a civil code system, the French government defines in advance what things count as commodities and the conditions under which they may be bought and sold.

With so much of the economy regulated, it is little surprise that France leads in the total number of infringements. France does not, however, rank as highly as Italy, Belgium, and Greece in terms of the percentage of cases referred to the ECJ for settlement; only 13.8% of infringements committed by France are settled by the ECJ compared with almost twice that number in Belgium, Italy and Greece. The French government's ability to settle these violations sooner than others may result from the strong bureaucratic autonomy the state enjoys compared with arrangements in both Italy and Belgium. The SGAE, an independent authority responsible for all EU issues, is able to transform the legislative status quo easily compared with counterpart authorities in both Belgium and Italy. In Belgium, the government must consult with regional authorities and in Italy it must consult with multiple parties against a backdrop of relatively weaker forms of party discipline. However, comparing Belgium and Spain's settlement patterns would challenge the thesis that regional governance is the sole factor in explaining why one country can avoid an ECJ settlement more easily than another can. As reflected in an interview conducted with a Spanish official, compliance there depends on both the motivations of the state in general and the legal jurisdiction to which the law pertains. In the cases of both Portugal and Spain, their commitment to European integration and the desire to modernize their economies leads them to want to prove that they are "good" and assets rather than liabilities to the EU. In addition, one must determine which level of governance is responsible for a particular policy area to determine whether there will be difficulties complying with EU law. In the case of Spain, most of its infringements occur in the area of environmental policy, which is also the responsibility of regional authorities. However, the central state remains in charge of all laws pertaining to international trade and commerce. Therefore, whether or not non-compliance with the EC Treaty takes place depends not only on where codification is taking place in the distribution

of regulatory powers, but also on whether normative commitments to international institutions overwhelm the desire to maintain the status quo, whatever the price or traditional legal norms.

An additional anomaly that threatens the bureaucratic autonomy hypothesis is the role of Greece. Greek law follows the pattern of German law, in which elements of the *ius commune* are codified into a single legal text. While we would therefore expect the Greek government to commit at least occasional violations of EU law, it should be able to settle such disputes with the Commission quickly. Still, in the case of Greece and perhaps other situations or countries, one cannot exclude the possibility that simple competence and familiarity with EU law affects the compliance process. Greek authorities replied that problems of adaptation arose also from the difficulty the administrative system has had in “grasping the meaning behind the free movement of goods.”²⁰⁹

Aside from the Greek example, what separates these countries from Germany and other countries using the German civil law system is the use of law to define not only the parameters of market behavior, but the outcomes as well. As we have seen, the German government has faced the greatest difficulty in complying with EU law when its preventive forms of regulation have been challenged. The German civil code system has coexisted with a more fundamental norm of *Ordnungspolitik*, of encasing markets within particular boundaries. Regulation has rarely determined the precise content or method by which a product could be manufactured or sold. When it has, however, the German government has been extremely reluctant to settle such a dispute until the ECJ has provided a definitive ruling.

The German legal system may serve to illustrate a middle ground between the common law tradition of the UK and Ireland, and now Cyprus and Malta, and the civil

²⁰⁹ Response to questionnaire, September 29, 2005.

code systems of Belgium, France, Luxembourg, and Italy in terms of the degree to which the national economy is codified. In the former group of countries, the legal tradition allows markets and market actors to function freely unless specific disputes have emerged over time that define appropriate forms of market behavior.²¹⁰ In contrast, the latter group of countries predefines as much of the economy, the objects involved, and the procedures by which they are bought and sold, as possible. Rather than simply reacting to economic disputes as they emerge, nations with a classical civil code system attempt to construct the market in advance. As a result, violations of EU rules become ubiquitous, simply because there are more rules and procedures that must be reformed or removed.

The Middle Ranked

Along with Germany, the Netherlands, Portugal and Spain—and also the UK and Ireland—form a second group of countries that have frequently violated the EC Treaty, but not nearly as often as the others. Both Portugal and Spain share the civil code system and the use of Roman law. However, as voiced in their responses, these countries have tied their future economic development to the EU. Respondents in both countries emphasized the gains their countries have obtained from EU membership and their desire to demonstrate to the Commission and other member states that their countries are interested in a highly functional institutional regime. Spain's difficulties in adapting to EU law on time were primarily the result of the problem of instructing local officials in the nature of EU law. Portuguese officials responded similarly and stated that the greatest problem they faced was educating administrative officials in the complexity of EU law. Finally, the Netherlands uses a version of the Napoleonic code in its legal tradition, although its new civil law books employ more elements

²¹⁰ This excludes Acts of Parliament, of course.

from the German legal system. Nevertheless, the Dutch are strongly committed to the single market inside the EU and have worked to avoid referring cases to the ECJ.

Ireland and the UK represent the two countries with a common law legal tradition.²¹¹ The number of violations committed by these two countries has always been quite low. The common law tradition prevents many infringements from taking place. When violations do occur, there is a great deal of coordination, especially on the part of Ireland with the United Kingdom. Officials in the Irish government have stipulated that they coordinated with the British government primarily to develop the administrative tools necessary to adapt to EU law. As in the British case, statutory instruments, not acts of the Oireachtas, were used to comply with EU law.

The Obedient

Among the countries that enjoy the status of complying most often with EU law are the Scandinavian countries and Austria. The primary reason these countries rank so low in terms of the number of violations committed is their relatively recent entry into the EU. Since 1995, however, we can observe some divergence. In particular, the number of violations committed by Austria has increased markedly in comparison the records of its entry partners. Austrian government officials attribute this to the role of individual Länder and their powers. Many of the violations committed by Austria have dealt with policy issues for which the regional governments were responsible. In contrast to German practice, however, robust forms of cooperation have not developed between the federal government and state authorities in regards to complying with EU law. One official remarked that the authorities in each Land are very protective of their duties and responsibilities. In

²¹¹ With the accession of Malta and Cyprus, the number of countries employing the common law tradition is now four.

contrast to Germany, Austria has not seen cooperative federalism emerge to overcome problems of policy coordination. As a result, when infringements have occurred, state officials in Austria have perceived EU law as an illegitimate interference in local affairs.

In marked contrast to Austria and other countries, each of the Scandinavian countries emphasized the importance of complying. As one official in Finland replied, “we have a rule-obeying culture.” Although other EU member states certainly share the idea that the law should be obeyed, this confirms U. Sverdrup’s hypothesis that these countries have an especially strong norm of avoiding conflict (Sverdrup 2004). One method of compliance is the intense form of cooperation that exists between government officials across Northern Europe. Swedish, Finnish, and Danish officials repeatedly use informal contacts to devise the most efficient administrative means with which to respond to EU legal demands. Of course, each of these countries also shares a common legal heritage in which elements of Roman or civil law are completely absent. This may also help account for the low number of violations. Yet, both Sweden and Finland have had no infringements of the EC Treaty settled by the ECJ, which illustrates how the “culture of compliance” deters confrontation with the European Commission.

Even in the one state in which parliament is most likely to have significant involvement in foreign affairs, Denmark, national parliamentarians have little input into or impact on the process of complying. The Danish parliament possesses one of the strongest committees among national parliaments for monitoring EU affairs. The European Affairs Committee in the Folketing requires the relevant government minister to obtain a national bargaining mandate from parliament and provide information about all major EU policy developments on a timely basis. Any position the government takes on particular EU policy must have majority support in the

Folketing. In addition, various standing committees exist to monitor developments in specific EU policy areas, such as the environment, legal affairs or taxation (Damgaard 2003). If any parliament would have hindered the process of compliance, it would have been Denmark's.

As in the case of other EU member states considered here, however, the Foreign Ministry takes the lead in the compliance process. A Legal Affairs committee is formed, composed of legal professionals from various parts of the state bureaucracy. They draft legal responses to the European Commission and defend the country before the European Court of Justice. In contrast to the process of bargaining in support of the Danish position in EU policy negotiations, the parliament plays no role in devising the legal opinion of the Danish state. While the interests of the Danish parliament or the country as a whole may serve as the basis for its legal defense, the government's legal position must employ European law and a set of justifications based on legal precedent or analysis. In the course of deliberations between the government's lawyers and the Commission, the implicit goal is to arrive at a consensus over the "correct" interpretation of the law. Government cannot bargain over the meaning of the law. Rather it must employ the law to persuade EU Commission officials either that the practices employed do not constitute a violation or that the remedy for such a violation is not legally appropriate.

In conclusion, this short survey of the compliance process among member states demonstrates how little parliamentary oversight there is pertaining to the compliance process. Even in states where national parliaments or regional governments have developed new tools to monitor what happens in Brussels, national laws are still questioned and overturned by the European Commission without their input. As in the case of the German Beer Law, traditional regulatory practices that date back over five hundred years can be overruled within a few years without any

democratic participation in the process of complying. Of course, interpretations of the law are meant to be approved by a majority of the electorate. According to positivist theories of the law, legal principles should be devised logically from both legal texts and historical precedent. National parliaments are however not only excluded from the deliberative process, but also, as shown in the several cases concerning British and German violations, they are being bypassed in terms of the legislative process. Most issues of non-compliance are addressed through the issuance of executive regulations and published in regulatory journals that rarely receive close attention. These findings thus illustrate an important dimension of the democratic deficit in the EU that has not been previously considered.

III. Making EU Law Softer

Over time, as member states increasingly faced pressure from an assertive Court of Justice and Commission, concerns that the Court and Commission were exercising too much power began to grow. The Court responded to increasing member state opposition to the substance of the Court's decisions on the creation of the single market by issuing the Keck opinion. Under Keck, the scope of the EU's authority over national marketing practices was curtailed.²¹² "Selling practices," or the methods by which or the conditions under which products can be sold, such as prohibitions on Sunday trading, would not come under legal scrutiny. Although still contested within the legal community, most scholars agree that the Keck decision and subsequent cases demonstrated that the Court has learned that its decisions must be perceived as legitimate by the member states (Maduro 1998). If not, then the member states will threaten the powers of the ECJ to exercise judicial review of the member states' laws.

²¹² Cases C-267/91 and C-268/91, Keck and Mithouard, Preliminary Reference under Article 234 (ex 177), ECR 1993 I-6097.

Or the member states, acting through the Council of Ministers, would pass legislation preventing the decisions of the ECJ from entering into force.

As a result, the ECJ and the Commission began to reduce the number of investigations against member states. Instead, European integration would continue through a manner more consistent with the member states' interests and their regulatory methods, namely through the use of the directive. In contrast to the EC Treaty and its associated regulations, directives enable states to devise the most appropriate methods to reach EU legislative goals. Beginning in the 1990s, the EU increasingly turned to the directive as the most effective tool for completing the internal market. As a result, it was expected that compliance would be more common, serious conflicts would be avoided, and the internal market would be completed sooner. Yet, while the use of the directive allows governments to find nationally appropriate solutions for EU policy goals, it also brought national parliaments directly into the EU policymaking process.

The inclusion of national parliaments enables both formal and informal political actors to affect the process of European integration. In so doing, the policies agreed upon at the EU level supposedly have a greater degree of legitimacy among national actors than they otherwise would. These laws should also be more effective, given that member states can now use the regulatory tools that are familiar to them when crafting and implementing national legislation. Yet, the inclusion of national parliaments has not always led to the passing of legislation within the specified timeframe. In addition, the implementing legislation is often drafted incorrectly from a legal standpoint or incorrectly applied. As demonstrated earlier, these problems are ubiquitous among member states. While the use of directives to implement EU law gives the process of European integration greater transparency, the policies devised at the EU level are also subject to a greater degree of scrutiny on the part of individual

members of parliament and their political allies within the public sphere. Thus, as predicted by the theory of foreign policy delegation, more information about the nature of foreign policy inhibits the process of compliance in numerous ways, controlling for the type of domestic legal tradition.

Two brief examples from the German case illustrate this phenomenon. In 1986, the German government was drafting legislation to comply with EU demands that a firm from any EU member state government be allowed to sell its pharmaceuticals in Germany without being required to have a place of business there. At the same time, the German government was transposing several EU directives into EU law that would establish common regulatory standards and a common labeling system. At that time, the CDU-led government also included amendments that would provide additional research funds for the pharmaceutical industry. Disputes over the passage of these directives emerged that are based on the typical policy positions of political parties in Germany.

As the legislation was being drafted in committee, the members of the Green party opposed what they perceived as less rigorous regulatory standards, and the Social Democratic Party opposed the awarding of greater resources to the pharmaceutical industry. Instead, they wanted the funds used for research to be allocated to the health system to reduce the cost of prescription drugs for members of the publicly financed health system. Because these EU directives required parliamentary approval, there were significant delays in passing the required legislation.

The contributing authors in the study of compliance by Falkner et al. (2005) showed that party politics also mattered during the implementation of directives related to social policy (Falkner et al. 2005). In 16 of 91 cases of directive implementation, they found that party ideologies determined both the amount of time

necessary to pass directive legislation and whether to approve of these directives at all. For example, the Parental Leave Directive afforded each parent the ability to take 14 weeks paid vacation in order to care for a newborn. In Germany, the CDU-led government opposed this. The government refused to extend such rights to single-income households. It also failed to lift the ban on night work for pregnant women. The first directive concerning Parental Leave was approved only when the government was replaced by a Red-Green coalition. The entry of the Center-Left coalition has also led to greater support for changing legislation concerning working pregnant women (Falkner et al. 2005, 292).

These short examples do more than simply demonstrate that party politics matters (Castles 1982; Schmidt 1996). These directives were approved at the EU level with the agreement of a majority number of votes within the Council of Ministers. They also have the strength of EU law and, therefore, are superior to national law, even if they have not been implemented. Even though directives require implementation at the national level, member states still face international legal liability. The main difference between directives and the EC Treaty and its associated regulations is that the Commission assesses the degree to which states have complied with the law when implementing a directive based on the policy effects of domestic legislation. Domestic legislation used in implementing a directive is measured in terms of the degree to which it conforms to basic policy goals. As a result, states have greater leeway insofar as domestic legislation is compliant with EU law. In contrast, regulations and the EC Treaty stipulate what non-compliance is, irrespective of the policy effects of domestic legislation. Nevertheless, because EU directives have the effect of law even when not being implemented, non-compliance still results. Therefore, since the process of implementing EU directives requires the explicit inclusion of parliaments in the approval process, study of non-compliance in all its

forms would serve as a fruitful avenue along which to drive further research in assessing the relative importance of the three compliance hypotheses covered here.

IV. International Governance at the National Level

EU directives are a unique legislative tool employed by international regimes to reach their policy goals. Theoretically, directives increase the effectiveness of international law within the EU. They also serve to increase the democratic legitimacy of these laws. By allowing EU legislation to be contested, deliberated and, in some cases, approved by a democratically elected majority, national parliaments can assert their control and authority. While obtaining parliamentary approval may cause delays or implementation difficulties, the process of European integration is more transparent and accountable. Yet, not all regimes have such tools available to them, and some policymakers and scholars argue that they should not.

One vision of international law perceives its rule as uniformly beneficial. If only more lawyers, judges, and other national officials could form networks with their counterparts in other countries, international cooperation could be enhanced (Slaughter 2004). The operation of international financial transactions, shipping lanes, and commercial markets require daily interaction on the part of officials who exchange information, legal knowledge and general experiences in order to assist others in governing the international system. Greater cooperation among these officials would increase the effectiveness of international coordination. In the world of international terrorism, where terrorist suspects reside in many countries with an equal number of diverse legal traditions, such cooperation is not only desirable, but also absolutely necessary.

The findings here suggest that such forms of international exchange provide an additional source of support and assistance as legal professionals find ways to adapt to

international legal practices. Judges and lawyers who belong to similar legal systems should develop contacts with their counterparts. Given that these systems rely on past settlements and case law that are unique to each country's history of litigation, it is not always certain that judges or lawyers will find similar solutions to common problems. The problem of coordination becomes more severe the more the national economy is codified. Officials must not merely compare case histories, they must also exchange information about the very meaning and classification of objects (Duina 2006). As the definition of the world and objects is so institutionally entrenched and unique to specific historical contexts, international cooperation may not be sufficient to overcome compliance problems. Nevertheless, networks of lawyers and judges could improve the chances that compliance problems will be avoided.

The need for these forms of coordination among national officials demonstrates that international law has moved beyond any point at which it is merely the byproduct of states' interests. The rationalist view conceptualizes international law as nothing more than reflecting the interests of national governments as they pursue the gains of international cooperation. Non-compliance occurs only when the costs of obeying exceed the benefits of continued cooperation. Since states would rarely accede to international agreements that would make them worse off, however, non-compliance should be rare.

The European Union may not serve as the best laboratory in which to test this theory. As a highly legalized environment, where supranational law trumps national law, the likelihood of observing non-compliance for the reasons Jack Goldsmith and Eric Posner suggest is low (Goldsmith and Posner 2005). However, even as the European Court of Justice, through the Commission, began to enforce the articles of the EC Treaty related to the free movement of goods, the member states rarely took positive action to curtail judgments that were adverse to their interests. Many

situations arose in which the member states could have chosen simply not to comply or to limit the powers of the ECJ to exercise judicial review. Instead, member states worked within the EU legal regime to defend their national practices. When legal reasoning failed, the Court would assign its own interpretation of the law. The law, whether national or international, possesses a degree of authority and legitimacy that is not taken into account by rationalist explanations of international law. The use of international law, as social constructivists argue, is the primary means by which states in the modern age structure their relations. The current international system is the product of mutually shared norms of proper state conduct. Among these is the belief in the rule of law. Law is the tool modern states use to enforce obligations without resorting to the use of force. International law has the force of legitimacy of its own. Yet, its shared sense of legitimacy among member states is also its greatest threat.

Policy networks of legal and bureaucratic professionals often operate in secret, whether intentionally or not. These networks emerge for good reasons. Professionals hope to exchange information in order to make regulatory systems work better, with progress often measured in terms of efficiency and the avoidance of conflict. It is not unusual for professionals to socialize with each other across national borders and form groups that lead to the development of productive solutions for legal challenges at home. Yet, both the decision-making process in which these actors engage and the results they obtain are often opaque. As illustrated in the case of the EU, legal disputes are settled within the corridors of Westminster, Brussels, and Berlin. They are rarely, if ever, discussed in the public sphere. While developing solutions for transnational legal problems is important, these solutions increasingly lack legitimacy when they are not placed in domestic forums that allow the public, through their representatives, to deliberate over them.

Theoretically, most social constructivists have assumed that the legitimacy of international law and the legal obligations that flow from it are an indisputably positive aspect of the international system. Unlike law at the national level, however, international rules are rarely made by democratically elected representatives. There are no international political parties to which world citizens belong. There are no international institutions that have developed through a shared sense of history. There is no international state that is coupled with an international identity held commonly by its citizens. Each of these features exists at the national level. Compliance with international law can endanger each one.

As legitimate and authoritative as international law is, national law is also sovereign. National constitutions, whether codified or customary, are competing sources of legitimacy. Not all states have such constitutions. When international law can be used to fill in the gaps that exist at the national level, such as in the area of human rights or environmental protection, few would question its influence. However, when international rules challenge fundamental norms of democratic procedure and the policies that result from democratic deliberation that exist at the national level, there should be some healthy skepticism.

In the chain of democratic delegation, judges typically have the greatest degree of autonomy. Their task is to adjudicate legal conflicts and uphold the rule of law independently of the interests of either the minority or majority. Their judgments are the result, usually, of reasoned logic. Yet, when they fail to reflect established norms in society, parliaments serve as venues in which interpretations can be contested in the public sphere. Parliaments act as public clearinghouses where the meaning and import of the law can be debated. In some circumstances, an outcome can result in the majority's reasserting its will over the interests of the minority, even re-establishing practices of discrimination. Yet at least the issue has entered a wider, more transparent

realm where the norm or law in question can be openly debated and considered. Through debate and deliberation, citizens or their representatives at least can appeal to common standards and shared histories to convince each other of the rightness of their opinions. As a result, whatever the outcome, it is more democratically legitimate. There will always be winners and losers in this process. But democratic rule is not just majority rule tempered by the rule of law. Democracy also implies that minorities accept policy outcomes decided by the majority when democratic procedures are employed to contest them.

Such public forums are missing at the international level and within the EU. Most of the conflicts over EU law are settled and argued by national bureaucratic officials with their counterparts in Brussels. When problems of non-compliance emerge, what disturbs the European population is not always the outcome of such debates, but the procedures employed to settle them. EU law, and the institutions themselves, would be perceived to have greater legitimacy among Europeans generally if states could more effectively deliberate with EU officials over the impact of such laws. One method that could be used to accomplish this is increasing the powers of the European Parliament. Because the European population has demonstrated often how little it cares about the institution and its members, however, this would not be the best solution. The best solution is, therefore, developing more transparent mechanisms within the process of compliance. Not everyone will be satisfied with the outcome of such debates. Nevertheless, if national parliamentarians are included in the process of legal deliberations, at least the legal outcomes might be perceived as more legitimate. In taking such an approach, the amount of power and authority delegated to the EU can be limited and the dangers of moral hazard avoided.

At the same time as national parliaments are bypassed and the ECJ is issuing ruling after ruling striking down national barriers to the free movement of the factors

of production across the EU, a new *ius commune* is being constructed. Instead of Bologna, Padua, and Milan serving as the epicenters for the development of a common law for Europe, it is Brussels and Strasbourg. Just as justices and lawyers were evangelized in canonical and Roman law in the university cities of medieval Europe, so national lawyers and bureaucrats are now being converted to a new *ius commune* in the offices and courtrooms of the European Union. Just as the *ius commune* united a politically, economically, and socially diverse Europe, even in spite of this diversity, so do the new sets of doctrines espoused by judges and officials in the European Commission accomplish a similar outcome. Finally, just as the *ius commune* existed independently of and without democratic consent, so does this new common law of Europe. One of the great innovations of the French revolution was that the law, all law, would reflect the consent of the governed. It also reflects the collective will of a specific nation, with its own traditions, values, and identity. Unless the process of producing European law can be made more democratic, or until national parliaments can more effectively monitor the homogenizing effects of EU law, much of that rich diversity is at risk of being lost.

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