Contemplating compliance: European compliance mechanisms in international perspective
Koops, C.E.

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Contemplating Compliance
European compliance mechanisms in international perspective

How can international organizations make their Member States comply with the rules of the organization? Which is the more effective method: to coax and entice, to argue and persuade, or to threaten and punish? On the basis of which criteria should a compliance mechanism be construed and applied, given the character of the underlying obligations and the nature and set-up of the organization?

Contemplating Compliance provides the reader with an understanding of what determines the effective functioning of compliance mechanisms. A three-dimensional compliance model is developed and applied to mechanisms in four international organizations: the European Union (EU), the Organization for Economic Cooperation and Development (OECD), the World Trade Organization (WTO) and the International Monetary Fund (IMF). This systematic comparative analysis offers new insights into the way compliance mechanisms function, highlighting the importance of the existence of different types of mechanisms. Especially the possibility for interaction between hard and softer mechanisms plays an important role in inducing Member State compliance with the rules of an international organization.

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Contemplating Compliance
European compliance mechanisms in international perspective

Catharina E. Koops
Contemplating Compliance
European compliance mechanisms in international perspective

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. D.C. van den Boom
ten overstaan van een door het college voor promoties
ingestelde commissie,
in het openbaar te verdedigen in de Agnietenkapel
op donderdag 13 maart 2014, te 10:00 uur

doctor
Catharina Elisabeth Koops
geboren te Delfzijl
PROMOTIECOMMISSIE

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Prof. dr. R. Smits
Prof. mr. B. Smulders
Prof. dr. B.E.F.M. de Witte

Faculteit der Rechtsgeleerdheid
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<td>AB</td>
<td>Appellate Body</td>
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<tr>
<td>CHAP</td>
<td>Complaint Handling/Acceuil des Plaignants</td>
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<tr>
<td>CJEU</td>
<td>The Court of Justice of the European Union</td>
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<tr>
<td>DAC</td>
<td>Development Assistance Committee</td>
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<tr>
<td>DC</td>
<td>Development Committee</td>
</tr>
<tr>
<td>DG</td>
<td>Director General or Directorate General</td>
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<tr>
<td>DRB</td>
<td>Downs, Rocke and Barsoom (authors)</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>DSU</td>
<td>Dispute Settlement Understanding</td>
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<td>EC</td>
<td>(Treaty establishing the) European Community</td>
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<td>ECB</td>
<td>European Central Bank</td>
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<td>ECC-net</td>
<td>European Consumer Centre Network</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECOFIN</td>
<td>Economic and Financial Affairs Council</td>
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<td>ECOSOC</td>
<td>Economic and Social Council</td>
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<td>EDP</td>
<td>Excessive Deficit Procedure</td>
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<td>EDRC</td>
<td>Economic and Development Review Committee</td>
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<td>EEC</td>
<td>(Treaty establishing the) European Economic Community</td>
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<td>EIB</td>
<td>European Investment Bank</td>
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<td>EMU</td>
<td>Economic and Monetary Union</td>
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<td>EU</td>
<td>(Treaty establishing the) European Union</td>
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<td>FIN-net</td>
<td>Financial services alternative dispute resolution network</td>
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<td>GAP</td>
<td>General and Persistent Infringements</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GC</td>
<td>General Council</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>GFSR</td>
<td>Global Financial Stability Report</td>
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<td>ICITO</td>
<td>Interim Commission for the International Trade Organization</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>IMFC</td>
<td>International Monetary and Financial Committee</td>
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<td>IMS</td>
<td>Internal Market Scoreboard</td>
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<td>ISD</td>
<td>Integrated Surveillance Decision</td>
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<td>ITO</td>
<td>International Trade Organization</td>
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<td>MC</td>
<td>Ministerial Conference</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
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<td>OEEC</td>
<td>Organization for European Economic Cooperation</td>
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<tr>
<td>PICT</td>
<td>Project on International Courts and Tribunals</td>
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<td>PILOT</td>
<td>European Commission EU Pilot Project</td>
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<td>PIN</td>
<td>Public Information Notices</td>
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<td>SDR</td>
<td>Special Drawing Rights</td>
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<td>SGP</td>
<td>Stability and Growth Pact</td>
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<td>SOLVIT</td>
<td>Online problem-solving network for EU Internal Market problems</td>
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<td>SPS</td>
<td>Sanitary and Phytosanitary measures</td>
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<tr>
<td>TBT</td>
<td>Technical Barriers to Trade</td>
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<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TPR</td>
<td>Trade Policy Review (report)</td>
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<td>TPRB</td>
<td>Trade Policy Review Body</td>
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<tr>
<td>TPRM</td>
<td>Trade Policy Review Mechanism</td>
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<td>TRIPS</td>
<td>Agreement on Trade Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>TSCG</td>
<td>Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>WEO</td>
<td>World Economic Outlook</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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Introduction
“I now see a willingness of governments to accept stronger monitoring, backed up by incentives for compliance and earlier sanctions. The Commission will strengthen its role as independent referee and enforcer of the new rules.”
An analysis of effective mechanisms

The previous statement was made by Mr. Barroso, President of the European Commission, as part of the first State of the Union address to the European Union in 2010. By that time it had become clear that economic governance in the European Union needed to be modified in order to be able to face the challenges that Member States were confronted with following the 2008 economic crisis. Reforms were proposed to the Stability and Growth Pact and the Excessive Deficit Procedure, while new forms of governance were introduced in the shape of inter alia minimum requirements for national budgetary frameworks and a Macroeconomic Imbalance Procedure. These reforms not only increased the role of the European Commission as Guardian of the Treaties, but also introduced new and strengthened existing procedures for supervision and enforcement through reversed majority voting systems, stronger surveillance mechanisms and heavier sanctions applied to non-compliant Member States.¹

In the area of EU Internal Market law, the role of the European Commission as enforcer of the Treaties has since long been established.² The infringement procedures under Articles 258 – 260 TFEU make several options available to the Commission to induce compliance by the Member States, including court procedures and the ultimate option of imposing sanctions.³ Over the past years, however, new systems have been introduced with the aim of increasing adherence to Internal Market rules. These newer compliance mechanisms rely on the power of soft methods such as increased transparency, dialogue, peer review, naming-and-shaming and the like, to induce compliance without recourse to the harder option of enforcement and sanctions.⁴

This introduction of soft mechanisms for an area where an established hard compliance mechanism already existed, alongside a gradual shift in the opposite direction in the area of economic governance, demonstrates the intricacies of choosing the correct mechanism to induce compliance. In international organizations in general, outside of the EU, compliance systems range from very soft, with no enforcement options whatsoever,⁵ to systems with elaborate dispute settlement mechanisms, including judicial procedures and the possibility for com-

² Article 17(1) TEU.
³ The infringement procedures apply to most other areas of EU law as well, with some notable exceptions. See chapter 3, section 3 for an overview of these exceptions.
⁴ Examples of these softer mechanisms are the Internal Market Scoreboard, SOLVIT and EU Pilot. These will be discussed in more detail in chapter 4.
⁵ The Organization for Economic Cooperation and Development is one example of such an organization. See also chapter 5.
Introduction

Compensation and retaliation. This is not surprising, given the fact that the choice for a surveillance system is made under various constraints. The institutional set-up as well as the existing legal framework of an organization, combined with changing political and economic circumstances, influence these choices. The choice of a compliance system, however, is crucial for the functioning of an international organization.

The well-known adage claims that a chain is only as strong as its weakest link. If the Member States of an international organization are regarded as linked to one another by the rules and regulations of the organization, it would thus follow that the organization is only as strong as its least compliant Member State. Given the fact that the strength of an organization is more than the total sum of its parts, this statement does not hold true. However, the existence of a non-compliant state does weaken the foundations of the organization and renders the proverbial chain less strong. The existence and application of a compliance mechanism in case of non-adherence to the rules can therefore contribute greatly to the strength and functioning of the organization as a whole. The extent to which the compliance system can induce adherence to the underlying obligations – in short: its effectiveness – is essential to take into account when making a choice for a certain type of mechanism.

A comparative analysis

Much has been written on compliance with the rules of an organization, usually by scholars from the fields of international relations, political science, or law and economics. However, compliance research from a legal point of view is rare.

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6 One example of an organization with an elaborate dispute settlement system is The World Trade Organization. See also chapter 6.
7 See chapter 1 for an analysis of the factors influencing the choice for a certain kind of compliance mechanism.
Introduction

while an in-depth investigation of soft compliance procedures within the EU is virtually non-existent. A wealth of studies exists on compliance with EU law, but they tend to focus on what some call the “implementation deficit”, specifically analyzing why states do not implement EU legislation in a timely or correct manner. They do not investigate the design of compliance mechanisms targeted at reducing this implementation deficit, which is the focus of this current research. Moreover, a comparative analysis of different types of mechanisms across international organizations has not yet been carried out.

This study will try to determine the underlying factors influencing the effective functioning of compliance mechanisms in international organizations by applying a three-dimensional compliance model. The aim is to provide a legal analysis of the original hard infringement procedures as well as the soft newer procedures used in the EU, applying a comparative approach to learn from best


practices in other organizations. Through this analysis, an understanding may be created of what determines the effective functioning of the European infringement procedures in particular and compliance mechanisms in international organizations in general.

The thesis takes the mechanism of European infringement procedures as its basis for comparison, as this is the most elaborate of all existing compliance procedures, as well as one considered to function effectively. Through a comparison of the European infringement procedures with newer alternative EU compliance mechanisms, as well as by comparing these EU systems with similar ones in other international organizations, the aim is to answer the following research question: “How effective are the European infringement procedures in comparison with alternative mechanisms, both within the EU as well as in other international organizations?”

A structured analysis
The thesis is structured as follows. Part I focuses on theory and methodology. Chapter 1 defines the concepts of compliance and effectiveness, building the framework for analysis used throughout the study. The three-dimensional effectiveness model developed in this chapter is based on management and enforcement theories of compliance, taking Tallberg’s “management-enforcement ladder” as a point for departure, given its capacity to show how management and enforcement elements work together to induce compliance with the rules of an organization. These theories provide a preliminary explanation of the use of the broad range of enforcement and compliance mechanisms in international law. By following the steps of the model applied in this thesis, then, a comparative assessment can be made of the effectiveness of these mechanisms.

Next, chapter 2 explains the methodology that is applied in this study. The chapter provides a justification for the methods, techniques and underlying data employed to compare the effectiveness of the compliance mechanisms in the different international organizations. Furthermore, the choice and use of case studies and other qualitative and quantitative techniques throughout the book is explained.

Parts II and III, then, can be seen as an elaboration of the case studies to which the theory of compliance and effectiveness is applied. All chapters consist of two basic parts: first, a description of the set-up and character of the relevant system, and second, an analysis of the effectiveness of the system through an application of the effectiveness model. Part II contains this analysis for the EU compliance mechanisms. Chapter 3 contains the basic mechanism, the infringement
Introduction

procedures, while chapter 4 analyzes three alternative mechanisms: SOLVIT, EU Pilot and the Internal Market Scoreboard. This part concludes with a comparative analysis of the base mechanisms and the alternative mechanisms. It is shown how and why a mutually beneficial interaction exists between the infringement procedures and the softer mechanisms.

Part III similarly applies the effectiveness model to compliance mechanisms in other international organizations. Chapter 5 analyzes the peer review system of the OECD, chapter 6 focuses on the WTO dispute settlement system and Trade Policy Review Mechanism, while chapter 7 discusses the IMF surveillance systems. The comparative conclusions at the end of this part show that there are important drawbacks to the set-up of the compliance mechanisms in those organizations, often related to a mismatch between the character of the underlying obligations and that of the mechanisms itself, as well as a lack of interaction between the mechanisms within an organization.

The final conclusion, comparing the findings for all compliance mechanisms analyzed in this research, finds that the less than optimal interaction between the systems in any one organization deprives it of several of the advantages that the EU does enjoy. On the other hand, the EU can learn from the experiences of these organizations, where systems similar to the EU alternative mechanisms have been used for a much longer period of time.
PART I
Theory and Methodology
INTRODUCTION TO PART I

Before turning to the theoretical background underpinning this dissertation, an explanation of the distinction made in this thesis between theory and methodology is in order.¹ According to some, theory and methodology can be used synonymously.² Cryer et al., for example, prefer to make a distinction between ‘methodology’ and ‘method’. According to these authors, the concept of methodology has theoretical connotations, while method is the way in which a research project is pursued – what one actually does to answer the research question – and has empirical and sociological connotations.³ This interpretation of the terms theory, method and methodology, then, faces two main problems. The first concerns the literal meaning of these terms, and the second the interpretation of and distinction between them.

In the legal research context, method is understood to mean the way or procedure of attaining an object, in casu the tools employed in finding the answer to a legal research question.⁴ Methodology refers to the system or body of methods, or a particular procedure, where the tools or methods employed in finding the answer to the research question are deployed or interpreted based on certain principles.⁵ A chapter or paragraph on methodology should thus focus not mere-

¹ There is a plethora of literature discussing the issue of methodology and especially concerning the question of what constitutes science or a “scientific method”. However, in legal research this discussion is much more recent. (See e.g. Cryer, R. et al., Research Methodologies in EU and International Law (Hart Publishing, Oxford 2011); McConville, M. and W. Hong Cui, eds., Research Methods for Law (Edinburgh University Press Ltd, Edinburgh 2007); Patterson, D., ‘Methodology and Theoretical Disagreement’ in U. Neergaard et al. (eds), Essays in European Legal Method (DJOEF Publishing, 2011); Hesselink, M., ‘A European Legal Method? On European Private Law and Scientific Method’ (2009) 15 (1) European Law Journal.)
² Cryer et al. (2011), p. 5.
³ Ibid.
⁴ The word method originates via the French word methode and the Latin methodus from the Greek word methodos, literally meaning “to practice” or “to follow” (from meta (after) + hodos (way or route)). Modern dictionaries yield the following definitions for the word method: “a particular procedure for accomplishing or approaching something” (in Oxford Dictionaries Online, accessed December 2012, from http://www.oxforddictionaries.com (Oxford dictionary)), or “a procedure or process for attaining an object” (in Merriam Webster Online, accessed December, 2012, from http://www.merriam-webster.com/dictionary) (Merriam-Webster)).
⁵ Methodology adds the suffix –ology, stemming from the Greek word logos, which means “word”, “thought” or “reason” or “the study of”. Literally, the word methodology thus means “the study of following or practicing”. Dictionary definitions for methodology give “a system of methods used in a particular area of study or activity” (Oxford dictionary), “1: A body of methods, rules, and postulates employed by a discipline: a particular procedure or set of procedures; 2: the analysis of the principles or procedures of inquiry in a particular field” (Merriam-Webster). The American Heritage Dictionary adds the following: “Methodology can properly refer to the theoretical analysis of the methods
ly on the methods or tools employed in order to find the answer to the research question, but should also explain how these methods are used and interpreted, and what principles are used in choosing these methods.

In order to choose the correct elements and principles for finding the necessary methods, an additional but separate element is needed: a theoretical framework. As mentioned above, the terms methodology and theory are sometimes used as synonyms. However, a system or body of methods (methodology) is not synonymous with a system of ideas intended to explain something (theory). Rather, one formulates a theory, a system of ideas, in order to explain something and subsequently, in order to test or prove one’s theory, a system of methods chosen according to certain principles (methodology) can be applied.

In light of the above explanation, this part of the thesis is set up as follows. Chapter 2 will explain the theoretical framework that underlies this dissertation. A general theory is formulated based on existing ideas and theories, which will be used to explain the facts of the case studies, and which will lead to an answer to the general research question posed in this dissertation. Chapter 3 will then...
explain which methods are used, why and how, in order to be able to actually apply the theoretical framework to the facts and cases.
CHAPTER 1
On Compliance and Enforcement
If you think it your duty to make children do what you want, whether they will or not, then it follows inexorably that you must make them afraid of what will happen to them if they don’t do what you want. You can do this in the old-fashioned way, openly and avowedly, with the threat of harsh words, infringement of liberty, or physical punishment. Or you can do it in the modern way, subtly, smoothly, quietly, by withholding the acceptance and approval which you and others have trained the children to depend on; or by making them feel that some retribution awaits them in the future, too vague to imagine but too implacable to escape.

1. INTRODUCTION

In order to ascertain the effectiveness of compliance mechanisms in international organizations, first and foremost the concept “compliance” must be defined. A general understanding of the elements that constitute compliance is an essential prerequisite before any comparison of compliance mechanisms can be undertaken. This chapter will thus first examine existing theories and develop a working definition of the concept of compliance. Second, four questions related to the concept of compliance are posed to determine the type of obligations, compliance and relevant compliance mechanisms. The final part will discuss the concept of effectiveness in the context of this research.

2. TO ENFORCE OR NOT TO ENFORCE

States become members of international organizations for a multitude of reasons, such as to enhance economic cooperation,¹ to tackle common problems together,² or to maintain international peace and security through coordinated efforts,³ to name but a few. More broadly, international organizations and international law enhance cooperation to alleviate externality problems that arise

¹ As in the WTO: “The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,[…]” (preamble of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 2 (1999), 1867 UNTS 3, 33 ILM 1125 (WTO Agreement)).

² For example, the WHO Constitution states: “For the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties agree to the present Constitution and hereby establish the World Health Organization” (preamble of the Constitution of the World Health Organization, 22 July 1946, 14 UNTS 185, hereinafter WHO Agreement).

³ As stated in the preamble of the UN Charter: “We The Peoples Of The United Nations Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends, […] have resolved to combine our efforts to accomplish these aims” (preamble to the Charter of the United Nations, 24 October 1945, 1 UNTS XVI, 1 UNTS XVI, hereinafter UN Charter).
when states act unilaterally. Furthermore, international laws may be used to discourage national governments from engaging in wasteful economic behavior due to their relations with international interest groups. Regardless of the regulatory context, it is hard to imagine states acceding to international organizations if they did not benefit in some way from the membership of these organizations. No country would willingly commit itself to the obligations that membership of an international organization entails if the cost of membership outweighed the benefits.

On the other hand, it is also difficult to understand why states would want to comply with international agreements, given that these agreements are usually costly in the short term, while generally no central enforcement system exists. In fact, countries in practice do indeed prove less willing to comply with the obligations they signed up for upon their membership to an international organization. Despite this existence of non-compliant behavior, however, it probably still holds true that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time (as stated by Henkin in 1968). In light of this reality, multiple theories have been developed over the past four decades to explain why states comply with their obligations. However, almost no theory exists on why states sometimes do not comply with their obligations, and even less theory on what should be done in the case of non-compliance.

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5. Ibid.


9. Most of the literature comes from the field of international relations. Section 3 further on in this chapter explains the main theories, including realism, institutionalism, or normative theories.

10. See section 3 and below in this chapter for an overview of the theories that relate to (non-
For sake of simplicity, and in line with Henkin’s statement, this research assumes that states have a natural propensity to comply with their treaty obligations: “For a study of the methods by which compliance can be improved, the background assumption of a general propensity of states to comply with international obligations […] seems more illuminating.” The adoption of this assumption does not imply the absolute truth of this statement, but helps focus on the exception, rather than the norm; that is, cases where compliance with legal obligations is not achieved by the Member States of an international organization. Given the fact that obligations are usually adhered to even in the absence of an enforcement system, those relatively few cases where nations do not observe their obligations stand out all the more and deserve special attention. Although it is debatable whether perfect compliance is preferable to some level of non-compliance, it is clear that a certain level of compliance is needed for an international organization to function.

If it is difficult to understand why exactly states do not comply with their international agreements, it is even more complicated to find a way to induce compliance in situations where states do not adhere to the rules of the organization. One way to make states comply could be to introduce systems that are able to force Member States into compliance. However, enforcement requires an enforcer, which the international system as a whole does not have. Also, even where a specific body has been appointed as enforcer within the context of an international organization, certain underlying elements (e.g. the institutional set-up of the organization, its legal framework, political considerations) will often play a role in preventing or inducing Member State compliance, which the enforcer can only influence up to a certain point. When these elements can be

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12 This alludes to the theory of efficient breach, where economic theory suggests that when the benefits of breaching an agreement exceed the costs of complying with an agreement, the system governing the agreement should allow a party to breach the agreement and vice versa. In this manner efficient breaches will be allowed and inefficient breaches deterred. (See e.g. Posner and Sykes (2010), p. 243 or Morrison, R., ‘Efficient Breach of International Agreements’ (1994) Denver Journal of International Law and Policy, p. 183.)
13 What Chayes and Chayes call an “acceptable level of compliance” not only changes over time with the capacities of the parties and the urgency of the problem, but may also depend on the type of treaty, the context, or the exact behavior involved. (Chayes and Handler Chayes (1995), p. 17).
15 One could see the European Commission as the enforcer of EU law, given its function as Guardian of the Treaties as per Article 17 of the Treaty on European Union (“[The Commission] shall oversee the application of Union law under the control of the Court of Justice of the European Union”).
16 E.g. the influence of the Member States, the existence of more than one compliance mechanism,
The possibility of discretionary decision-making by the enforcer etc. Such elements will be encountered throughout the analysis of the seven compliance mechanisms investigated in this thesis.

17 Oxford English Dictionary
18 Young (1979), p. 3.
This chapter’s focus is on the second dimension of compliance – how instances of non-compliance are dealt with in a particular context.

From the above definitions it is not clear whether non-compliance should be seen as the mirror image of compliance. Young’s definition illustrates this best by stating that non-compliance occurs when actual behavior departs significantly from prescribed behavior. Not every instance of non-conformity to prescribed behavior therefore automatically constitutes non-compliance. As previously mentioned, it is debatable whether perfect compliance is preferable to some undefined degree of non-compliance. From an economic perspective at least, perfect compliance is neither practicable nor desirable. In deciding how much compliance is economically desirable, it is necessary to compare three factors: the avoided social losses, compliance costs and enforcement costs. In some cases, it may cost more to avoid or repair non-compliance than the actual harm that would occur in the event of non-compliance. There is thus a difference between optimal compliance and perfect compliance.

Given the general absence of an enforcer in the international realm, however, who will determine when certain behavior constitutes non-compliance with obligations or when action should be taken to induce better or perfect compliance?

In most international organizations, this determination is left to the Member States. In the WTO, for example, only Member States can start proceedings against another Member State for non-compliance with WTO rules. The EU on the other hand has solved the determination problem by assigning the European Commission ("the Commission") the role of Guardian of the Treaty. This means the Commission is the institution that decides if and when to start proceedings

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21 The other dimension of compliance (the difference between behavior and obligation) will be explained in the context of the international organizations that are discussed in later chapters. In this current chapter, a theoretical framework is set out that is potentially applicable to all types of international (economic) organizations and thus all types of international obligations under the rules of those organizations.

22 See e.g. Abbot, C., Enforcing Pollution Control Regulation; Strengthening Sanctions and Improving Deterrence (Hart Publishing, New York 2009), pp. 1-17.


24 Article 17(1) TEU (ex 211 EC, as amended) confers the responsibility of the correct application of the Treaty onto the Commission: “The Commission shall promote the general interest of the EU and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of EU law under the control of the Court of Justice of the European Union.”
against a Member State for non-compliance (Article 258 TFEU). If the Commission
chooses not to bring proceedings, other Member States also have the option of
bringing an allegedly non-compliant Member State before the Court of Justice
of the European Union (CJEU) (Article 259 TFEU). Ultimately, it is the CJEU that
decides whether non-compliance exists or not (Article 260 TFEU). Be it through a
Member State or a more central enforcement actor, a certain amount of discre-
tion remains as to the determination of the existence of non-compliance, as well
as regarding the decision to take action against this perceived non-compliance.

For the purpose of this research, the assumption is made here that the ab-
sence of perfect compliance is equal to non-compliance. This assumption, how-
ever, will need to take into account the discretion left to those making the ac-
tual decision on when behavior constitutes non-compliance in practice. A certain
level of non-compliance may be acceptable within an international organization.
However, since it is impossible to determine beforehand on what criteria these
“enforcers” within international organizations will base their decisions, the as-
sumption of non-compliance being equal to anything less than perfect compli-
ance remains valid.25 After a discussion of compliance theories as well as compli-
ance in practice in the following sections, a definition of non-compliance can be
formulated that will be used in this study.

4. COMPLIANCE THEORIES

Compliance with international law is a complex and much-debated subject.
Scholars from the fields of international law, international relations, social sci-
ence and in particular political science have examined how international law can
affect the conduct of states. The current chapter borrows from these various dis-
ciplines to create a general overview of the most important theories on why states
do or do not comply with international law. First, an understanding is formed of
why states comply with their international obligations without the existence of
enforcement systems. These findings can then be used to see how, when “natu-
ral” compliance does not happen, “artificial” compliance can be induced through
enforcement systems in the framework of international organizations. Artificial

25 This assumption is made for this chapter only. The analysis of the compliance mechanisms
in later chapters is based on the assumption of non-compliance after a procedure has been set in
motion. Before the application of a compliance procedure, any behavior by the Member States is
apparently tacitly or explicitly condoned or accepted by the enforcer of that particular organization
(be it a supra-national institution or the Member States themselves) and should be seen as compliant
behavior.
compliance includes systems that target non-compliance by the use of, for example, peer pressure. Peer pressure is usually used to target non-compliance in those areas where other enforcement mechanisms do not exist, and is often used in international organizations as an official compliance-inducing mechanism – executed by publishing reports on rule adherence or by holding peer-review meetings, for example. Any compliance resulting from these types of peer-pressure actions thus cannot be seen as “natural” compliance in the sense that here outside pressure is also needed to induce compliance, and Member States do not comply only through internal pressure such as self-interest or moral obligations.

A traditional way of classifying theories on compliance with international law, originally stemming from the discipline of international relations, is to distinguish between realist theories and normative theories. A plethora of variations exist on these two strands of thought, including neo-realism, rationalism, liberalism, institutionalism, constructivism, enforcement theory, transnational legal process, and many others. However, all of these can be seen as variations or elaborations of the two main strands: realism and normative theories. The aim here is therefore not to give an overview of all theory on compliance within international relations literature, but to get an idea of what types of approach exist when studying compliance with international obligations. By discerning between realism and normative theories, the basic difference between compliance theories can be captured. This difference lies in the fact that on the one hand, non-compliance can be intentional, rational, or based on cost-benefit analysis, while on the other hand it may be unintentional, unknown to the actor or based on informational, communicational or capacity issues. As the current chapter will show, the distinction between the two theoretical sides is not as clear-cut as it may seem. Clarifying the specific elements of the two strands of compliance theory, however, is an essential step before constructing a model that can assess the effective functioning of compliance mechanisms.

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26 As occurs in e.g. the Organization for Economic Cooperation and Development (OECD) and the WTO Trade Policy Review Mechanism (WTO TPRM), but also in certain areas of EU law. It will be seen, however, that sometimes peer review mechanisms exist alongside harder enforcement mechanisms, such as in the EU (see chapter 5 of this thesis) and the WTO (see chapter 6). On peer review, see e.g. Pagani, F. ‘Peer Review as a Tool for Co-operation and Change. An analysis of an OECD working method.’ (2002) 11 (4) African Security Review, or OECD (2003) Peer review: merits and approaches in a trade and competition context CCNM/GF/COMP/TR (2003)15.

27 See e.g. Keohane (2005).

28 For an overview of existing theories, see e.g. Burgstaller (2005).
4.1. Realism

Realism is based on the belief that states sometimes follow international law, but only when it is in their self-interest to do so. Most realists do not see rules as affecting state behavior, but rather as reflecting states’ interests.\(^\text{29}\) Therefore, compliance will occur when a state’s international interest concurs with its national self-interest.\(^\text{30}\) According to this view, non-compliance can be attributed to the lack of a central enforcement agency in the international community.\(^\text{31}\) A central enforcement agency can make non-compliance more costly by introducing sanctions or using force, thereby increasing a state’s self-interest in complying with its international obligations. Without this central enforcement agency, compliance thus depends on the outcome of strategic interaction, based on cost-benefit analysis.\(^\text{32}\)

Another element influencing compliance is the nature of the underlying obligation a state has committed itself to comply with. Haas, for example, argues that according to realism, compliance patterns vary with the extent to which territorial integrity would be at risk. Compliance would therefore be strongest in the area of human rights, followed by the environment, then trade and finally arms control. Within the trade area compliance levels would vary accordingly, with the lowest level of compliance for technologies with potential military applications.\(^\text{33}\)

The subsequent presumption is then that when the interests of a state are not in alignment with its international obligations, a state will only comply when it is compelled to do so, either by a dominant state or some type of enforcement system. This enforcement will realign interests with obligations, since it will be in the state’s self-interest to not be punished by other states or the international organization of which it is a member. Realism, in short, says that either 1) a hegemonic state forces or induces other states to comply (coercion), 2) treaty rules merely codify parties’ existing behavior or expected future behavior, thereby aligning national with international interests, or 3) the treaty resolves a coordination game where no party has an incentive to violate the rules once a stable

\(^{29}\) Ibid., p. 96.
\(^{30}\) Ibid.
\(^{32}\) Ibid.
\(^{33}\) Haas (1998).
equilibrium has been achieved. Most importantly, according to this theory the adoption of treaty rules themselves can correlate with, but not cause compliance.34

An example of a domestic, national theory of compliance is based on the realist assumption that individuals are purely driven by self-interest, and weigh only the potential gain of non-compliance against the potential costs. Becker first developed this approach in his famous article on crime and punishment, in which he shows that the optimal amount of enforcement depends on the cost of enforcement, the nature of the sanctions and the responses of offenders to changes in enforcement.35 His basic deterrence model assumes that the threat of sanction is the best policy mechanism to improve compliance with regulations. This instrumental perspective on compliance assumes that individuals are driven by self-interest and respond to changes in the tangible, immediate incentives and penalties associated with a certain act.36 It is thus evident that in the domestic (as well as the international) context, enforcement and punishment play an important role in inducing compliance with obligations in self-interested individuals or states.

The rationalist theory of institutionalism builds on the realist theory in its view that states are the primary actors, whereby a game-theoretic approach is taken to the study of the international system. Institutionalism, however, goes on to say that states can combine to create institutions that can autonomously create rules that in turn affect state behavior. Institutions can reduce incentives to cheat, increase the value of reputation37 and facilitate the monitoring and surveillance of compliance. By lowering information and transaction costs and increasing the repeated nature of interaction, institutions can enhance cooperation and thereby increase compliance.38 International institutions can facilitate cooperation that is in the state’s long-term interests and thereby prevent short-term defections that may jeopardize these interests. Institutionalism posits that power and interests alone cannot explain behavior: Other forces, such as transparency, reciprocity, accountability and regime-mindedness matter as well.39 Creating institutions to support the influence of these forces will thus help in

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37 On the impact of reputation, see also in general Chayes and Handler Chayes (1995); Downs and Jones (2002); Keohane (2005). The role of reputation is re-examined when discussing peer review mechanisms in later chapters.
38 See Burgstaller (2005).
gearing a state’s self-interest towards compliance. While this theory is good at explaining compliance with international law, it does not account well for acts of non-compliance (unless the absence of institutions is taken into account).

4.2. Normative Theories

Normative theories do not posit that state behavior can be explained solely on the basis of a state’s self-interest or cost-benefit analysis. Rather, states are assumed to comply with norms guided by morality and ethics taken from natural law and justice. As Burgstaller phrases it: “normative theories basically argue that norms qua norms influence and induce states’ behavior”. The central assumption underlying normative theories is that states obey international law out of a moral obligation to do so.

Different varieties of normative theories exist. Franck, for example, posits a rather narrow normative theory focused on a norm’s "compliance pull", meaning that the higher a norm scores on legitimacy, the more compliance with that norm is likely. Franck defines legitimacy as follows: “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process”. On the other hand, some believe this is an overly narrow normative view of compliance. For one thing, international law, as a product of negotiations among bureaucrats and politicians (treaties), or as a description of empirical regularities in the behavior of nations (customary international law), cannot be seen as having a compliance-inducing moral force of and by itself. International law is thus not neutral, but rather designed to further a certain purpose. Compliance with international law should therefore serve some kind of function as well.

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44 Posner and Sykes (2010)
45 Ibid., p. 245.
4.3. Management and Enforcement

A somewhat more recent take on the compliance debate focuses on regime characteristics that are able to induce compliance by Member States.\(^{46}\) The two most important perspectives in this debate are referred to as the enforcement approach and the management approach. It can be quite illuminating to define compliance in terms of enforcement and management rather than realist or normative theories. These two models incorporate most elements of realist and normative theories without distinguishing between the different variations on those theories.

4.3.1. Management

One broader and more realistic\(^{47}\) variation on the normative theory is managerialism, as described by Chayes and Chayes.\(^{48}\) This model proposes a theory of why states sometimes do not comply despite strong compliance-inducing factors. The authors assume that states do not violate international law either intentionally or when it suits them. Other forces, such as reciprocity, transparency and accountability, can better explain their behavior towards compliance. Chayes and Chayes argue against realism’s basic proposition in which non-compliance is based upon a cost-benefit calculation, which would mean that non-compliance is always a premeditated and deliberate violation. In reality, according to the Chayes’, this type of violation only happens very infrequently.\(^{49}\) The authors therefore assume that states have a general propensity for complying with their treaty obligations. According to the Chayes’, there are three main considerations that support this general assumption: efficiency, interests and norms.\(^{50}\)

The factor of efficiency contends that decisions are not a cost-free good, given that governmental resources for policy analysis and decision-making are costly and in short supply. It is therefore not feasible to continuously recalculate costs and benefits if the circumstances have not changed substantively since the original decision was taken. The most efficient alternative, therefore, is to follow the established treaty rule until the circumstances have changed – as Chayes and Chayes put it: “compliance saves transaction costs”.\(^{51}\)

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\(^{46}\) Tallberg (2002), p. 611.

\(^{47}\) Realistic, not realist.

\(^{48}\) Chayes and Handler Chayes (1993).

\(^{49}\) Chayes and Handler Chayes (1995).

\(^{50}\) Ibid. p. 4.

\(^{51}\) Ibid.
The *interests* factor then posits that international obligations are largely endogenous. An international treaty has no force unless a state has agreed with it – it is a consensual instrument. Since international obligations are made and enforced by states, these same states are assumed to have an interest in complying with them. In an organization such as the WTO, which calls itself a “member-driven” organization,\(^{52}\) this feeling might be especially strong, with the Members formally being able to join every one of the more than 70 different institutional bodies of the organization.\(^{53}\) Particularly the process by which treaties are formulated and concluded ensures to some degree that the treaty will represent the Member States’ interest.

Of course, a state’s interests at the time of treaty conclusion may differ from those existing at the time compliance is called for. The treaty-making process is necessarily a process of compromise, in which every actor is at both the giving as well as the receiving end during the negotiations. However, compliance decisions are influenced by both the mutual expectations created by entering into the international agreement by the parties, as well as the fact that parties will not consent to a treaty without the notion that they will comply with the obligations they consent to. Moreover, treaties will usually be adapted along the way, either through formal amendments or more informal ways such as interpretation by courts or adaptations through votes of the parties in, for example, technical annexes.\(^{54}\)

The third factor, *norms*, is the basic thought behind normative theories, where compliance has to do with the sense of legal obligation induced in states with which they feel bound to comply. Treaties are legally binding on the parties that ratify them.\(^{55}\) The existence of a legal obligation usually translates into the presumption of compliance, unless there are compelling reasons to disobey. Chayes and Chayes call this the “legal obligation to obey and presumptively a guide to action”.\(^{56}\)

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\(^{52}\) See e.g. the WTO website: “The WTO is a rules-based, member-driven organization — all decisions are made by the member governments, and the rules are the outcome of negotiations among members.” [http://www.wto.org/english/thewto_e/thewto_e.htm](http://www.wto.org/english/thewto_e/thewto_e.htm)


\(^{54}\) Chayes and Handler Chayes (1995), pp. 4-7.

\(^{55}\) In line with the notion of *pacta sunt servanda* – every treaty in force is binding upon the parties to it and must be performed by them in good faith (Article 26 of the Vienna Convention on the Law of Treaties).

When there is non-compliance by states, this is, according to Chayes and Chayes, not necessarily due to deliberate defiance of the legal standard. They propose that violations are rather due to:

1) The ambiguity and indeterminacy of treaty language, leaving too much room for uncertainty and thus unintended discretion;
2) A limited capability of parties to carry out their obligations (e.g. domestic regulatory capacity in the sense of scientific, technical, bureaucratic or financial capacity); or
3) The inherent temporal dimension of the social and economic changes contemplated by regulatory treaties, causing a time-lag between commitment and performance and thereby creating room for non-compliance.\(^{57}\)

In conclusion, the management model is one of cooperation, where justification, discourse and persuasion form elements of remedies for non-compliance. Some of the main elements of the management approach are transparency, reporting and data collection, verification and monitoring, strategic (implementation) reviews and assessment techniques.\(^{58}\) Chayes and Chayes see enforcement happening through a combination of assistance and persuasion measures, rather than coercion. Formal enforcement measures or coercive informal sanctions should only be applied in those rare and few egregious cases that are left, once it is clear that it concerns a “black-and-white case of deliberate violation”.\(^{59}\)

### 4.3.2. Enforcement

In 1996, Downs, Rocke and Barsoom (DRB) published a direct response to Chayes and Chayes’ article. They propose the so-called enforcement model of compliance, which is based on cooperation, enforcement, and “the endogenous quality of rules”.\(^{60}\) According to this model, compliance is structured around state incentives in order to induce compliance, with the use of sanctions in the case of non-compliance. The enforcement model is a rather economic approach to compliance, where social control is replaced by ‘regime control’, and where compliance is coercive rather than persuasive.

\(^{57}\) Ibid., pp 9-17.
\(^{58}\) Burgstaller (2005), p. 141.
\(^{59}\) Chayes and Handler Chayes (1995).
\(^{60}\) Downs et al. (1996).
DRB argue that the findings of the managerial school, of which the Chayes’ are the founders (so to speak), are seriously flawed due to endogeneity and selection problems. The regulatory treaties examined in managerial literature experience a high level of compliance due to the fact that most of these treaties require Member States to depart only marginally from their “normal” behavior. DRB use the notion of “depth of coordination”, which refers to the extent to which a treaty requires states to depart from what they would have done in its absence. They see a logical connection between the depth of coordination and the amount of enforcement that is needed to elicit compliance by the treaty’s signatories. Therefore the proposition is that the deeper an agreement, the greater the incentives for non-compliant behavior and thus the need for enforcement will be. This poses a problem, however, for measuring the effectiveness of enforcement mechanisms.

A high rate of compliance may not be due to the availability or effectiveness of enforcement. Rather, the limited use of sanctions may be explained by the fact that most treaties require only modest changes in state behavior. According to DRB, international agreements thus tend to codify existing behavior, and thereby confront states with few incentives to defect, lessening the need for enforcement mechanisms. This means that enforcement is a necessary element in securing compliance for those treaties that require profound behavioral changes for states. The fact that there are not many cases of deliberate non-compliance does not mean, as the managerialists posit, that coercion is only to be used as a measure of last resort for those few egregious cases. Rather, DRB argue there are only a few treaties with deep coordination and thus few incentives to deviate. However, when deviation occurs, enforcement is indeed imperative.

Building on the model of DRB, the model was further expanded by Tallberg. He states there are two ways to gain from participation in a multilateral regime as it exists in international organizations: first, if states can benefit at little or no cost (“free-riding”), and second, when the benefits of shirking from one’s obliga-

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61 Ibid., pp. 379-380.
62 Ibid., p. 383.
63 Comparable to what the Chayes’ label the interests-factor, where international obligations are largely endogenous. However, where the Chayes’ see this as a compliance-inducing factor, DRB turn the connection around by linking this endogeneity to the lack of enforcement mechanisms in international law. The less endogenous the rules are, the greater the depth of coordination and thereby the need for enforcement.
64 Downs et al. (1996).
65 Ibid., pp. 387-388.
66 Ibid., pp. 397-399.
Compliance problems are thus easiest solved or prevented by increased monitoring and sanctions. In contrast to the management theory, states, as rational actors that weigh the benefits and costs of their actions against each other, might willfully choose not to comply when this suits them. Even when the decision to sign a treaty has been made, subsequent decisions are not necessarily made in light of the signed treaty. The likelihood of free-riding is especially high in collaborative situations (as opposed to coordination situations), since after signing the agreement states can gain more if they merely reap the benefits of the agreement without putting in their own fair share. Of course, the game-theoretical problem here would be that if all states were to think this way, one would end up with a classic prisoner’s dilemma, where all states possibly would attempt to free-ride, and no one would make any actual effort. To avoid a prisoner’s dilemma, enforcement methods such as monitoring and sanctions are required to prevent states from shirking.

4.3.3. Management and Enforcement in Practice
One drawback of management and enforcement models is the fact that the institutional design of enforcement systems does not play an important role. Where Chayes and Chayes argue that “On the whole, it has not seemed to matter whether the dispute settlement procedure is legally required or the decision is legally binding, so long as the outcome is treated as authoritative,” DRB state: “The specific mechanism by which states punish violations is less relevant to the specific relationship between depth of cooperation and enforcement, than is the magnitude of enforcement. Although we motivate the model by using a case of

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67 Tallberg (2002).
68 Game theory is the analysis of strategies for dealing with competitive situations where the outcome of a participant’s choice of action depends critically on the actions of other participants.
69 A prisoner’s dilemma is a situation in which two players each have two options whose outcome depends on the simultaneous choice made by the other. This situation is often illustrated in terms of two prisoners separately deciding whether to confess to a crime (the idea was originally thought of by A.W. Tucker in 1950). For example, if prisoner A confesses and betrays B, A will not go to prison, but B is jailed for 10 years (and vice versa). If both confess, they each get 3 years; but if neither confesses, they both get only 6 months. The best option for both, therefore, would be to confess – hoping their fellow prisoner does not betray them. Since both will probably think alike, they will both confess and betray the other, and each thus gets a longer prison sentence than if they had kept quiet. See Axelrod, R., *The Evolution of Cooperation* (Basic Books, Cambridge, MA 1984), for further explanation of the prisoner’s dilemma.
centralized enforcement for convenience, nothing in the analysis precludes effective decentralized enforcement schemes. 

One important difference in institutional design essential to the current research is the distinction between interstate and supranational supervisory systems. The literature suggests that the design of compliance systems can be seen as a continuum, with two ideal-types of a supranational (as embodied by the EU infringement procedures) or interstate (as e.g. within the WTO dispute settlement procedure) system at the two opposite ends of the continuum. However, as will be shown, within both these organizations there are also examples of stronger and weaker variations of these systems, where the effects of applying enforcement and management systems can be discerned.

4.3.4. A Management-Enforcement Ladder

In addition to, or rather drawing on the management and enforcement approaches, Tallberg puts forward a third approach. The author proposes to further integrate the two models by positing the idea of a “management-enforcement ladder”: a twinning of cooperative and coercive instruments. He takes the EU centralized compliance mechanism (the infringement procedures) as an example of how the combination of management and enforcement mechanisms forms a ladder of measures, consisting of preventive capacity building and rule interpretation, systems of monitoring, informal channels of bargaining, legal proceedings against violators and the final option of sanctions. In his article, Tallberg shows how, with every step in the centralized infringement procedures and the accompanying step up the management enforcement ladder, a sharp reduction of violations is achieved. Tallberg’s ladder has four steps:

1) Prevention - preventive capacity building and rule clarification that reduce the risk of violations due to incapacity or inadvertence;
2) Monitoring - forms of monitoring that enhance the transparency of state behavior and expose violators;

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73 Tallberg (2002).
74 See chapters 3-8 below for illustrations and an analysis of these findings. See also ibid., or in more detail Keohane, R.O. et al., ‘Legalized Dispute Resolution: Interstate and Transnational.’ (2000) 54 (3) International Organization.
76 Ibid., pp. 615-618. More on these centralized procedures in chapter 4 below.
77 Ibid., pp. 632-633.
3) **Legal framework** - a legal system that permits cases to be brought against non-compliant states and that further clarifies existing rules; and

4) **Sanctions** - deterrent sanctions as a final measure if states refuse to accept the rulings of the legal system.

According to Tallberg, this ladder is especially active in the EU, which makes the EU exceedingly effective in combating detected violations, reducing non-compliance to a temporal phenomenon.\(^78\) The institutional enforcement element plays a much more important role in his view, where three institutional factors have played a particularly essential role in establishing effectiveness in the EU: the delegation of supervisory powers to the supranational institutions, EU institutions' autonomous transformation of available compliance procedures, and the willingness of domestic actors to play a role in EU enforcement.\(^79\) Given the fact that these three factors are quite specific to the EU, however, it remains to be seen in how far the institutional enforcement framework of the EU would be replicable in other international organizations. Nevertheless, by looking at the EU management-enforcement ladder in comparison with the institutional framework in other international organizations, it should be possible to discern some general elements or variables that are conducive to establishing compliance with the obligations under the rules of an international organization.\(^80\)

5. **SOFT AND HARD MECHANISMS**

Now that the basic theories underlying the management and enforcement models have been outlined as well as Tallberg's hybrid form, the different types of compliance mechanisms will be examined. Two dimensions are identified regarding compliance: compliance with a basic, primary set of rules, and compliance with a complementary set of rules, which is meant to induce compliance with the primary rules.\(^81\) The primary set of rules includes all rules that the members of an organization should comply with, including primary and secondary law, while the complementary set comprises those rules meant to ensure compliance

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\(^78\) This means that the solution to non-compliance problems will take time – but compliance will be achieved in the end.


\(^80\) For another take on integrating normative and realist models of compliance, see Beach (2006), pp. 113-142.

\(^81\) Note that these dimensions do not refer to Hart's primary and secondary legal rules (Hart, H.L.A., *The concept of law* (Oxford University Press, New York and London 1978)).
with the primary rules. The complementary set thus includes rules on, for example, monitoring, sanctioning and enforcement, but also court jurisdiction. It is necessary to achieve the best “fit” of the complementary rules with the primary set in order to achieve the highest level of compliance with both sets. To find the optimal fit, the sources of non-compliant behavior need to be addressed as well as the character of the underlying obligations.

5.1. The Sources of Non-Compliant Behavior

According to the management model, the complementary set of rules is usually not necessary, since non-compliance is due to ambiguous treaty language, capacity limitations and a certain temporal dimension. These elements most often cannot be solved effectively by an enforcement system as laid down by complementary rules.\textsuperscript{82} The enforcement model, on the other hand, relies on the complementary set of rules to induce compliance with the primary set. The assumption underlying the enforcement model is that non-compliance is intentional, and thus that any enforcement mechanism should be coercive rather than persuasive in order to be effective.

The source of non-compliant behavior should thus indicate which type of step to take in order to induce compliance. When non-compliance is intentional, a coercive method would work best; but when non-compliant behavior is not intentional, a managerial model will probably be more effective.\textsuperscript{83} A combination of the two models, then, may thus be most successful in those organizations where both underlying causes occur.

5.2. The Character of the Underlying Obligations

Apart from the reasons for non-compliance, the character of the underlying obligations can also be an important factor in the occurrence of non-compliance. Here a distinction can be made between softer and harder obligations, which can be matched by softer and harder enforcement strategies. The term “soft obligations” here refers in the first place to non-binding obligations, or “soft law”. Soft law is a term about which much has been written and spoken over the past years.

\textsuperscript{82} See supra, section 4.3.1.
\textsuperscript{83} See supra, section 4.3.2.
A clear definition of this term, first attributed to Lord McNair, does not exist. Soft law is not law in the sense of a binding agreement and does not constitute a legal norm. It includes those instruments that have legal effects, but do not amount to real law. Positivist legal scholars take issue with the existence of the term, however. The positivist assumption holds that soft law cannot exist, since law by definition is binding. Non-binding law is therefore impossible.

On the other side of the spectrum are scholars such as Abbot and Snidal, who provide a very specific definition of hard and soft law. They define hard law as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law”. Soft law, then, is everything that does not fit this definition: “the realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision and delegation”. Thus, if an agreement is not formally binding and/or not precise and/or not delegated to a third party for monitoring, interpretation or enforcement, it is seen as soft law. This definition, however, takes an ex ante negotiation perspective of actors’ choices, where certain types of agreements are used in order to further particular aims, but which have unpredicted effects ex post.

A more useful point of view for the purposes of this study is the more binary ex post enforcement perspective, where a given instrument is either legally binding or non-binding, and thereby enforceable (or not) in court. Non-binding instruments can be quite influential and sometimes eventually lead up to binding instruments. The strength of soft law comes from the intention of the parties as laid down in the non-binding instruments – although they are not binding in a legal sense, they are often perceived as, or in any case acted upon as if they were binding in a moral sense. They may be perceived as binding because of their authority, rather than their coerciveness.

How soft law is complied with can be observed in, for example, the Organization for Economic Cooperation and Development (OECD), an organization that operates mostly through non-binding soft law. Were the OECD to have a judicial body such as exists under several other organizations (which it does

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84 Although he himself does not use the expression in his seminal work on the Law of Treaties (McNair, L., The Law of Treaties (Clarendon Press, Oxford. 1961)).
87 Ibid., pp. 421-422.
89 E.g. the Court of Justice of the EU, or the quasi-judicial WTO Dispute Settlement Body for that
not), a Member State could not be brought before this body to be forced in any way to comply with these soft obligations. The way the OECD works, however, is through the authority of the soft obligations themselves. Member States commit to adhering to these obligations, not only on becoming a member of the organization, but also upon the issuance of OECD recommendations, statements and so on. These types of reports do not hold any legal obligations for the Member States concerned, but through the power of the authority, and persuasiveness qua scientific background of the writings, as well as the fact that the Member States themselves are involved in the drafting of the reports or at least commit themselves to accepting the outcome, the reports in practice have a great impact on the actual behavior of Member States.90

In other international organizations, the instrument of soft law also exists in combination with similar types of softer compliance mechanisms. However, these softer mechanisms are sometimes also applied in organizations in cases where the underlying obligations are, in fact, binding obligations. Apparently the fact that the underlying obligation is of a hard, binding nature is not enough by itself for a hard system to be applied, at least not on first sight. In the European Union, peer pressure mechanisms exist for binding internal market law. The Internal Market Scoreboard (IMS), for example, compares Member States’ performance in applying internal market rules on a scale to other Member States’ performance. This type of comparison creates peer pressure through the fact that the worst-performing Member States are questioned by other States, their bad performance is discussed in the media and on certain political levels, thus motivating the Member State concerned to improve its behavior before the next report comes out. A Member State that performs particularly well as compared to other Member States is viewed and treated more favorably by other Member States and other institutions within the EU. A country with a good compliance reputation might be regarded as a more trustworthy partner for other Member States than one with a bad reputation.91

The underlying obligations for which progress concerning compliance is reported on by the IMS, however, are of a particularly binding nature.92 Non-com-
Compliance in that area can certainly be the subject of an infringement procedure, the hard procedure, if deemed necessary by the Commission. It is difficult to determine which type of mechanism, the harder or the softer procedure, can most effectively induce compliance with internal market rules, since they can both work alongside each other. If the IMS report were to come out at the same time as the start of an infringement procedure by the Commission targeting the same non-compliant behavior, it would be impossible to state with certainty whether eventual compliance had then been induced by the IMS or by the infringement procedure. More likely, it would be the combination of the two systems that led to greater adherence to the rules.\textsuperscript{93}

5.3. Compliance Variables

We have just discussed two elements that should be taken into account when determining what type of mechanism can be applied to induce compliance with Member State obligations: the source of the non-compliant behavior, and the character (bindingness) of the underlying obligations. The variables that were discussed in the above sections can be mapped in the following Table 1.1.

It was shown that when non-compliance is intentional, theory would predict that an enforcement model is most effective in inducing compliance. An enforcement approach increases the cost of non-compliance, thereby tipping the outcome of a cost-benefit analysis for non-compliance towards compliance. This holds true when the underlying obligations are of a hard nature, and can indeed be enforced through courts, coercion or other compliance mechanisms. When the underlying obligations are of a soft nature, however, theory currently holds

<table>
<thead>
<tr>
<th>Character</th>
<th>Source</th>
<th>Intentional non-compliance</th>
<th>Unintentional non-compliance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soft underlying obligations</td>
<td>Management</td>
<td>Management</td>
<td>Management</td>
</tr>
<tr>
<td>Hard underlying obligations</td>
<td>Enforcement</td>
<td>Management or Enforcement</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{93} An analysis of this assumption can be found in part II and III of this book.
that the enforcement model would not work. Soft obligations are not binding in court and cannot be enforced. Here, a management model would be better at predicting compliance outcomes.

The same holds true, and even more so, in cases where the underlying obligations are of a soft nature and non-compliance was unintentional. Not only would an enforcement approach be inappropriate, it would also not be effective. Since the non-compliance was not caused by cost-benefit analysis but rather by other factors, merely increasing the costs of non-compliance cannot induce adherence to the rules. However, when non-compliance was unintentional but the underlying obligations are of a harder nature, it is unclear which model would work best. Hard underlying obligations are enforceable in court, and an enforcement approach would thus theoretically be more appropriate. On the other hand, when non-compliance is unintentional, management theory predicts that an enforcement model will not work well since the non-compliant behavior is not based on the outcome of a cost-benefit analysis. A combination of the two systems could be an option – first trying to induce compliance through managerial efforts (such as increasing awareness, cooperation, transparency etc.), and when the results remain unsatisfactory, backing it up with an enforcement approach. This is precisely what Tallberg shows in his management-enforcement ladder.95

6. A COMPLIANCE PYRAMID

Tallberg shows how in the EU, a combination of cooperative and coercive elements work together to reduce non-compliance. The four steps of the ladder lead from prevention, through monitoring, a legal framework and the use of sanctions, up to increased compliance with the rules of the organization. This current research proposes to use this model to analyze the operation of compliance mechanisms in general, not only in the EU but in other international organizations as well. However, the ladder will not only be used to analyze each individual mechanism, but also more generally to include the multiple different but interacting mechanisms within a single organization. Rather than a two-dimensional ladder, Tallberg’s model needs to be adapted to provide a more three-dimensional

94 Since a Member State would be punished for not adhering to non-legally binding rules.

95 See supra, section 4.3.4. This holds true to a certain extent for all types of non-intentional non-compliant behavior. When, for example, non-compliance is due to a lack of capacity, which makes it impossible to implement a certain directive in the way or by the deadline that is demanded, the managerial efforts need to be targeted at creating that capacity. In such a case, enforcement options come into view only when capacity-building efforts have been deployed to the fullest extent.
perspective on the inner workings and external interactions of compliance mechanism. Therefore a three-dimensional pyramidal model – where steps on all sides of the issue will eventually lead up to the ultimate goal of compliance – enables a comparison of the ways the different compliance mechanisms function as well as their effectiveness. The figure below shows what the model would look like in this pyramidal shape. Figure 1.1A shows a front view, while B depicts the pyramid as seen from above.

A pyramid is usually depicted as having four faces (not including the base), as familiar from the architectural structures of ancient Egypt. These four sides correspond to the number of mechanisms under investigation in this thesis: first, the EU infringement procedures and three EU alternative mechanisms; second, the EU infringement procedures and three other international organizations.

The idea of a pyramid to illustrate the increasing hardness of enforcement measures has been introduced before, but was applied to the infringement procedures only in a more abstract, limited manner, not including any specific steps toward compliance. (See e.g. Andersen, S., The Enforcement of EU Law: The Role of the European Commission (Oxford University Press, Oxford 2012), pp. 128).

The title of the figure is a reference to Tallberg’s paper called ‘Paths to Compliance: Enforcement, Management and the European Union’ (2002) 56(3) International Organization.

The geometrical shape called a pyramid is in fact a polyhedron of which one face is a polygon of any number of sides, and the other faces are triangles with a common vertex. A pyramid with an \( n \) -sided base will have \( n + 1 \) faces (including the base). This means that the pyramid shape can have a square base and thus have four triangular faces, but might just as well have a triangular or hexagonal base and thus have three or six triangular faces respectively. For more on pyramids, see e.g. Wenninger, M.J., Polyhedron Models (Cambridge University Press, Cambridge, 1974). Following the

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**Figure 1.1:** Routes to Compliance
A: Side view
B: Top view
The pyramid is used here merely to illustrate the three-dimensional multilevel aspect of the management-enforcement compliance issue. As subsequent chapters will show, not all mechanisms investigated in this thesis (the sides of the pyramid) include all four steps. In fact, the “sanctions” step, for example, only exists within the mechanism of the EU infringement procedures, although some kind of sanctioning system is found in other organizations as well. Moreover, skipping a step does not necessarily lead to slipping and falling to the ground, but may bring compliance into view sooner than when all steps are followed. Moreover, one can sometimes cross over from side to side. Thus, if compliance cannot be reached by climbing one side of the pyramid, it might be achieved by following the route with more or less steps.

7. DEFINING NON-COMPLIANCE

On the basis of compliance theories, the previous sections determined the main elements that may theoretically determine the choice for a certain type of reaction to non-compliance: the source of the non-compliant behavior, and the character of the underlying obligations. The effectiveness of a compliance mechanism can be assessed by using these elements in the application of a compliance pyramid model. Before this model can be applied to the compliance mechanisms in this research, the concept of compliance requires further definition. At the beginning of this chapter, some general definitions of the term were provided. In practice, however, international organizations entertain quite different concepts of compliance.

Table 1.2 provides an overview of the meaning of non-compliance as well as possible subsequent enforcement actions, both in theory as well as for the four organizations that will be discussed in much greater detail in part II of this study. When this table is examined, three important differences can be discerned between the definitions of non-compliance in general and those in the context of international organizations. It is important to keep these differences in mind when applying the management-enforcement theories to the four organizations in parts II and III.

(footnote: pyramid analogy, an international organization can also have more or fewer mechanisms available to induce compliance, and thus need more or fewer faces on the pyramid. (Note that the analogy stops for international organizations with less than three mechanisms, but there Tallberg’s original ladder can be applied, which can of course have one or two faces.)

99 The actions in case of non-compliance given in this table refer to official action according to the rules of the organization.)
Chapter 1  On Compliance and Enforcement

Deterrence

First, the literature refers to a concept of compliance where an actor’s prescribed or expected behavior is set against his actual behavior. When the organizations’ founding treaties are examined, on the other hand, non-compliance refers not only to actual behavior, but also to possible future behavior as set out in national legislation. Infringement or other enforcement actions, therefore, focus on past, actual as well as possible future non-compliant behavior, while in more general theoretical definitions, the prevention of future behavior (deterrence) is not incorporated. Deterrence is therefore an additional aspect that may have to be taken into account when examining Member State behavior in the context of international organizations.\footnote{In the EU for example, the introduction of the possibility of sanctions in Article 260 TFEU has had a significant deterrent effect (see chapter 3).}

\begin{table}[h]
\centering
\caption{Non-Compliance Definitions}
\begin{tabular}{|l|L|}
\hline
\textbf{Source} & \textbf{Definition} \\
\hline
Oxford dictionary & Not acting in accordance with, or yielding to a desire, request, condition, direction, etc.\textsuperscript{1} \\
\hline
Raustiala & When an actor’s behavior does not conform to a treaty’s explicit rules.\textsuperscript{2} \\
\hline
Young & When the actual behavior of a given subject does not conform to prescribed behavior.\textsuperscript{3} \\
\hline
Zürn and Joerges & The difference between obligation and behavior.\textsuperscript{4} \\
\hline
EU Treaties & The failure to fulfill an obligation under the Treaties (Article 258 TFEU). [Infringement procedures, subject to Commission discretion.] \\
\hline
WTO rules & Non-conformity of measures with the covered agreements (DSU). [Dispute settlement procedure, subject to Member State action; and TPRM (peer review mechanism).] \\
\hline
IMF Articles of Agreement (AoA) & The failure to fulfill a Member’s obligations under the AoA. [Subject to action by Executive Board/Board of Governors. Surveillance mechanism. No dispute settlement or judiciary system.] \\
\hline
OECD Convention & Not explicitly mentioned; probably non-conformity with the OECD Convention. [Peer review mechanism. No dispute settlement or judiciary system.] \\
\hline
\end{tabular}
\end{table}
Discretion
A second important element is that, for international organizations, no objective standard can be found against which compliance (or non-compliance) can be measured. As was discussed earlier, the determination of the existence of non-compliant behavior, or at least the decision to take enforcement actions, is in all cases left to the discretion of other Member States or a more or less independent body.  

If these Member States or bodies decide that there is no occurrence of non-compliance, or the non-compliance is not of such a nature as to call for enforcement action, no action will be taken. This means that non-compliance can be allowed to occur even when it is known to exist. This element of determining non-compliance or starting enforcement action is missing from the more general definitions given in dictionaries or by scholars – compliance is then implicitly assumed to be objectively observable.

Enforcement
A third noticeable difference between compliance in theory and in practice is that in practice, non-compliance is usually backed up or countered by a certain type of enforcement or at least compliance-inducing action. When there is non-compliance, there is thus a possibility of making Member States comply – at least in the organizations examined here, whether mentioned explicitly in the rules of the organization or in practice. Whether the mechanisms that can come into play in case of non-compliance are actually effective in inducing compliance in those international organizations remains to be seen.

Given the findings above, the concept of non-compliance in international organizations can now be redefined as follows:

Non-compliance occurs when a Member State’s actual or expected future behavior does not conform to the expected behavior as outlined in the organization’s rules, while the determination of the existence of non-compliant behavior is left to the discretion of the organization’s other Member States or an independent body. Enforcement or other compliance-inducing action might then occur after such a determination of non-compliance, a determination which is in some cases confirmed by judicial or arbitral bodies.

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101 Action by Member States is furthermore often subject to having a legal interest in bringing a case. More on this in the discussion of the individual mechanisms in chapters 3 to 7.

102 Here the notion of perfect compliance not being equal to optimal compliance returns. A certain degree of non-compliance can be deemed acceptable.
It was concluded previously that two main elements are essential in determining which type of compliance-inducing mechanism should follow non-compliant behavior: the source of (reason for) non-compliant behavior, and the character (bindingness) of the underlying obligations. Two additional elements should now be added: 1) which behavior is expected from Member States under the rules of a certain international organization, and 2) in how far the element of discretion can influence the outcome of the determination of whether actual behavior is different from expected behavior.

In conclusion, therefore, the following four questions have to be taken into account when examining compliance-inducing mechanisms in international organizations:

1) Which obligations should Member States adhere to? (expected behavior)
2) What is the character of these obligations? (hard or soft)
3) When is a Member State non-compliant? Who determines when a Member State is not in compliance, and what role is played by the element of discretion? (actual behavior ~ discretion)
4) What caused the alleged non-compliant behavior? (intentional or non-intentional)

A combination of the answers to these four questions will theoretically predict which type of compliance mechanism or combination of compliance mechanisms may be most effective in inducing compliance by the Member States. It will be seen that the international organizations discussed in this thesis have several different mechanisms to induce compliance with their rules. As was mentioned before, not all of these mechanisms include all steps of the pyramid, and switching between the sides of the pyramid remains a possibility.

8. EFFECTIVENESS

Now that the concept of compliance has been discussed and the four questions essential for theoretically predicting the effectiveness of compliance mechanisms have been formulated, the concept of effectiveness itself needs to be defined to enable a test of these theoretical assumptions.
8.1. Effectiveness vs. Efficiency

Effectiveness and efficiency are terms that are unfortunately often used interchangeably. However, these two terms, although related, do not have the same meaning. A procedure can be held to work in an efficient manner when optimal output is achieved with minimum input, at minimum cost. Efficiency can thus be described by the relation between input and output, with the objective of maximizing output for a given amount of inputs, or of minimizing inputs for a given output. In order to determine efficiency, therefore, one needs to examine both input and output. Effectiveness, on the other hand, which can be defined as the degree to which objectives are achieved, focuses on the outcome only; it relates the input or output to the final policy objective (the outcome).

When determining the effectiveness of the procedures, the focus is not (or at least, not at first) on the cost of these procedures, but only in their capability of achieving what they set out to accomplish – the assessment of the success in the use of public resources for achieving a given set of objectives. Figure 1.2 below shows these relationships.

![Figure 1.2: Efficiency and Effectiveness](image)

When this concept is translated into the subject of the infringement procedures, the following results. The infringement procedures induce compliance with EU law through a combination of management and enforcement (as visualized in the compliance pyramid). This means: if possible in an informal setting of cooperation and communication (management in the preliminary stages), otherwise by enforcement through judicial proceedings and if necessary through the imposition of lump-sum and/or penalty payments. The final objective of the procedures is to induce the highest degree of compliance possible, where transposition

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103 Based on the figure used in Mandl, U. et al., ‘The effectiveness and efficiency of public spending’ (European Economy - Economic Papers, Directorate General Economic and Monetary Affairs, European Commission, Brussels 2008).

104 A more elaborate application of the model to the infringement procedures is undertaken in chapter 3 of this dissertation. The stages of the procedure as well as the managerial or enforcement elements on those phases are explained in more detail in that chapter.
deadlines are met on time, directives are transposed correctly and Member States apply EU law as required. Most interesting, in case of the EU, thus is the capacity of the infringement procedures to achieve this objective, given a certain set of theoretical parameters.

It is a prerequisite for an efficient system to start with an effective system. Obviously, a system that works perfectly effectively, but where the costs of the system outweigh the benefits of this effectiveness, will perhaps not be desirable in terms of public policy. However, the measure of effectiveness in terms of reaching public policy objectives precedes an evaluation on efficiency grounds. When a system does not achieve the goals it was created to accomplish, the usefulness of the system should be reassessed. If it only partly achieves its goals, one could adapt the system to make it more effective, design complementary systems that can improve effectiveness, or find alternative systems that are more effective.

### 8.2. Relative Compliance

In international legal compliance scholarship, a distinction is often made between the terms compliance and effectiveness. Whereas *compliance* in that context indicates the conformity of behavior to prescribed rules, *effectiveness* indicates the degree to which a regime is successful in transforming state behavior consistently with the norms that underlie the regime. A certain set of rules may be complied with to a very large extent, but this does not necessarily indicate that the rules are effective in changing state behavior. Compliance in this case could also indicate that the prescribed rules were already in line with pre-existing actual behavior, thus not necessitating any change in behavior after the introduction of the rules. What the current research examines, however, are those cases in which states do not naturally adhere to the *primary* set of rules that was instated (the legal obligations), and the effectiveness of a subsequent *complementary* system of rules that is meant to induce compliance with the primary set (the enforcement mechanism). In order to ascertain this effectiveness, it needs to be determined whether state behavior with regard to the primary set of rules is

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105 This objective also operates under the constraint of Commission discretion, which always needs to be taken into account when assessing compliance mechanisms (as was discussed above). This means that some degree of non-compliance will probably remain acceptable, for reasons of budget constraint, time limits, political or other. For more on Commission discretion and its consequences, see also chapter 3.

106 See e.g. Guzman (2002).
actually affected by the application of the complementary set of rules, whether their nature be managerial (authoritative) or enforcing (coercive).

The usual problem with determining the effectiveness of legal rules is that it is not possible to directly observe whether the law has been effective in the sense of influencing the conduct of states (due to the interference of pre-existing behavior or other compliance-inducing factors that interact with any possible effect from a change in legal rules). On the other hand, meanwhile, it is possible to determine compliance with these rules (meaning, whether the rules are observed in reality or not). Changes in outcome (compliance) can be observed, but these differences often cannot objectively be linked to alterations of the legal rules. Some degree of correlation may be established between the two, but it cannot be determined whether any causal link from legal to behavioral change existed. This problem is partly solved in this research however, since it is possible to assess the effectiveness of the complementary set of rules by looking at the effects of this complementary set on compliance with the primary set of rules. This means that not absolute compliance is examined (whether legal rules affect behavior), but rather relative compliance (whether an enforcement mechanism makes a difference to how legal rules affect behavior before and after the application of the enforcement mechanism).

9. CONCLUSION

The analysis in this chapter has shown there are several steps toward determining a compliance mechanism’s level of effectiveness. The first step is to determine what the mechanism intends to achieve: Is it meant to induce compliance with certain obligations? Second, the four questions formulated in the previous paragraph will need to be answered in the context of each of the mechanisms studied in order to determine how effective the chosen mechanism is in attaining the formulated goals (compliance). An investigation has to be made into the behavior expected of the Member States, whether obligations are hard or soft, what role (if any) discretion plays in the determination of compliance, as well as the underlying causes for non-compliant behavior: Does the mechanism target intentional or unintentional non-compliance? All of these steps of the model can be applied to different compliance mechanisms, providing a three-dimensional comparative analysis of their effectiveness. A comparison of the outcome of the model for mechanisms both within the EU as well as in other international organizations

107 Guzman (2008).
will add further depth to the results. That way it is possible to determine not only what makes a mechanism effective, but also whether the interaction with or replacement by other compliance mechanisms could lead to a higher level of effectiveness.
CHAPTER 2
Methodology
“You know my methods, Watson. There was not one of them which I did not apply to the inquiry. And it ended by my discovering traces, but very different ones from those which I had expected.”

1. INTRODUCTION

The previous chapter formulated a theory of compliance, enforcement and effectiveness, which led to the following steps in order to answer the research question:

A) Determine the goals of the different compliance mechanisms;
B) Answer the four questions concerning compliance for the area of each of the mechanisms:
   1) Which obligations should Member States adhere to? (expected behavior)
   2) What is the character of these obligations? (hard or soft)
   3) When is a Member State non-compliant? (actual behavior ~ discretion)
   4) What caused the alleged non-compliant behavior? (intentional or non-intentional)
C) Compare the goals of the mechanisms with their actual outcome in order to determine their effectiveness; and
D) Compare the results for these three elements (A, B, and C) between all compliance mechanisms to determine whether replacement or interaction with different mechanisms enhances their effectiveness.

The following terms will be used in the subsequent chapters to refer to these four steps. A: the goal, B: the compliance, C: the effectiveness, and D: the comparison. The current chapter will explain what tools or which system of methods is chosen in order to follow these four steps and draw conclusions regarding the effectiveness of compliance mechanisms in international organizations.

2. TYPES OF LEGAL RESEARCH

Legal research can generally be categorized in three major types, all with their own body of methods: doctrinal research, empirical legal scholarship and international and comparative legal research.¹ In their book, McConville and Chui provide an overview of the main methodologies, approaches and tools of research that come into play with the different forms of these three types of legal research. The current chapter explains how in the present thesis, which elements of all three types are applied to which data in order to answer the research question posed at the beginning.

¹ McConville and Hong Cui (2007), pp. 3-7.
2.1. Doctrinal Research

Doctrinal research, also labeled black-letter research, aims to systematize, rectify and clarify the law on any particular topic by analyzing authoritative texts consisting of primary and secondary sources. This type of research usually entails the use of interpretative tools or legal reasoning to evaluate legal rules, suggesting recommendations for further development of the law. The concept of “doctrinal research” is specifically used in the context of legal studies. More generally it belongs to the family of hermeneutic understanding, which refers to the interpretation of the meaning of human actions and culture, as applied in for example the humanities as well as in the social sciences.

2.2. Empirical Legal Scholarship

Empirical legal scholarship is often regarded as a relatively new, interdisciplinary version of legal research, in which methods usually taken from the social sciences are applied to legal studies. However, the word empirical denotes the use of evidence about the world, based on observation or experience. This evidence can be either numerical (quantitative) or non-numerical (qualitative), neither of these being more empirical than the other. Empirical research merely entails research based on observations from the real world: the data. When seen in this light, almost all legal research except the purely normative or theoretical falls under empirical research. And even in non-empirical research (normative or theoretical), empirical arguments (observations from the real world) are often used to stress the normative points made. However, the use of data is almost never made explicit in the more traditional legal articles. Moreover, the manner in which the social sciences have developed their tools and methods to organize and analyze the data used in their research has been adopted by only a very few of the legal researchers. It is mostly in the “law and ...” disciplines that one finds the use of these methods, as for example in law and economics scholarship. This, however, is usually not really regarded as a part of legal research as such, but rather as a

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2 Ibid.
3 See for example Bem, S. and H. Looren de Jong, Theoretical issues in psychology (Sage, Los Angeles 2003), for the use of hermeneutics in the social sciences.
Chapter 2  Methodology

separate discipline or even part of economic research, where economic tools and models are used to analyze legal questions.5

More recently a turn towards the more explicit use of empirical methods in legal research can be observed.6 For the purpose of this study, this explicit use of qualitative or quantitative methods to analyze legal questions is what is meant by empirical legal research.

Qualitative methods entail, for example, systematic interviewing or participant observation, case studies or grounded theory studies, which have the advantage of being grounded in specific social contexts not easily captured by numerical data alone. A possible drawback of these types of methods is the difficulty of generalizing the results, since the analysis is often context specific. Still, the results can be generalized up to a certain point as long as that context is kept in mind. Quantitative methods then refer rather to more ‘hardcore’ numerical methods in experimental or non-experimental designs (such as surveys) that make it possible to test theories against larger quantities of data using statistical analysis, for example. Problematic issues that can arise here are the well-known challenges of measurement and causality.7

The divide between qualitative and quantitative analysis is of course not as large as it seems from the above explanation. Often the two types are used together in multi-method or mixed-method approaches. One could think, for example, of sequential mixed methods, where the research is started by conducting exploratory qualitative interviews, followed up by a large sample quantitative survey analysis in order to test whether the preliminary results can be generalized to a larger population. Another example would be concurrent mixed methods, where both forms of data are collected at the same time and this information is integrated in the interpretation of the overall results. The embedded mixed method is also applied quite often, where one smaller form of data is embedded within a

5 The fact that the Amsterdam Center for Law and Economics (ACLE) has its main offices in the Economics building of the University of Amsterdam, not the Law building, is illustrative of this.
7 The issue of measurement refers to how to choose a reliable and valid measurement instrument. Reliable is used in the sense that a new test would yield approximately the same score, while validity refers to whether a test actually measures what it is supposed to measure. The problem of causality arises when trying to determine the existence of a causal link between fact A and fact B, excluding all other factors which could possibly influence that same link, and also excluding the fact that not only can A cause B, but B could also have caused A (reverse causality). Causality is notoriously difficult to establish, given the number of other factors needed to be accounted for.
larger data collection to analyze different types of questions concerning the same underlying population.  

2.3. International and Comparative Research

Conducting research in international law requires an approach quite different to that used in the domestic context since, unlike in the domestic sphere, there is no international legislature or law-creating body. This means that firstly, the sources of international law are significantly different in character from those in domestic law, and secondly, the hierarchy between the various sources of international law is not as well established. The three main sources of international law are treaties, customary law and general principles of law.

Comparative research, then, refers to the study of legal questions from the perspective of different jurisdictions. It is an approach used mostly in the context of national law. When making statements about a concept from one’s own national jurisdiction, interesting results are often produced if one’s own legal rules are compared with those of another jurisdiction – for example, comparing civil law with common law, or comparing Dutch law with German and French law. By looking at another jurisdiction, one can see the problems, drawbacks or maybe benefits of one’s own jurisdiction more clearly. In this way one can analyze how the different elements of a jurisdiction develop into a system. This comparative research can also be carried out on the international plane, of course, for example by performing comparative analysis of the institutional law of international organizations.

3. METHODS AND DATA

The subject of this study is an assessment of the effectiveness of the European infringement procedures in comparison with alternative compliance mechanisms.

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9 Article 38(1) of the Statute of the International Court of Justice (1945), 59 Stat. 1055, 33 UNTS 993 [*ICJ Statute*], hereinafter *ICJ Statute*.

10 See for example the works of Zweigert and Kötz (e.g. Zweigert, K. and H. Kötz, *An Introduction to Comparative Law* (Oxford University Press, Oxford 1977)).

both within the EU (IMS, SOLVIT and EU Pilot) as well as in other international organizations (OECD, WTO and IMF). In order to make this assessment, elements are used from all three types of research explained above: doctrinal, empirical (quantitative and qualitative) and comparative international legal research. A choice for a multi-method approach is made here intentionally, realizing that science can only flourish when accepting and applying a “multiplicity of explanation”.

3.1. Doctrinal

In order to compare the effectiveness of the different compliance mechanisms, a detailed study will need to be made of these mechanisms and the international organizations they operate in. Since it is impossible within this thesis to make a detailed study of all mechanisms in all international organizations, the research has been limited to a specific few. First of all, an examination is made of the European infringement procedures in general. Their legal basis, institutional set-up, scope, exceptions and other elements are examined in some detail. The EU infringement procedures are chosen as the main case under investigation, given their particularities, most importantly the existence of a supranational institution (the Commission) able to take Member States to Court and even ask for the imposition of sanctions and payments. This is a particular feature that no other international organization has. It thus offers an interesting basis for comparison regarding the effectiveness of such a set-up. Moreover, the existence in the EU of alternative and complementary systems not involving the court or the supranational institution offers the possibility of comparison with other organizations as well. To enable even further-going comparisons with other compliance mechanisms, the scope of research is narrowed down to the internal market of the European Union.

The reason for this focus on the internal market is threefold. First, given its relatively long lifetime it provides the largest body of data compared with the other areas of European law.

Second, the internal market was the first area where alternative, softer compliance mechanisms were established while the harder infringement procedures were already in place. Three alternative mechanisms were chosen for in-depth study and comparison: the Internal Market Scoreboard (IMS) – a peer-pressure

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13 In this thesis the role played by national courts in inducing compliance with EU law is kept out of the analysis. The focus of the study is on compliance mechanisms set up by international organizations and their institutions.
mechanism, which matches the softer compliance mechanisms discussed in the previous chapter; SOLVIT – an alternative dispute resolution system providing a fast alternative to the long and cumbersome infringement procedures, which is again a softer mechanism, although harder than the IMS in some respects; and EU Pilot – a system that has developed into a preliminary step of the infringement procedures, meant as a way to induce compliance with EU law without actually starting the infringement procedures – still a soft mechanism, but the hardest of the three. These three mechanisms provide an opportunity to study how softer compliance mechanisms function next to and interact with the existing harder infringement procedures.

Third, the focus on the internal market provides a basis for comparison with other international economic organizations. The OECD was chosen as an organization that uses peer review to induce compliance, as it does not have an official compliance mechanism and produces mostly soft law. The WTO was chosen as an organization that uses a similar peer review mechanism, where the underlying obligations contain enforceable legal rules. In addition, the WTO has a hard compliance mechanism in the shape of a functioning dispute settlement system. Finally, the IMF was chosen as it has no hard enforcement mechanism but works on the basis of mutual surveillance systems, which lead to soft obligations. The functioning of this mechanism is affected by the existence of particularly hard obligations and an enforcement mechanism in one area, which is separate from its general functioning – the Balance of Payments programs.

The different approaches to compliance in these three international organizations, the differences in hard law and soft law, as well as the interaction of different compliance mechanisms within the organizations themselves make them particularly suitable for comparison with the European Union single market compliance mechanisms.

3.2. Empirical

The term “empirical” is used here in the broad sense described above. It comprises qualitative as well as quantitative approaches, and may be more context specific or generally descriptive. The following sections explain the use of case-studies, documentation, statistical analysis and interviews throughout this study.
3.2.1. Case studies

One of the approaches used in empirical qualitative inquiry is the case study.\textsuperscript{14} The case-study method is set apart by the fact that it relies on evidence from a single case while attempting to reveal and explain features of a broader set of cases.\textsuperscript{15} A researcher may choose to study a lot of cases superficially, or a few cases more intensely (or do both). The choice of a case-study approach is made in the belief that one can gain a better understanding of the whole by focusing on a key part of that whole. A case study can be seen as the intensive study of a single case where the purpose of that study is – at least in part – to shed light on a larger class of cases: the population.\textsuperscript{16} It is thus a method of learning about a complex case through extensive description and analysis of that case as a whole and in its context.

When the case-study approach is applied in the social sciences, it is often used to observe the impact of an intervention in a particular instance. For example, when a researcher wants to know what the effect is of income on the school attendance of females in rural areas, she could choose to select three or four locations where extra income is provided to families (the intervention), and observe the differences in school attendance behavior before and after the intervention. A quantitative approach, on the other hand, would select a larger sample (of perhaps a few hundred) of families and measure how many girls go to school before the intervention and how many go to school after the intervention. Statistical analysis could show whether there was a significant effect of income on attendance rates.

The case-study approach, by selecting only a few families, will not be able to draw any conclusions as to the existence of a significant effect of income on school attendance rates in general. However, in these in-depth case studies, the researcher would be able to see what effect the income increase had on the family in that particular instance, and what type of decision-making strategies were used in choosing increased school attendance over other options. The case study can therefore analyze the how and the why of the choices made, while the more quantitative analysis will focus more on the what: What choices are made? A combination of the two approaches would yield the most useful results, since it would then be possible to say, for example: “increased income has not increased the school attending rate, and we saw in our case studies that some of the reasons

\begin{itemize}
  \item Others are for example narrative research, phenomenology, grounded theory or ethnography.
  \item Ibid., pp. 2-19.
\end{itemize}
for this lack of increase were the following: ...” One could then carry out a follow-up study where the results of the case study were incorporated into a new type of intervention. Of course, as stated before, the generalizability of the case-study results is questionable. Maybe these few chosen families were special in their non-response to increased income. However, the results may indicate routes for further analysis.

The detailed and in-depth character of the case study is the reason why this approach has been chosen in the present dissertation to analyze the effectiveness of compliance mechanisms in international organizations. It is impossible to study all existing mechanisms in the level of detail needed in order to answer the theoretical questions posed in the previous chapter. The aim of the thesis is to discover how compliance mechanisms have evolved over time, and how they compare with each other both within the relevant organization and across organizations. It is often thought that case study research is only appropriate for the exploratory phase of an investigation. However, the research strategy to be used is to a large extent determined by the research question asked.17 “How” and “why” questions are explanatory questions, dealing with operational links that need to be traced over time. These types of questions are particularly suitable for the use of case study analysis.

The previous section has explained the rationale for choosing particular organizations and compliance mechanisms. It was based on the possibility for comparison between the mechanisms, in order to be able to draw conclusions as to their effectiveness and through this analysis be able to offer suggestions for improvement.

Part II of the study focuses on the European Union. Chapter 3 analyzes the basic study and basis for comparison, the European infringement procedures. In the pyramid analogy, this can be seen as the compliance route on the front side of the pyramid. The following chapter 4 explores three alternative compliance mechanisms in the EU internal market area (IMS, SOLVIT and EU PILOT). Part III of the thesis continues the same analysis for the chosen three other international organizations. Each chapter offers a view of an additional side of the compliance pyramid: chapter 5 covers the OECD, chapter 6 the WTO and chapter 7 the IMF. At the end of each chapter, the effectiveness model developed in chapter 1 of the thesis is applied to the mechanisms discussed for that particular organization.

Parts II and III also offer a compact comparative analysis of the mechanisms investigated in those parts. It is most revealing to first do this comparative analy-
sis for the EU separately from the other international organizations, given the particular and unique features of the European infringement procedures. Part II therefore not only compares the three case studies discussed in that chapter with the European infringement procedures, but also explores the interaction between all four procedures as well as their influence on each other. Part III performs a comparative analysis for the mechanisms within the individual organizations at the end of each chapter, as well as an overall analysis across all four organizations (including the infringement procedures) in the conclusion. The final chapter of the thesis will bring together the findings of parts II and III, comparing the conclusions for all mechanisms in all organizations. This study thus draws on both a within-case analysis and a cross-case analysis, thereby benefiting from insights both of a specific compliance mechanism but also of cross-mechanism comparisons.

As stated above, not every mechanism includes all of the steps of the pyramid. Which steps are taken, how and when, as well as their influence on effectively reaching the top of the pyramid (and achieving compliance), however, is precisely what will be explored in the case studies. As will be shown in the next chapter, the basis for comparison in the shape of the infringement procedures includes all four steps. Figure 2.1 shows how the pyramid looks for the case studies, as seen from above. Pyramid A depicts the situation in which a comparison is made between the EU infringement procedures and the EU alternatives (part II

![Case-study Pyramids](image)

**Figure 2.1: Case-study Pyramids**
A: EU mechanisms
B: IO mechanisms
of the thesis), while pyramid B shows the EU infringement procedures with the alternative international organizations (part III of the thesis).

Case studies are a strategy of inquiry where a certain occurrence or process is explored in depth. This entails collecting data over a sustained period of time, or analyzing data for a certain period. Parts II and III analyze data concerning the compliance mechanisms throughout the period of their existence, as far as this information is publicly available. Information for this in-depth analysis was obtained from three sources: documentation, statistics and interviews.

3.2.2. Documentation
The word documentation here refers to the use of information available in official documents, such as from the organizations themselves (the founding treaties, primary law, secondary law, other official documents such as Commission Communications, white papers, OECD reports, WTO papers, websites for the organizations etc.,) as well as academic literature – in short, the use of doctrinal methods as explained earlier.

3.2.3. Statistical Analysis
Data are not limited to what was described above as belonging to doctrinal research, but also include the statistics as made available by the international organizations themselves. These statistics are especially useful in the context of the European Union, where they are readily available and usable up to a certain extent.\(^{18}\) They can be used to shed further light on the effectiveness of the different compliance mechanisms and especially their interaction with each other. Since a study is made up of different but similar mechanisms targeted at inducing compliance with the rules in a certain area of law, statistical analysis can show whether the mechanisms influence each other’s functioning. The issue of causation remains, but the existence of correlation by itself can already tell us much, as will be seen. However, the statistical data that are publicly available are not very complete or coherent throughout the years covered. The way data are presented in the SOLVIT reports, for instance, differs from year to year, with some reports giving for example the number of newly registered cases over the past year, but other reports merely indicating a percentage increase in the number of

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\(^{18}\) Chapter 4, section 8 explains the problems encountered in using the available statistical information from Commission documents.
Chapter 2  Methodology

all complaints brought to the SOLVIT centers. The same type of problem occurs with the other statistical information used throughout the dissertation. However, since the statistics are not used for precise or conclusive quantitative analysis, but rather for illustrative purposes or at best to show trends and changes in the data, the statistical reporting is usually adequate.

3.2.4. Interviews

The findings in this dissertation are enriched through the use of the results of ten semi-structured expert interviews. The interviews were conducted to enhance the understanding of the European infringement procedures, as well as their interaction with the alternative compliance mechanisms. Interviews were limited to experts on the European procedures only. Not only is the functioning of the infringement procedures and EU alternatives at the basis of the research in this thesis, but it is also the area where some essential elements are unclear or unknown. In particular, data on the functioning of the alternative mechanisms and their interaction with the infringement procedures were not readily publicly available. The interviews were thus conducted in order to obtain otherwise unavailable information. However, the results were neither intended to be used in a systematic manner nor for quantitative analysis in the thesis, but at the most for inspirational and illustrative purposes.

The respondents were chosen on the basis of their particular expertise in the area of either the application of EU law in general, the infringement procedures, or one of the alternative compliance mechanisms. Almost all interviewees requested to remain anonymous, while permission was obtained to reproduce any comments literally where possible and necessary. The interview protocol was structured along the lines of the set-up of the chapters on the European Union alternative mechanisms. This means that specific questions were asked regarding the rationale for establishing the alternative mechanisms, their practical functioning and interaction with the infringement procedures, the involvement of the Commission throughout the procedures, and the intended purpose of the systems as well as their perceived effectiveness.

The interviews were recorded on tape and subsequently transcribed, coded and systematically analyzed through the use of analytical software (NVivo). The

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19 Since not all complaints will be registered as new cases, as they might fall beyond SOLVIT’s remit or not qualify for other reasons, one cannot use the percentage increase to calculate the number of newly registered cases.

20 NVivo qualitative data analysis software; QSR International Pty Ltd. Version 9, 2010.
interviews were mostly of a descriptive and explanatory character, which meant that the interviewees were asked to describe the mechanisms of interest and to express their own views on their functioning and effectiveness. The information gained was therefore not limited to preconceived questions or categories and the interviews thus had the possibility to yield new and unexpected information. Given the use of a semi-structured list of questions, however, as well as the use of a rather homogeneous group of respondents, the data were easily comparable and analyzable.

3.3. Comparative Analysis

In order to find out which type of compliance mechanism is most effective in which situation, the results of the case studies are compared with each other as to their effectiveness. In making this comparison, the answers to the four compliance questions will be taken into account so as to be able to draw robust conclusions. This thesis thus makes a comparative analysis of compliance mechanisms both within (“within-case”) as well as between international organizations (“cross-case”). The fact that the chapters for the case studies are all set up in a similar fashion, where the same four compliance questions are answered for each case, facilitates this comparative approach.

4. CONCLUSION

This dissertation makes use of doctrinal, empirical and comparative methods in order to analyze the effectiveness of the European infringement procedures. The research will cover compliance mechanisms in four international organizations, as discussed in the part on case-study analysis. The model for assessing the effectiveness of compliance mechanisms as developed in the previous chapter will be applied using the methodology as outlined in this current chapter. The chosen methods allow for a systematic analysis of the available data, making it possible to follow the four steps outlined at the beginning of this chapter: A: the goal, B: the compliance, C: the effectiveness, and D: the comparison.

By following these steps, the structure of the compliance pyramid can be determined for each of the mechanisms individually as well as in comparison with

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21 A list of respondents can be found at the end of the book. When this study uses information obtained during the interviews, reference is made to the respondent by number.
each other, eventually leading to conclusions regarding the effective functioning of compliance mechanisms in international organizations. The following chapters will perform this exercise for each of the case studies.
PART II
EU Compliance Mechanisms
Introduction to Part II
Chapter 1 has developed a theoretical model that can be applied to compliance mechanisms in international organizations in order to determine to what extent these systems function effectively. Chapter 2 has determined which tools should be used to methodologically gather and assess the data needed for the analysis in this thesis. The following chapters will apply the model and methodology of part I to four compliance mechanisms. Chapter 3 introduces the mechanism serving as the basis for analysis, the European infringement procedures, while chapter 4 analyzes the three alternative mechanisms of interest to the research, the IMS, SOLVIT and EU Pilot.

The European infringement procedures
Since international organizations themselves generally do not provide institutionalized enforcement systems to induce compliance with the rules and principles which they embody, enforcement in the international system is usually left to the constituent states. The way enforcement procedures work differs between international organizations, varying between dispute settlement (WTO), arbitration (e.g. in international investment disputes), judicial procedures before courts and tribunals (e.g. before the International Criminal Court or the ICTY), or more diplomatic and political means of dispute settlement, such as negotiation, good offices and mediation, inquiry or conciliation. In all cases, however, there is no centralized enforcement institution, meaning that the initiative for enforcement action is left to the Member States of the international organizations themselves.

One obvious exception to this generalization is the infringement procedure of the EU, the subject of chapter 3. Here the European Commission, an institution working independently of the Member States and in the interest of the European Union as a whole, can take the initiative for enforcement action and indeed does do so regularly. The need for such a centralized enforcement system within the EU can be explained, first, by the fact that there is a Union interest in ensuring compliance with EU law, as was confirmed by the CJEU. While the Member States that form part of the EU can defend their own individual interests

3 Article 17(3) TEU: “in carrying out its responsibilities, the Commission shall be completely independent.”
4 Article 17(1) TEU: “The Commission shall promote the general interest of the EU and take appropriate initiatives to that end.”
6 E.g. Case C-13/00, Commission v Ireland, [2002] ECR 2943.
before the CJEU, it is the Commission that is responsible for defending EU interest before the Court. Second, by charging a specific institution with the duty of protecting and promoting the interests of the EU, it is more likely that any action taken will be more effective than when Member States pursue their own particular interests.³ Third, by centralizing the enforcement system, the correct and uniform application of EU law throughout the entire EU can be better accomplished.

Despite the rationale for a centralized enforcement mechanism, the infringement procedures also provide for the possibility of adversarial procedures between Member States themselves. Article 259 TFEU offers a dispute settlement option similar to enforcement or dispute settlement procedures in other international organizations. However, rare use is made of this particular article; moreover, this article also calls for the involvement of the Commission in the early stages of the procedure. In practice, Commission involvement is in most cases preferred to court procedures between Member States.⁸

The next chapter evaluates the set-up and functioning of the infringement procedures, while the final sections of the chapter apply the theoretical model developed in part I in order to evaluate the effectiveness of the procedures. The chapter goes into some descriptive detail regarding the infringement procedures, not only because they are the basis for the comparative analysis in this thesis, but also because their unique features and history require some detailed attention so an understanding of the way the system has developed and functions today can be gained.

EU alternative mechanisms
The infringement procedures constitute the main compliance mechanism available to the Commission and Member States to increase adherence to EU rules. However, over the past decades, several newer mechanisms have been set up as additional ways of inducing compliance. SOLVIT is meant as a more efficient and quicker system to offer redress to European citizens and businesses that believe their rights under European internal market law have been infringed. Any solutions found under SOLVIT need to be in compliance with EU law.⁹ The Internal Market Scoreboard, then, is a peer review mechanism that intends to pressure Member States into compliance through methods such as ranking and naming-and-shaming.¹⁰ EU Pilot, finally, was originally set up to function in a similar fash-


⁸ For more on the use of Article 259 TFEU, see section 5 in chapter 3.

⁹ See also section 3 of chapter 4.

¹⁰ See chapter 4, section 4.
ion as SOLVIT, but has developed into a preliminary stage of the infringement procedures, offering a more efficient and quicker way of information exchange between Member States and the Commission, as well as a better complaint handling system.\textsuperscript{11}

Chapter 4 describes and analyzes these three alternative compliance mechanisms. Their set-up and functioning is discussed, as well as their interaction with each other and the infringement procedures. The final sections evaluate the effectiveness of the procedures, while the conclusion to part II compares the findings for the infringement procedures and the alternative mechanisms.

\textsuperscript{11} See chapter 4, section 5.
CHAPTER 3
EU Infringement Procedures
“I would say it’s only in a national system that you can have forced compliance. In a totally international system like the WTO or something in-between like the EU, at the end of the day you implement, because you want to implement. And you believe that the cost of not implementing is worse than the cost of implementing.”

Respondent #3.
1. INTRODUCTION

This chapter provides an overview of the development and workings of the European infringement procedures. First an overview is given of how these procedures function, setting out the legal as well as the practical aspects. Second, the character of the infringement procedures is discussed, with a focus on the development of the system from a highly political one in its early days – with ample room for diplomacy and Commission discretion – to a more judicial system up until and after the ratification of the Lisbon Treaty. Furthermore, two additional elements of the system are explained – the articles concerning the possibility of asking for sanctions against a non-compliant Member State, as well as the option under Article 259 TFEU, where a Member State can itself start an infringement procedure against another Member State without further involvement of the Commission. Finally, an analysis is made of the effectiveness of the infringement procedure, following the steps of the theoretical model as set out in Part I.

2. ARTICLE 258 TFEU

Article 17(1) TEU confers the responsibility of the correct application of the Treaty onto the Commission:

The Commission shall promote the general interest of the EU and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of EU law under the control of the Court of Justice of the European Union. [...]1

The manner in which the Commission can fulfill this responsibility as ‘Guardian of the Treaty’ is laid down in Article 258 TFEU, which states the following:

If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the

1 This article is the replacement (in substance) of Article 211 EC “The Commission shall ... ensure that the provisions of this Treaty and the measures taken by institutions pursuant thereto are applied".
PART II EU Compliance Mechanisms

Court of Justice of the European Union.

As is clear from the text of Article 258, the infringement procedure consists of two stages: first, the administrative (or preliminary) stage where the alleged infringement is handled between the Member State and the Commission; second, the judicial (or litigation) stage, when the Commission decides to take the case before the Court of Justice. In practice, only 5% of all infringement procedures make it to the judicial phase – all other cases are closed before referral to the Court of Justice.2 The way the infringement system works is outlined in the following sections. The section starts by determining the scope and aim of the procedures before turning toward the actual process.

2.1. Scope and Aim of the Procedures

Both the scope and the aim of the procedures are determined by the wording of Article 258 TFEU. The next subsections elaborate on the content of this article regarding the scope and aim of the procedures, as well as the modes of detection of alleged cases of non-compliance available to the Commission.

2.1.1. Detecting Infringements

First, the Commission needs to establish that there is or has indeed been an infringement of EU law.3 An infringement is defined in Article 258 TFEU as the “failure to fulfill an obligation under the Treaties”. This very general description of a Member State violation covers two elements: “obligation under the Treaties” and the “failure to fulfill”.

Obligation under the Treaties

This refers to any obligation under European Union Law, covering all rules of EU law that are binding on the Member States: primary legislation, secondary legislation and supplementary legislation.

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3 See ibid. for details on how and why individual cases are started by the Commission.
A. Primary law
- Treaty on European Union (TEU)
- Treaty on the Functioning of the European Union (TFEU)
- Charter of Fundamental Rights of the European Union
- Protocols attached to TEU and TFEU

B. Secondary law
- Regulations (binding and directly applicable in all Member States)
- Directives (binding upon each Member State to which it is addressed as to the result to be achieved (but leaves the choice of form and methods of implementation to the national authorities))
- Decisions (binding in its entirety on those to whom they are addressed)
- Recommendations (no binding force)
- Opinions (no binding force)
- International agreements (a Member State cannot act against an international agreement concluded between the Union and a third party, as per Article 218 TFEU; while a Member State cannot conclude an international agreement with a third party, if this were to interfere with the exclusive competence of the EU)

C. Supplementary law
- Case law of the European Court of Justice
- International law
- General principles of law (e.g. the principles of proportionality, legitimate expectation or the guarantee of basic rights)

The term “obligation” equally covers both acts (such as, for example, the impositions of customs duties by a Member State, contrary to Article 34 TFEU where all quantitative restrictions on imports between Member States are prohibited) and omissions (such as, for example, the omission to implement a directive within the required timeframe).

4 The legal basis for these legal instruments (regulations, directives, decisions, recommendations and opinions) is found in Article 288 TFEU.
5 Recommendations and opinions are not binding on the Member States, and are therefore not enforceable in a court of law. However, national courts do have to interpret EU law and national laws in light of these recommendations and opinions (cf. Case C-322/88, Grimaldi v Fonds des Maladies Professionnelles, [1989] ECR 4407).
6 See also Case C-266/03, Commission v Luxembourg, [2005] ECR 4805, paras. 34-52: if the EU has established competence in a certain area, the Member States lose their right to conclude agreements with third parties in this area.
7 In 2009, the areas in which most new infringement procedures were started were Environment (15%), Energy and Transport (15%), Justice, Freedom and Security (14%), and Internal Market and...
Failure to fulfill
From the wording of Article 258 it is apparent that the action for the failure to fulfill obligations is objective in nature, and thus any shortcoming by a Member State with regard to its obligations under the rules of European Union Law would be sufficient grounds for a claim that it is in breach of its obligations under the Treaties. It thus makes no difference if the action (or omission) had adverse effects, nor how long, how often or when it took place. Whether it is appropriate to bring an action for a “small” infringement, for example, rests solely with the Commission, who has complete discretion in this matter.

An infringement can theoretically be made by any part of the national system. In Belgian Wood the Belgian government stated it could not be held responsible for the actions undertaken (or rather not undertaken) by the Belgian Parliament. The Belgian Parliament had been out of session, which caused it to be late in implementing a certain Directive. The Court of Justice held that “Obligations arise whatever the agency of the state whose action or inaction is the cause of the failure to fulfill its obligation even in the case of a constitutionally independent institution”.

More recently, in regard to a case involving Sweden, it was debated whether the failure of national courts to comply with EU law could also be the basis of an Article 258 procedure, since national governments cannot force their independent courts to act in a certain manner. This would go against the idea familiar from general international law of the separation of powers and Trias Politica. However, in the infringement procedures it is not the national government that stands before the court, but the Member State in its entirety, thus including the judiciary. Generally speaking, where there is a conflict between national and EU law, the courts of the Member States shall set aside national law and apply EU law. Furthermore, when a question regarding, for example, the interpretation of the Treaties is raised before national courts, a lower court may, and a national court of final instance must refer the matter to the CJEU under Article 267 TFEU (the preliminary reference procedure). In practice, many cases involving issues of EU law have been solved in national supreme courts without a reference to the

Services (13%). Almost half of all cases originated from a complaint made to the Commission by citizens or businesses, 20% were own-initiative cases (including five petitions and parliamentary questions) and 30% were non-communication cases (see also section 2.1.2 on non-communication).

Under Article 260(3) regarding sanctions, some of these elements do play a role. See also section 6 in this chapter.

More on the Commission’s discretion in section 2.2 et seq.

Case C-77/69, Commission v Belgium (Belgian Wood), [1970] ECR 237.
CJEU. According to the so-called *Due Report* by a group of ‘wise men’ on issues of reform for the EU Court system, it is however theoretically possible to take actions against a Member State for failing its obligation to refer.

*In 2004,* the Commission sent a reasoned opinion under Article 258 to the Swedish government observing that the Swedish courts of final instance seldom referred cases to the CJEU for a preliminary ruling. It noted in particular that there was no regulation in Swedish law on the procedure for referring cases, and found it questionable whether the Swedish practice was in line with its obligations under Article 267 TFEU. The matter never came before the CJEU, and was settled during the preliminary (prejudicial) phase since the Swedish government had meanwhile passed a law changing the code of procedure, obligating the national courts to state their reasons for not referring to the CJEU. Nevertheless, this action by the Commission indicates it might be possible for Article 258 procedures to be opened on the basis of (in)actions by the national courts of the Member States.

In practice, most infringement procedures concern the incorrect or late implementation of directives. Börzel outlines the following five infringement categories that can be identified from case law: i) Violations of treaty provisions, regulations, and decisions; ii) Non-transposition of directives or no notification; iii) Incorrect legal implementation of directives; iv) Improper application of directives; v) Non-compliance with CJEU judgments.

As can be seen from these five categories, directives play an important role in the infringement procedures – which is not surprising, given the fact that 80% of all EU legislation is made up of this type of legislation. Furthermore, directives are only binding as to the result to be achieved, which leaves room for the Member States as to how they will implement the directives. This in consequence leaves room for mistakes to be made in the implementation of the legisla-

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13 Two cases where the Court addressed the possibility of Member State liability for breaches of EU law by the judiciary are Case C-224/01, Köbler, [2003] ECR 10239; and Case C-173/03, Traghetti del Mediterraneo, [2006] ECR 5177.
14 As was learned from examining the infringement reports, available at http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm.
tion, thereby leading to a higher probability of infringements. With regulations, which make up the bulk of the rest of EU legislation, this problem is partly solved since a regulation is binding on the Member State in its entirety and is directly applicable. By skipping the implementation stage, therefore, there is less opportunity for mistakes to be made by the Member States.

A second reason why directives play an important role in the infringement procedures is that non-compliance with EU directives is the most visible and easily detectable of all infringements of EU law. First, directives need to be implemented in national law within a certain timeframe – which can be checked by the Commission. Second, anyone can check national legislation against the original directive to determine whether it is in line with the directive. With regulations, for example, one need only look towards practice in the Member States or national secondary legislation (which is often less easily accessible) to see whether the Member State is in compliance with EU law in this regard. Moreover, where cases are based on complaints from individuals or others, the complaints often stem from the incorrect implementation or application of directives as well.

2.1.2. Modes of Detection
It was pointed out above that infringement procedures involve directives more often than other types of legislation. One of the explanations for this is the fact that infringements concerning directives are more easily detectable. Nevertheless, the Commission cannot detect all infringements by itself and counts on other parties for information as well. The Commission has three modes of detection: complaints, own initiative and non-communication.

Complaints
Anyone may lodge a complaint with the Commission against a Member State for any measure or practice attributable to that Member State which they consider incompatible with a provision or a principle of EU law. It must concern a specific breach of EU law by a Member State and therefore cannot concern a private dispute. However, the complainant does not have to demonstrate his or her formal interest in the proceedings, or that he or she is directly concerned. The threshold for lodging a complaint is very low – one can simply download a form from the Commission website or send a letter or e-mail to the Commission. Anyone may lodge a complaint with the Commission without the need to prove a personal interest in the case. Complainants can thus be private citizens, businesses, NGOs
or other entities. Once the infringement procedures have started, however, the complainant no longer stays actively involved in the procedures.\footnote{But is kept informed on steps taken in the procedures by the Commission. More on the role of the complainant in infringement procedures below in section 2.2.}

**Own-initiative cases**

Since the Commission has limited investigation services, it largely depends on outside information for the detection of infringements, for example following parliamentary questions or petitions or through the press. Given the amount of information available through these channels, however, the non-existence of an investigative service is not a serious problem – even more so since Member States are obliged to cooperate with the Commission and provide all information necessary to fulfill the Commission’s task as Guardian of the Treaty in its investigations under Article 4(3) TEU:

> Pursuant to the principle of sincere cooperation, the EU and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

> The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU.

> The Member States shall facilitate the achievement of the EU’s tasks and refrain from any measure which could jeopardize the attainment of the EU’s objectives.\footnote{This is in part the text as could previously be found in Article 10 EC.}

This “duty of sincere cooperation” under Article 4(3) can itself also be the reason for starting infringement procedures against a Member State if the Member State fails to cooperate. Non-cooperation would constitute a failure to fulfill an obligation under the Treaties.\footnote{See e.g. Case C-240/86, Commission v Greece, [1988] ECR 1835.} In a way, this Article thus obliges Member States to work towards their own conviction if they are indeed infringers.

Another important source of information for the Commission is the preliminary reference procedure under Article 267 TFEU. Questions that come up in these procedures can often alert the Commission to problems with or infringements regarding the application of EU law, irrespective of the outcome of the preliminary or national procedure.
Although the Commission does not have a general investigation unit of its own, some of the Directorates General (DGs) can avail themselves of such an investigation possibility. These units regularly report to the Commission on instances of non-compliance.\(^{19}\) However, most DGs do not have this option. Moreover, on-the-spot-checks are quite costly and labor intensive, and can also be blocked by the Member States. This happens quite often, specifically in politically sensitive areas. The Member State in question can then of course be forced to cooperate with the Commission and provide the Commission with the information it requires due to the principle of sincere cooperation. However, given the forced nature of this track the information rendered is probably less transparent and objective. Because of its limited capacities therefore, the Commission remains dependent on monitoring and information gathering by external agents, including industries and NGOs.

**Non-communication**

Non-communication of measures refers to the breach of the obligation for Member States to notify the Commission of the measures they have undertaken to properly transpose a certain directive. A directive is in principle only binding upon Member States as to the results to be achieved, but leaves the choice of form and methods to achieve these results up to the Member States.\(^{20}\) A directive can, however, have a vertical direct effect\(^{21}\) once the deadline for transposition has passed.\(^{22}\) Usually one of the last articles of a Directive contains the following text, in which it demands communication from the Member States on the measures they have taken in implementing the Directive before a certain deadline:

\(^{19}\) One example is the Food and Veterinary Office, that produces inspection reports not only on compliance in certain priority areas to inform the Commission, but also to highlight areas where the Commission may need to consider clarifying or adapting legislation, or to propose new legislation. This Office was established in 1997 as a Commission service under the Directorate General Health and Consumers and can carry out on the spot inspections.

\(^{20}\) Article 288 TFEU.

\(^{21}\) It can thus be relied upon by individuals against a Member State in court (it cannot be relied upon by individuals against other individuals in court (horizontal direct effect)), based upon the established case-law of Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others (Brasserie du Pêcheur and Factortame)*, [1996] ECR 1029, para. 51; Case C-5/94, *Hedley Lomas*, [1996] ECR 2553, para. 25; Case C-424/97, *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein (Haim)*, [2000] ECR 5123, para. 83, and para. 83.

\(^{22}\) The CJEU has judged that a Member State should not be permitted to take advantage of its own wrongdoing by non-implementation, which would deny individuals the rights they were intended to enjoy under Union law (see Joined cases C-6/90 and C-9/90, *Andrea Francovich and Davila Bonifaci and others v Italian Republic*, [1991] ECR I-05357, as well as e.g. Dougan, M., ‘The “disguised” Vertical Direct Effect of Directives?’ (2000) 59 (3) *The Cambridge Law Journal*).
“Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [date]. They shall forthwith inform the Commission thereof.”

If no communication is made to the Commission on whether or how the Member State has implemented the directive within this deadline, the Commission automatically starts the first informal phase of investigation under Article 258 TFEU. In 2008, almost half of all new infringement cases were detected due to the non-communication of Member States. Given the important role played by non-communication cases, and the fact that these cases are quite easily detectable and automatically lead to the start of infringement procedures, the implementation of directives within the EU has been the focus of much research over the past years, especially in the fields of social and political science.23

Figure 3.1 below shows the relative importance of these three modes of detection.24 In the past, complaints usually amounted to the largest source of detection, with non-communication coming a close second. Strikingly however, a decline in the number of complaints leading to infringement procedures is evident. Especially in 2010, the last data available at the time of writing, a large decrease in the number of complaints leading to infringement procedures can be seen. Cases detected by the Commission (own-initiative cases) play only a relatively minor role, probably due to the aforementioned reasons.25

The figure shows an increase in the total volume of cases up until 2004, after which the numbers decline (except for 2007), with the last year for which

25 However, one can also see that surges in non-communication are found in the years 1995/1996, 2004/2005 and 2007, meaning the years following the fourth (1994) and fifth (2004), and sixth (2007) EU enlargement. One explanation could be therefore that the new Member States have some start-up problems with notifications, but gradually adapt. More on this below.
statistics are available (2010) as the lowest point in the last 15 years. Especially interesting is the fall in the number of cases based on complaints, which was the largest mode of detection until 2008, but in the last statistics has been reduced to the same numbers as the Commission’s own-initiative cases. In addition, the accession of Member States between 1995 and 2008, with an increase from 15 to 27 Member States, needs to be taken into account when looking at the total amount of cases. This means that the real amount of infringement procedures per Member State in that period may actually have fallen, since the Union doubled in size, thereby doubling the possible amount of infringements. One of the explanations for this reduction in infringement procedures can be found in the introduction of the alternative, ‘softer’ compliance mechanisms such as the IMS, SOLVIT and EU Pilot. The influence of these mechanisms on the workings and effectiveness of the infringement procedures will be discussed in more detail in the next chapter.

26 The number per Member State has fallen, clearly, but this does not mean the number of infringements has fallen for each Member State. The amount has risen or stayed equal for some of the “old” MS, while some of the “new” Member States have a relatively low number of infringements (ibid.).

27 Another explanation that has been given is that under President Barroso, the Commission has become averse from pursuing infringement cases, especially against the larger members. Interviews with Commission Officials have brought forward that for some time this has indeed been the case. However, that reluctance seems to have been dropped by now (respondents #2 and #3).
2.1.3. Aim of the Procedures

According to Article 258 TFEU, the primary aim of the infringement procedures is to make Member States comply with and fulfill their obligations under the Treaties. As is shown in the next sections, the way of making Member States comply with Union law differs per stage in the procedures. The procedures start with informal contacts between the Commission and the Member States, gradually building up pressure from the Commission until the final measure of sanctions. The primary aim of the procedures is not to punish Member States for their non-compliant behavior, but to ensure that the behavior is ended as quickly and effectively as possible.

2.2. The Preliminary Phase

When the Commission has been alerted to the possible existence of an infringement, it will subsequently need to investigate the circumstances of the suspected infringement through fact-finding, discussions with the Member State or, when possible, on-the-ground investigations in the preliminary phase (or pre-258 phase). Contacts with the Member State are usually initiated by a letter from the Director-General responsible for the sector in question to the Permanent Representative of the Member State in Brussels. The Member State is given a certain timeframe during which it can reply to the letter (but not always does), usually two months. This phase is an informal phase, where communications between the Commission and the Member State are mostly kept confidential. Here, the Commission needs to rely heavily on cooperation with the Member State, as in most cases it is not possible for the Commission to send its own inspectors to sites to determine whether an infringement exists. Due to the duty of sincere cooperation, the Commission is able to obtain much information through the Member States themselves.\(^{28}\)

If the case has been brought to the attention of the Commission through an individual complaint, the Member State and the complainant are informed of the Commission’s decision on whether or not it believes there is indeed an infringement. The way in which individuals are informed of the closure of the case in this (or a subsequent) stage has evolved somewhat over the past years due to the influence of the European Ombudsman. Since it is left to the discretion of

\(^{28}\) As pointed out earlier in section 2.1.2, Member States can also be forced to cooperate if needed. However, information obtained in this manner is less transparent and objective, and therefore not the preferred route.
the Commission whether or not it will continue with the case, the Commission did not feel the necessity to explain the reasoning behind its decision to complainants. This was also acknowledged by the Court, for example in Commission v Germany [1995] C-431/92 or Commission v Belgium [2002] C-471/98. In the latter case, the Court stated:

The Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and on account of which conduct or omission attributable to the Member State concerned those proceedings should be brought.

However, due to an investigation by the European Ombudsman in 1997, the Commission changed its procedures on this point. The Ombudsman’s own initiative inquiry focused on the administrative procedures used by the Commission to handle complaints. Since the Commission relies for a large part on information of complainants in detecting infringements, the legitimacy of the process in the eyes of these complainants is essential. If a complainant believes the Commission might not deal with its complaint seriously, he may decide not to complain at all. This would undermine the infringement system as it currently functions.

The topics the Ombudsman investigated in its inquiry related to the duration of complaint handling, the lack of information vis-à-vis the complainant and

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29 This follows from the wording of Article 258 TFEU (‘If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion […]. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.’ (emphasis added)), also acknowledged e.g. in Case C-247/87, France v Commission, [1989] ECR 291, where the court said the Commission is not obliged to commence proceedings but has a discretionary power in this regard. More on Commission discretion in section 4.

30 Case C-431/92, Commission v Germany, [1995] ECR 2189.

31 Case C-471/98, Commission v Belgium, [2002] ECR 9681. This discretionary power has actually increased again with the 2012 amendments to the code of procedure, impacting the rights of complainants. The changes to the rules mean that the College of Commissioners are no longer automatically involved at every step of the procedure, leaving the responsibility at the level of the DGs and individual Commissioners.

32 This article is the replacement (in substance) of Article 211 EC “The Commission shall … ensure that the provisions of this Treaty and the measures taken by institutions pursuant thereto are applied”.

33 Possible under Article 228 TFEU, according to which the Ombudsman, elected by the European Parliament, can conduct inquiries concerning cases of maladministration in the activities of the EU institutions (except the CJEU in its judicial role) either on his own initiative or on the basis of complaints submitted to him, except if these are or have been the subject of legal proceedings.
the failure to give reasons for not starting or closing a procedure to the complainant.\(^{34}\) In its conclusions

The Ombudsman therefore suggested that the Commission might communicate to registered complainants a provisional conclusion that there was no breach of Community law and its findings in support of that conclusion, with an invitation to submit observations within a defined period, before making its final decision.\(^{35}\)

In its response, the Commission acknowledged that “complainants have a place in the infringement proceedings and that, in the period before judicial proceedings may begin, they enjoy procedural safeguards”.\(^{36}\) It also outlined what its procedures are for dealing with complainants with regard to when a complainant is informed of decisions taken in the process, and what deadlines it applies (e.g. a decision for opening a case or to take no action to be made within one year from the receipt of the complaint). Furthermore the Commission declared it would extend its practice to inform complainants of its reasons for rejecting a complaint, before the actual decision for rejection is taken.

Over the years, the European Ombudsman has been able to change the Commission’s attitude towards complainants in infringement procedures not only through the above-mentioned own-initiative inquiry but also through dealing with complaints brought to the Ombudsman concerning infringement procedures. In this way, the Ombudsman has extracted commitments from the Commission regarding the registering of complaints, obtaining replies from Member States, proposed deadlines for handling complaints, stating adequate, clear and sufficient reasons for its decisions, and providing the complainants with enough time and information to prepare and submit observations before a certain case is closed.\(^{37}\)

The influence of the Ombudsman’s inquiries and subsequent changes in the Commission’s dealing with complainants confirm the (albeit limited) role of individuals in the centralized enforcement procedures, despite the discretionary power of the Commission. Shortly after the Ombudsman’s decision in its own-initiative inquiry in 2002, the Commission published a code of procedure regarding relations with complainants.\(^{38}\)

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\(^{34}\) The European Ombudsman Annual Report for 1997 own initiative inquiry 303/97/PD, p. 271.
\(^{35}\) As quoted in ibid.
\(^{36}\) Ibid., p. 272.
\(^{38}\) European Commission Commission communication to the european parliament and the european ombudsman on relations with the complainant in respect of infringements of community law COM(2002) 141 final.
Commission’s electronic complaint handling system CHAP\(^{39}\) (Complaint Handling/Accueil des Plaignants) in 2009, this code of procedure was amended in 2012.\(^{40}\) This document sets out detailed procedures with regard to acknowledgement of receipt of complaints, the methods for submitting a complaint, protection of the complainant and personal data, communication with complainants, time limits for investigating complaints, the outcome of such investigations, closure of the case, publicizing of infringement decisions, the access to documents, and the possibility of complaining to the European Ombudsman. It now seems, given the developments above, as though the complainant has a firmly established and protected position in the infringement procedures. Nevertheless, the Commission reiterates in its code of procedure the fact that it alone enjoys a discretionary power to decide whether or not and when to commence infringement proceedings or to refer a case to Court.\(^{41}\)

2.3. The Official Phase

When the existence of an infringement has indeed been established, and the Member State concerned has not shown that a quick resolution to the problem is possible in the preliminary phase, the Commission can decide to start the (first official) formal phase of the procedure by sending a formal request for observations (‘letter of formal notice’) to the Member State.\(^{42}\) In this letter, the Member State is officially offered the option to submit its own observations on the matter to the Commission. Again, the Member State is given a reasonable time limit for the

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\(^{39}\) CHAP handles the assignment of complaints to the relevant Commission departments as well as the feedback to the complainants. In 2010, a total of 4035 cases were created in CHAP, of which 83% were based on complaints and 17% on enquiries. Of these cases, 52.5% were closed in CHAP after a response by the Commission, 14% were closed due to lack of EU competence, 17% went on to be entered into EU Pilot and 9% were transferred into infringement proceedings (2010 Infringement Report, pp. 7-8).

\(^{40}\) European Commission Communication from the Commission to the Council and the European Parliament Updating the handling of relations with the complainant in respect of the application of Union Law COM(2012) 154 final.

\(^{41}\) Ibid., p. 3. This discretionary power has actually increased again with the 2012 amendments to the code of procedure, impacting the rights of complainants. The changes to the rules mean that the College of Commissioners is no longer automatically involved at every step of the procedure, leaving the responsibility at the level of the DGs and individual Commissioners.

\(^{42}\) In practice, 30% of the suspected infringements can already be dealt with in this pre-258 phase. It has previously also been found that the preliminary phase is often the last and final phase for many of the investigations. See e.g. Tallberg (2002), or for an older analysis (that remains applicable in many respects) Audretsch, H.A.H., Supervision in Community Law (2nd edn Elsevier, Amsterdam: North-Holland 1986).
submission of observations in a reply to the Commission, usually two months. This element of the preliminary procedure has its basis in Article 258, second sentence, where it is stated that the Commission “shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations” (emphasis added).

If no (satisfactory) reply is received from the Member State, the Commission can decide to turn to the second formal stage, the sending of a ‘reasoned opinion’, in which it sets out a detailed reasoning for its suspicion of an infringement. This stage of the preliminary phase is obligatory. The wording of Article 258 is very precise in this regard: If the Commission considers a breach of obligations to exist, and after it has given the Member State concerned the opportunity to deliver its opinion, the Commission “shall deliver a reasoned opinion” (emphasis added).43

The reasoned opinion has four purposes: 1) It serves to specify exactly what (according to the Commission) the Member State has done wrong; 2) it can outline what action a Member State can take to rectify the situation; 44) 3) it sets a time limit within which the violation must be ended; and 4) it serves as procedural protection for the Member State. This last element implies that the Commission cannot amend the substantive content of the submission if and when it brings its application to the CJEU. If new grounds have arisen after the sending of the reasoned opinion, or if the parties wish to bring new elements to the attention of the Court, the Article 258 procedure must be re-initiated. However, this is not the case when the Commission’s submissions are more limited than those contained in the reasoned opinion, or when later evidence is of the same kind as earlier evidence and is included only to support the original argument.45

43 Another 46% of all cases are solved before the sending of the reasoned opinion.
44 However, suggestions are not always included. Especially when directives are concerned, the Commission could also merely point out in what way the Member State does not comply with EU law, leaving the way in which the Member State can comply up to that State. The Member State is always free in its choice of what measures should be taken to comply with EU law. If, for example, the Member State decides to delegate its enforcement powers to private or other parties, it has the right to do so. The only obligation of the Member State vis-à-vis the EU is to ensure compliance. However, the Court has somewhat conditioned the free choice of the Member State as to how they ensure this in the Greek Maize case – here the obligation to ensure compliance was determined to include sanctions should that be necessary to ensure full compliance (Case C-68/88, Commission v Greece (Greek Maize), [1989] ECR 2965).
45 This last element was seen for example in Case C-494/01, Commission v Ireland, [2005] ECR 3331, where the Commission was allowed to produce new evidence which went to show that the earlier breach concerning the application of the Waste water directive (Directive 2006/12/EC of the European Parliament and of the Council of April 2006 on waste (Waste Directive)), was part of a general and persistent pattern of breaches. See also Schrauwen, A., ‘Fishery, Waste Management and Persistent
As stated before, the Commission has the discretion to decide whether or not to start proceedings under Article 258 (as the text states: “if the Commission considers that a Member State has failed to fulfill an obligation ...”). The text of Article 258 relevant for the reasoned opinion, however, now suggests that this discretion in the prejudicial phase is limited to decisions on concluding whether a violation has taken place and on sending the letter of formal notice or not. Nevertheless, the word “shall” (in “shall deliver a reasoned opinion”) does not imply an actual obligation for the Commission in practice. Since the sending of a reasoned opinion depends wholly on the considerations of the Commission during the stages that come before the reasoned opinion (communications with the MS, the sending of the letter of formal notice, the interaction with the Member State afterward and the conclusions to be drawn from the exchange of observations during all phases), the appreciation of the Commission remains the decisive element in sending the reasoned opinion or not. Moreover, no individual, Member State or institution can force the Commission to start the proceedings at any point in time.

Reasoned opinions, as well as letters of formal notice or other communications between the Commission and the Member State concerned, are usually kept confidential. The Commission, after deliberation with the Member State, may sometimes decide to publish a reasoned opinion or issue a press release. However, the Commission cannot be forced to do so, as confirmed by case law and codified by Regulation 1049/2001 on access to EU documents. Article 4(2) of this regulation states: “The institutions shall refuse access to a document where disclosure would undermine the protection of […] the purpose of inspections, investigations and audits”.

46 This discretionary power was also acknowledged by the Court in several instances, e.g. Commission v Germany (1995) or Commission v Belgium (2002), where the Court stated that the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfill its obligations.


48 Case C-317/92, Commission v Germany, [1994] ECR 2039 and Case C-422/92, Commission v Germany, [1995] ECR 1097. However, the Commission has set out certain priority criteria to ascertain which cases will be pursued to enhance effectiveness and fairness (European Commission (2001) European Governance: A White Paper COM(2001) 428 final).


Since the ultimate goal of the entire Article 258 procedure is to resolve the dispute between the Commission and the Member State and achieve compliance, Member States have the possibility to comply voluntarily until the judgment of the Court of Justice is delivered. As the CJEU stated in Bavarian Lager:

The disclosure of documents relating to the investigation stage of the procedure laid down in Article 169 of the Treaty (now Article 258 TFEU), during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement procedure inasmuch as its purpose – to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position - could be jeopardised.51

Third party access could thus be refused to documents produced in the administrative phase of the procedures according to Regulation 1049/2001, since disclosure of these documents could jeopardize the purpose of the infringement procedures.

2.4. The Judicial Phase

If the Member State has not complied after the time limit included in the reasoned opinion has passed, the Commission can decide to take the non-compliant Member State before the CJEU (submission to the court – saisine). Here again, the Commission has discretionary power. The wording of Article 258 is unambiguous concerning referral to the CJEU: The Commission “may bring the matter before the Court of Justice” (emphasis added). This wording offers the Commission the possibility to go to court, but not the obligation. The Court has made clear that as regards the Commission’s reasons for starting enforcement actions, the proceedings have an entirely objective character.52 The Court will thus only examine whether or not an infringement does in fact exist, as claimed by the Commission, and will not look into the Commission’s reasons for bringing the action. The Commission is thus not required to show it has an interest in bringing the proceedings. By referring to the Commission’s role as Guardian of the Treaties,53 the Court has stated that

52 As the Court held in Commission v United Kingdom, “it is not for the Court to consider what objectives are pursued in an action brought under Article 169 of the Treaty” (Case C-416/85, Commission v UK, [1988] ECR 3127. (Article 169 EEC is now Article 258 TFEU.)
Art 258 is not intended to protect the Commission’s own rights. The Commission’s function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfill the obligations deriving therefrom with a view to bringing it to an end.54

The Commission’s application must adhere to the requirement of coherence and precision. According to Article 38(1)(c) of the Rules of Procedure of the CJEU, “an application [...] shall state the subject matter of the proceedings and a summary of the pleas in law on which the application is based”. Established case law has confirmed that the application to the Court must

set out the complaints coherently and precisely in order that the Member State and the court may appreciate exactly the scope of the infringement of Community law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged.55

However, while the grounds of complaints must be precise and clear, the Commission is not required to indicate what steps the Member State concerned should take to remedy the alleged infringement, except when the subject-matter of the action is the failure to adopt measures to stop the established infringement.56

It is essential that the subject matter of the Court proceedings be the same as the one defined during the pre-judicial stage, meaning the application must be based on the same grounds and claims as contained in the letter of formal notice and the reasoned opinion. Moreover, proceedings cannot be brought before the CJEU if the Member State concerned has ended its breach before the deadline laid down in the reasoned opinion. However, once this deadline has passed the Commission can bring the proceedings even when the Member State asserts it has remedied the violation in the meantime.57 The question that matters for the CJEU is whether the Member State was in breach of its obligations at the time the Commission initiated proceedings before the court, as is shown by the wording of Article 258 TFEU, “If the State concerned does not comply with the opinion

54 Ibid., para. 21.
56 Case C-349/02, Commission v Greece, [2005] ECR 4713, paras. 21-23.
57 See e.g. Case C-7/61, Commission v Italy, [1964] ECR 317.
within the period laid down by the Commission, the latter may bring the matter before the Court of Justice” (emphasis added), and reaffirmed by established case law: “The Court has consistently held that the question whether there has been a failure to fulfill obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion”.  

An exception to this rule is found when the Commission can show there is an imminent risk of the infringement re-occurring, or other specific reasons for which the establishment of an infringement may be necessary. Reasons could be, for example, the limited duration or seasonal nature of the infringements. In those cases the Commission could prove it would not have been able to stop the infringements from having any negative effects even when acting without undue delay. In that case the Commission can ask for a judgment even when compliance was achieved within the time limit set out in the reasoned opinion. Otherwise infringements could take place that could escape review by the EU judicature given their limited or seasonal nature.

There are several reasons why the Commission would want to continue with a case before the CJEU despite the fact that the Member State concerned has complied with EU law, albeit late. First, to prevent a Member State from abusing the system by bringing their conduct into compliance just before a ruling is made, and possibly start with the same or similar conduct once the infringement procedure is officially ended. This way there could be an endless cycle of infringements without the court ever being able to pronounce on the conduct. Second, the judgment can establish a basis for liability on the part of a Member State. A declaration by the CJEU that the conduct of a Member State was in breach of its

59 Case C-276/99, Commission v Germany, [2001] ECR 8055, para. 32.
60 Prete and Smulders (2010), p. 33.
61 The fact that the Commission could not prove this in the Commission v Italy, supra note 139 was a reason for the Court not to admit the action brought by the Commission (para. 12). It should be stated, moreover, that the Commission did not act in good time in order to prevent, by means of procedures available to it, the infringement complained of from producing effects and did not even invoke the existence of circumstances preventing it from concluding the pre-litigation procedure laid down in Article 169 of the Treaty before the infringement ceased to exist.”
62 In Article 260 cases the Commission also pursues the case before the Court, even when the infringement has been remedied before the Court procedure but after the deadline in the reasoned opinion. More on this Article below in section 6.
64 Ibid.
Treaty obligations might help an individual’s action for redress when he or she brings a case before national courts.

The judgment of the CJEU in infringement procedures has a declaratory character: The court does not have the power to order a Member State to (not) do something, nor to declare invalid the national legislation that was at stake. It can merely pronounce on the compatibility of a Member State’s actions with EU law. In determining whether a breach of obligations exists, no subjective factors are taken into account, such as those invoked to justify the Member State’s conduct such as domestic (legislative/administrative/economic) difficulties, force majeure, the fact that other Member States are also in breach, illegality of the EU measure, a Member State complying in practice but not according to the law, or the lack of intentional wrongdoing. Furthermore, the proceedings are not a review of the reasoned opinion; they are rather a de novo consideration of the facts at hand. However, the scope of the proceedings is restricted to the infringements laid out in the reasoned opinion – as stated previously, the Commission cannot raise new allegations before the Court at this stage.

A Member State whose conduct has been declared incompatible with EU law by the CJEU is obliged to “take the necessary measures to comply with the judgment of the Court of Justice”. Thus, notwithstanding the declaratory character of the judgment by the Court under Article 258, a Member State is obliged to comply with the binding judgment. If the state subsequently does not comply, the Commission can take recourse to Article 260 TFEU to ask the CJEU to impose sanctions on the Member State concerned, as explained further in section 6 below.

2.5. Interim Measures

One of the problems often mentioned regarding the infringement procedures is their duration. It can take years before a final judgment is reached, and in some cases irreversible damage may have been done in the meantime by the Member

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66 Article 260(1) EC.
State’s non-compliant behavior. According to Article 279 TFEU, therefore, “The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.” This provision has no reservations or limitations, which has led the Court to consider ordering interim measures in the context of infringement procedures as well. The measures usually asked for are suspension of the continued operation of the contested measure. As the Court stated: “For a measure of this type to be ordered, applications for the adoption of interim measures must [...] state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima-facie case for the interim measures applied for.” This urgency requirement is strictly adhered to, as can be seen for example in Commission v. Malta, where the Court granted the measure, which was requested for the years 2008 and 2009, for 2008 only, since there appeared to be no urgency for the following year.

The application of interim measures in the context of infringement procedures has been quite rare, and stems mostly from the 70s and 80s. This low number of cases can be explained by the fact that the order of an interim measure can interfere quite strongly with the powers of the Member State concerned. However, it is necessary for the possibility for interim relief to exist, given the long duration of infringement procedures and the possibility for irreparable damage to occur to private or public interests without a rapid intervention. It sometimes seems to be the only effective way to remedy serious breaches of EU law.

It has been argued that the necessity for the Commission to allow Member States reasonable periods of time to respond during the several phases of the infringement procedures might present a problem in Court. If the Commission applies too short periods in the preliminary stages, it may run the risk of having its case declared inadmissible by the Court. On the other hand, if it does not, it may not fulfill the urgency requirement necessary to have interim measures im-

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69 Case C-57/89 R, Commission v Germany, [1989] ECR 2849, para. 15.
70 Case C-76/08 R, Commission v Malta, [2008] ECR I-0064.
72 Prete and Smulders (2010); Lenaerts et al. (2006), pp. 423-424.
posed. Whether this is an actual problem, though, is not obvious. There is quite a margin available in practice between response periods that are reasonable and an overly long period needed to request interim measures.

2.6. Conclusions on Article 258

Figure 3.2 shows the different steps in the infringement procedures as discussed in the previous sections, from the detection of a possible infringement up until the imposition of sanctions by the CJEU. The next section will address two elements of the procedures that were recognized in several, if not all, steps: first, the fixation on remedying the non-compliant situation as opposed to sanctioning or punishing; and second, the element of discretion.

3. THE CHARACTER OF THE INFRINGEMENT PROCEDURES

The previous sections have outlined the set-up of the “classic” infringement procedures, that is, the procedures as they originally functioned. Over the years certain changes have been introduced, altering the so-called “character” or nature of the infringement procedures. The next two subsections will address, first, the focus of the procedures on remedying non-compliance, and second, the element of discretion. The final subsections will draw an overall conclusion on the character of the infringement procedures.

3.1. Remedy or Sanctions

The theoretical model developed in part I included the step of sanctions as part of the compliance pyramid. Until now, sanctions as such have not yet come into play. As was stated earlier, the aim of the procedures according to Article 258 TFEU is to make Member States comply with their obligations under the Treaties. The objective nature of the procedures means that no account is taken of the reasons for non-compliance, whether intentional or unintentional. The pro-

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Ibid. This happened in for example Commission v Germany (1989). In this case the Commission took almost three years before sending a letter of formal notice, and the reasoned opinion was sent almost a year later. The application for interim measures took another year – in total the Commission had known of the situation for five years before requesting interim measures.
Chapter 3  EU Infringement Procedures

Figure 3.2. The European Infringement Procedures in Stages
procedures are meant to remedy non-compliant behavior, not to punish or sanction such behavior. The same underlying thought is encountered in the application of interim measures. Interim measures target the suspension of the continued operation of the contested measure only.

The application of the Court judgment is always ex tunc, but has no retroactive effect further than the end of the time-limit set in the reasoned opinion. Like part of the measures taken in the different phases of the procedures, there is thus no real pecuniary incentive to remedy the non-compliant behavior as soon as possible. The only costs associated with non-compliance before a declaratory judgment of the CJEU are, for example, the costs of and resources for responding to Commission correspondence and litigation, or the costs associated with loss of reputation. Given the fact that most correspondence between the Member State and the Commission in the preliminary stages is kept confidential, however, these reputational costs will be rather limited.

The lack of pecuniary sanctions for non-compliance at these stages of the procedure influences the effectiveness of the compliance mechanism. Later in this chapter the effectiveness of the procedures will be discussed at length, but it is important to note here that the incentive to follow the Commission in the stages of the procedure under Article 258 depends almost fully on managerial efforts, without fear for repercussions for non-compliance in later stages. The introduction of the possibility of sanctions in Article 260, which is discussed in section 6 of this chapter, has not fundamentally changed the central purpose of inducing compliance. These sanctions apply only to non-compliance with the declaratory judgment based on Article 258, and are meant to induce compliance as soon as possible after the CJEU has declared the existence of non-compliant behavior.

3.2. Discretion

One of the compliance questions formulated in chapter 2.1 (B: the compliance) relates to the determination of non-compliant behavior, given the element of discretion. Discretion plays an important and explicit role in the infringement procedures.

The procedures are objective in nature. The Court decides whether the alleged breach has indeed occurred or not – it is an objective assessment of a Member State’s conduct with EU law, and is not aimed at establishing guilt or liability. Moreover, neither the Commission nor the Member State has to show that it

75 Prete and Smulders (2010).
has an interest in bringing the proceedings. It is the Commission’s duty to ensure that Member States give effect to the treaty and to obtain a declaration of any failure to fulfill the obligations deriving from these Treaties.  

The infringement procedure is the centralized enforcement or dispute settlement system where compliance with EU rules is concerned. However, only a fraction of all expected infringements makes it to the litigation phase. The majority of all cases are settled in the preliminary phase, where the Commission negotiates with the parties concerned. As stated before, the goal of the preliminary phase is to induce voluntary compliance by the Member State, which can be done in a non-adversarial manner before the matter reaches the CJEU. As Snyder put it: “the main form of dispute settlement used by the Commission is negotiation, and litigation is simply a part, sometimes inevitable but nevertheless generally a minor part, of this process.”

When examining the statistics for the years 2004 to 2010, for example, it is found that on average 95% of all cases can be closed before the case actually comes before the CJEU (see Figure 3.3). The fact that a large portion of all cases is solved before reaching the litigation stage can in part be explained by the diplomatic or political nature of the preliminary stage, which is characterized by political considerations. Political here refers to the fact that it is unclear what elements other than a state’s non-compliant behavior will bring the Commission to open a case or not. If these considerations are not purely legal considerations, the term “political” is applied.
PART II EU Compliance Mechanisms

The discretionary power of the Commission and a certain lack of transparency. The combination of these two elements in particular, discretion and a lack of transparency, has been heavily criticized over the years. As the European Parliament put it: “Discretion may be a necessary evil in modern government; absolute discretion coupled with an absolute lack of transparency, however, is fundamentally contrary to the rule of law”.

The political character of the system can be felt at all stages of the procedure:

- The Commission determines whether an infringement has occurred, defines the extent and nature of the infringement, determines the course of action to be undertaken by the Member State to remedy that

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infringement, and decides on all relevant time-limits [...] It also decides whether or not to refer the case to the ECJ. To compound this unchecked power, all of these acts or decisions are not amenable to judicial review and are not subject to the legislation on transparency, which renders external regulation of the infringement process impossible.\textsuperscript{84}

Moreover, the procedures were perceived by the Member States as having a strong political dimension. In the early years of the procedures, this meant that the Commission used the procedures as an \textit{ultima ratio}:

Recourse to the formal infringement procedure and initiating proceedings before the Court against a Member State was to be avoided as much as possible. Indeed, already the act of sending a warning letter was considered as an (unfriendly) political act, and even more so was the issue of a reasoned opinion or decision, and, ultimately, recourse to the Court. Only after it had been proved that all informal efforts remained without effect was a formal step to be taken. That step, as such, was considered as an \textit{ultima ratio}. For that reason, every formal act was decided upon separately, since it was considered as a political act, having political consequences.\textsuperscript{85}

In fact, the mechanism was applied quite sparsely in the early years, with the first action for infringement brought three years after the EEC Treaty entered into force in 1961. Until 1967, only two actions were brought per year; between 1970 and 1975, only 15 judgments were given.\textsuperscript{86} The character of the system changed with the establishment of the Single European Act in 1987. The need for Member States to implement hundreds of directives within five years made the infringement procedures a tool for helping this implementation process. This meant the Commission started using the procedures in case of non-implementation without any special consideration. Another feature was the introduction of the possibility to submit complaints, and a complaint form was introduced for this purpose.\textsuperscript{87}

With the maturing of the system, and influenced by the process of European integration and an increased drive towards good governance and legitimacy, the infringement procedures underwent more changes. In 2001 the Commission published its White Paper on Governance,\textsuperscript{88} where it recognized the importance of the enforcement mechanism in the light of good governance by stating that it

\begin{itemize}
\item \textsuperscript{84} Ibid., p. 784.
\item \textsuperscript{85} Audretsch (1986), p. 279.
\item \textsuperscript{86} Varnay, E., ‘The Institutionalisation of infringement procedures in EC law - the birth of a community sanction’ (2006) 5 (2) European Integration Studies, p. 6.
\item \textsuperscript{87} Ibid., p. 7.
\item \textsuperscript{88} European Governance: A White Paper add further publication details
\end{itemize}
will “pursue infringements with vigor”, and “maximize the impact of the Commission’s actions as guardian of the Treaty”. More detailed ideas on how to incorporate the concept of good governance in the infringement procedure system came with two Commission Communications in 2002 and 2007. The next sections will discuss these two communications in some detail, as they form an essential element of the centralized infringement system of the Union.

3.2.1. The 2002 Communication

The 2002 Communication focuses on ways to improve the monitoring of the application of EU law, since due to EU enlargement to 27 states and an ever-increasing amount of legislation the Commission can no longer take recourse to the centralized enforcement system alone. The communication is divided in two parts: First, it addresses preventive measures that can be used to avoid infringements. Second, it sets out conditions for effective management of controls and actions against infringements. It does this through the prioritization of cases.

In principle, the prime responsibility for the correct application of EU Law is placed on the Member States. As mentioned before, the duty of sincere cooperation based on Article 4(3) TEU calls upon the Member State to take all appropriate measures to ensure fulfillment of all obligations arising out of the Treaty as well as actions taken by institutions of the EU. It is when a Member State fails to fulfill its obligations that the Commission can take action. Although not explicit in the article itself, this duty is reciprocal in that it calls for cooperation not only by the Member State with the EU institutions, but by the institutions (and especially the Commission) with the Member State as well. This duty was first explicitly recognized by the ECJ in Luxembourg v European Parliament, where the court stated that the rule embodied in Article 4(3) imposes mutual duties of sincere cooperation on Member States and the EU institutions.

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89 Ibid., pp 25-30.
92 As explained in chapter 1, the reasons for non-compliance can differ greatly. Non-compliance could be due to e.g. a lack of information, a misunderstanding or a lack of administrative capacity. Sometimes non-compliance is intentional. However, as was mentioned in earlier sections of the current chapter, the CJEU makes an objective, declaratory statement and will not take into account such explanations. Either there is compliance, or there is not.
As can be deduced from the fact that up to 95% of all cases are resolved in the stage before referral to the CJEU, this cooperation is a crucial element in the pre-litigation stage. It is in the best interest of the Commission as well as the Member States to try and solve the problems quickly and effectively during this stage. Infringements, especially in the case of misapplication of EU law, often do not come about because of malevolence on the part of the Member State. Member States may not even be aware of the misapplication due to misunderstandings or misinformation. The pre-litigation stage provides an opportunity for the Member States to rectify the problems without the additional costs that come with litigation.

The 2002 Communication calls for improvements in this cooperation between the Commission and the Member State before any actual infringement proceedings are initiated. The mechanisms aimed at preventing infringements mentioned in this document include:

- Interpretative communications on EU law
- The Internal Market Scoreboard
- Annual monitoring reports to create peer pressure
- Training, information and transparency campaigns
- Expert committees and networks assisting the Commission for the purpose of exchanging information and good practice

The Communication also recommends more attention be paid to monitoring and facilitating the proper transposition of directives. This, according to the Commission, could be achieved by improving transparency and knowledge of EU law, increasing cooperation before expiry of the transposition deadline, and improving the notification of transposition measures. Furthermore, more information on EU law should be provided to the public in order to increase public participation and thereby the quality of decisions.

The implications of this part of the Communication for the character of the preliminary stage are not as important as they might seem on first sight. Rather than focusing on the transparency of the system itself, it outlines ways to prevent the procedure from starting at all. What happens once the procedure has been set in motion is not affected by these new preventive mechanisms.

Whereas the first part of the Communication is thus aimed at preventing situations of non-compliance with EU law, the second part concentrates on improving the methods used for inducing compliance once an infringement has been detected. One of the most important aspects of this Communication is that...
it sets out priorities in addressing infringements of EU law. Priority will, according to this Communication, be given to the following “serious” infringements:

- Infringements that undermine the foundations of the rule of law (e.g. breaches of the principles of primacy and uniform application of EU law, violations of human rights or serious damage to the EU’s financial interests)

- Infringements that undermine the smooth functioning of the EU legal system (e.g. violation of an exclusive EU power, repetition of an earlier infringement within a certain timeframe or cross-border infringements)

- Infringements consisting in the failure to transpose or the incorrect transposition of directives

Since the Commission has discretionary powers over whether or not to bring infringement procedures, the publication of this prioritization helps greatly in dispensing with a certain sense of arbitrariness in the opening of cases and in improving transparency. It gives the procedure a more objective rather than political character. This was the first time the Commission had tried to explain which cases it would pursue and why. However, the political character has not been dispensed with altogether.

First, the Commission states in its Communication that when infringements meet the priority criteria, infringement proceedings will be commenced immediately, unless the situation can be remedied more rapidly by some other means.\(^{94}\) How it is determined when a situation can be remedied more rapidly, and what “some other means” indicates, remains unclear.

Second, it is stated that other cases of lower priority will be handled on the basis of complementary mechanisms,\(^{95}\) but can still be subjected to infringement procedures. When and how these cases are handled remains unclear as well.

Third, the interpretation of the criteria is not unambiguous. The determination of when infringements undermine the foundations of the rule of law or the smooth functioning of the EU legal system is still left to the Commission. Nevertheless, there is now at least some sort of benchmark for the Member States.

### 3.2.2. The 2007 Communication

The 2007 Communication on “A Europe of Results” deals not with improving the monitoring of EU law application, as the 2002 Communication did, but focuses on


\(^{95}\) These complementary mechanisms refer to systems such as SOLVIT or EU Pilot – which will be discussed in depth in chapter 4.
improving the *application* of EU law itself. It once again emphasizes that it is the Member State that has the primary responsibility for the correct and timely application of EU Treaties and legislation, with referral to the principle of sincere cooperation of Article 4(3) TEU. The role of the Commission in the application of EU law is outlined as being threefold: i) proposing new acts and amending acts, ii) partnering with Member States to manage the application of the law, and if need be, iii) fulfill its role as Guardian of the Treaty by starting the infringement proceedings.

To improve the working of the current system in which the Member States and the Commission interact, the Commission proposed four areas for improvement:

1. **Prevention**: improve the clarity, simplicity, operability and enforceability of legislation (corresponds to i) above);
2. **Efficient and effective response**: improve information exchange between Commission and MS, especially where citizens’ enquiries and complaints have raised the question of the correct application of EU law (corresponds to ii) above);
3. **Improving working methods**: improve efficiency of management and resolution of infringement cases; this is to be achieved through prioritization of cases (highest priority given to non-communication of transposition measures, breaches of EU law raising issues of principle, and respect for Court judgments with the help of the Article 260 procedure)\(^96\) and keeping the different stages within certain time limits (corresponds to iii) above: the Commission as Guardian of the Treaty);
4. **Enhancing dialogue and transparency**: improve information made available to the public.

Both the 2002 and the 2007 Communications focus on two elements: the prevention of the need for actual infringement procedures, and enhancing the efficiency of the infringement procedures by prioritizing certain cases. The prioritization of the 2007 Communication differs somewhat from that in the 2002 Communication, but can be regarded as a more precise summing up of priorities. Moreover, the Commission has added a time limit for non-communication procedures (12 months between the sending of a letter of formal notice and closure) and for Article 260 procedures (12 to 24 months between the 258 CJEU decision and the proceedings under Article 260).

\(^96\) More on Article 260 in section 5.
It seems as though the 2007 Communication does indeed improve the transparency of the procedures by an increased availability of information for the Member States as well as individuals, while also intensifying contacts with the Member States regarding the implementation of directives. Similarly to the 2002 Communication, however, most of the proposed changes are aimed at preventing the occurrence of infringements, rather than making the various stages of the actual procedures more transparent. The Commission does commit itself to publishing summary information on all stages of the infringement procedures, but will continue to maintain confidentiality on the content and timing of contacts with the Member States, as it has always done. Of particular interest is the proposal for a pilot project where certain complaints by individuals are forwarded to the Member State concerned, to offer the Member State the opportunity to solve the alleged problem more quickly and efficiently through contact with the complainant without going through the stages of the official infringement procedures. This EU Pilot project and its interaction with the infringement procedures will be discussed in more detail in the next chapter, as will its impact on transparency and timeliness in solving individual complaints.

3.2.3. Today
What can now be said about the element of discretion in the character of the infringement procedures – has it changed in recent years, especially after the publication of the two Commission communications? It has, but only to a certain extent. Recognizing the importance of citizen involvement and providing the greater public with more information during the different stages of the procedure goes a long way toward improving transparency and lessening the political character of the procedures. Prioritizing certain infringements also explains some of the choices the Commission makes under its discretionary powers both to the Member States and as the public, and diminishes its arbitrariness somewhat. Of course, these priorities may shift over the years, but after these two communications the Commission may be expected to inform the public on changes to this hierarchy.

Nevertheless, the system has retained much of its secretive and political character. It was pointed out earlier that the Commission has discretion in deciding on whether or not to pursue a case at almost all stages of the procedure.97 However, this character may serve an important purpose – in fact, Member State breaches may be mended more effectively and efficiently precisely because of this 

97 See supra, fn 46.
political character. If Member States feel free in their communications with the Commission and need fear the scrutiny neither of this political body nor of the greater public, non-compliance may be addressed more easily. Due to the system’s political character, however, it is difficult to assess whether this is truly the case.

Moreover, although improving the access to information for individuals and the greater public is part of improving the transparency of the procedures, it may not be essential to involve individuals to a great extent. The centralized infringement procedures are not meant as an option for individual redress.\textsuperscript{98} Individuals benefit from the principles of direct effect and the primacy of EU law, and can act in national courts obtaining indirect control on the compatibility of national laws through preliminary references, for example (Article 267 TFEU). Furthermore, they can make use of many of the complementary systems targeted specifically at individuals set up over the past decades.\textsuperscript{99}

There are, however, limits to the Commission’s discretion besides those rules outlined by the Commission itself. The Court has established that an excessive duration of the pre-litigation procedure may render the Commission’s action inadmissible.\textsuperscript{100} This holds only insofar as this duration has “made it more difficult for the Member State in question to refute the Commission’s arguments thereby infringing its rights of the defence”.\textsuperscript{101} Moreover, the Commission is also bound by certain rules in bringing applications, such as the obligation to inform the Member State in question precisely of the grievances laid before them, or the obligation to allow the Member State enough time to respond to the grievances or to remedy them.\textsuperscript{102} In any case, the Commission’s discretion is neither absolute nor to be exercised arbitrarily.

\textsuperscript{98} The Commission Communication on the application of Article 260(3) does mention the importance of the prompt transposition of directives by Member States for the protection of the individual rights of European citizens. However, the procedures remain targeted at the Member States and the Commission, as they are the ones who need to ensure adherence to EU legislation (see European Commission Commission Communication on the Implementation of Article 260(3) of the Treaty SEC(2010) 1371 final, para. 7).

\textsuperscript{99} Such as SOLVIT, to be discussed in the next chapter.


\textsuperscript{101} Case C-523, Commission v Netherlands, [2007] ECR 3267, para. 27-29.

\textsuperscript{102} See e.g. Case C-211/81, Commission v Denmark, [1982] ECR 04547, Case C-293/85, Commission v Belgium, [1988] ECR 00305, or Case C-296/92, Commission v Italy, [1994] ECR I-00001.
3.3. Conclusions on Character

The infringement procedures are characterized by two elements: the fact that the procedures are meant for remedying and not punishing situations of non-compliance, and the fact that Commission discretion plays an important role throughout the infringement process. Over the years, changes have been made to the procedures that have diminished Commission discretion to some extent and have made the procedures somewhat more transparent and open. However, discretion still surfaces at almost every stage of the procedure. Moreover, the attempts to lessen the workload of the Commission have included the introduction of newer, managerial-type systems such as SOLVIT or EU Pilot, which – as the next chapter will show – have as a consequence that many cases are not scrutinized as closely by the Commission as before. On the one hand the influence of Commission discretion may thus be less due to this outsourcing (so to speak) of solving certain cases. On the other hand, however, supervision of compliance with EU law may also be weaker.

The other element refers to the the limited *ex tunc* character of Court judgments and the effect this has on the incentive for early compliance. One consequence of this element is the greater reliance on managerial-type efforts in the infringement procedures. What this means for the effectiveness of the procedures will be examined later in this chapter.

4. ARTICLE 259 TFEU

The previous sections explained the set-up and character of the infringement procedures where the Commission decides to open a case against a Member State, under 258 TFEU. A second part of the procedures, although rarely used in practice, provides the Member States *themselves* with the opportunity to take other Member States to Court. Article 259 TFEU states: “A Member State which considers that another Member State has failed to fulfill an obligation under this Treaty may bring the matter before the Court of Justice.”

Before it can do so, however, according to Article 259(2) TFEU the complaining Member State needs to first ask the Commission to take action. The Commission then has to deliver a reasoned opinion on the matter within three months of the date on which the matter was brought before it (259(3) TFEU). When the Commission fails to do so within the set time limit, however, the Member State itself may then bring the matter before the Court of Justice.
The Article 259 TFEU reasoned opinion to be delivered by the Commission is not the same as the reasoned opinion under Article 258 TFEU. Prior to issuing this opinion, both Member States concerned are given the opportunity to present their own case, as well as comment on the case presented by the other party. Furthermore, these observations are presented both in writing and orally.

If the Commission has not delivered a reasoned opinion within three months, the applicant Member State can take the matter before the CJEU. However, this is a route not often taken by the Member States, since they prefer settling their disputes in a more diplomatic manner or through the Commission, while the Commission also prefers to keep things in its own hands. In fact, only three cases have come before the Court of Justice through action by a Member State, France v. UK in 1979, Belgium v. Spain in 2000, and Spain v. UK in 2006.

The French case concerned French fishermen who were convicted of infringing a particular UK order on, among other things, the size of fishing nets. France was of the opinion that (the adoption of) this UK order was in violation of the regulations under the Common Structural Policy for the Fishing Industry. The Commission had delivered a reasoned opinion in favor of the French arguments. However, as the UK did not comply after the reasoned opinion, France went to the Court. This is thus a case where, even when the Commission has acted, it remains possible for the grieved Member State to start procedures. Here, France started its case against the United Kingdom three months after the Commission had issued its reasoned opinion, while during the proceedings the Commission intervened in support of the French authorities. The Court ruled in favor of France.

Belgium v Spain concerned a Spanish decree on the rules of origin and denomination of wines (either denominación de origen (designation of origin) or, if certain additional conditions are complied with, a denominación de origen calificada (controlled designation of origin)) and the Rioja rules adopted under that decree. In an earlier case (the so-called Delhaize case) the Court held that “national provisions applicable to wine of designated origin which limited the quantity of wine that might be exported in bulk but otherwise permitted sales of wine in bulk within the region of production constituted measures having equivalent effect to a quantitative restriction on exports which were prohibited by Article 34 of the Treaty”. In Belgium v Spain, then, Belgium claimed that Spain had not...
complied with the judgment in the *Delhaize* case and that the contested rules were still in force. In the end, Belgium went to the Court as the Commission had not issued a reasoned opinion, since it considered an infringement procedure “inappropriate”:

In 1994, the Belgian Government drew the Commission’s attention to the fact that the Spanish rules at issue in Delhaize were still in force, despite the interpretation of Article 34 of the Treaty given by the Court in that judgment, and called on it to act. On 14 November 1994, the competent member of the Commission replied that the Commission considered it inappropriate to persist with Treaty-infringement cases.\(^\text{109}\)

The Court found that in this case, where during the proceedings the Commission intervened in support of Spain, the rules applied by the Spanish government were justified.

In the case of *Spain v UK* the Commission also did not deliver a reasoned opinion, stating that: “given the sensitivity of the underlying bilateral issue, the Commission at this stage refrains from adopting a reasoned opinion within the meaning of Article 259 [EC] and invites the parties to find an amicable solution”.\(^\text{110}\)

In this case, however, no amicable solution was found and in the end the CJEU had to pass judgment. The “underlying bilateral issue” referred to in the above citation was the sensitive issue of Gibraltar.\(^\text{111}\) The case was about the fact that citizens of Gibraltar were, despite specific UK legislation, able to vote and to stand for elections for the European Parliament. Spain contended that the citizens of Gibraltar, which is not a part of the UK, cannot be recognized as having the right to vote in the elections. The Court in the end followed the UK’s argumentation (supported by the Commission) that it is for the Member States to define the persons entitled to vote and to stand as candidate in the elections for the European Parliament. The Treaties do not preclude the Member States from granting that right to persons who have close links to them other than their own nationals or EU citizens resident in their territory. Moreover, no clear link between citizenship and the right to vote is to be discerned in the Treaty provisions.

The sheer lack of cases under Article 259 shows that action by the Commission is much preferred to individual Member State action, both by the Member States and the Commission. Apart from the three aforementioned cases, there

\(^{109}\) Ibid., para 27.
\(^{110}\) *Spain v UK* (2006), para 32.
\(^{111}\) The island had once been part of Spain, but was ceded by the King of Spain to the British Crown in 1713 as part of one of the treaties that put an end to the Spanish Succession War. It is currently a British Crown Colony and not part of the United Kingdom.
have been three other times that a Member State has requested the Commission to act under Article 259 *without* leading to an action before the CJEU. In 1984, the Commission issued a reasoned opinion under Article 259 in a dispute between France and the Netherlands, after which the Netherlands abolished the tariff structure that was deemed contrary to EU law.\(^{112}\) It was thus unnecessary to take the case to Court. Two other cases, *Ireland v France* and *Spain v United Kingdom*, were withdrawn and removed from the register before the delivery of a reasoned opinion.\(^{113}\) A total of six actions, therefore, is all that this article has produced in its fifty years of existence. Two reasons can be found for this low number of cases.

First, Member States believe the Commission is better equipped and more effective in handling such cases, and prefer to notify the Commission of alleged breaches in other ways than through Article 259 – and are satisfied by the outcome. Since an action by the Commission under Article 258 does not prevent procedures under Article 259, as stated in Article 260, unsatisfied Member States could still go to court even when the Commission also decides to start an Article 258 case against a Member State. Second, Member States might prefer to solve their differences in other ways than taking their neighbor states to Court. Reasons for this could be the high costs of litigation, a certain risk of retaliation (not necessarily through courts), diplomatic inconvenience and the greater acceptability of proceedings initiated by a neutral institution. The real reason can probably be found in a combination of the two – Member States prefer not to start adversarial proceedings before a Court against one of the other Members, and do not have to do so, generally, because the Commission is eager enough to do it for them. As worded nicely by one author:

> Interpolation of the Commission as delegate between Member States serves to deflect their wrath and defuse inter-state battles at the political level.\(^{114}\)

What does happen quite regularly is that States intervene in the judicial proceedings, as allowed by Article 40 of the Statute of the Court, in support of either the Commission or the accused Member State.

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\(^{112}\) This case was referred to in Case C-169/84, *Cofaz v Commission*, [1986] ECR 391.

\(^{113}\) Order of 15 February 1977 in Case C-58/77 *Ireland v France* NOT REPORTED; and order of 27 November 1992 in Case C-349/92; *Ireland v France* NOT REPORTED.

ARTICLE 260 TFEU

Of the three articles comprising the infringement procedures, it is Article 260 that has evolved the most over the course of its existence. Prior to the Treaty on European Union, there were no real options for the Commission to force a Member State to comply with a court judgment under Article 258. Article 260 (then Article 171EEC) provided only that

If the Court of Justice finds that a Member State has failed to fulfill an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

The sole option open to the Commission when Member States did not comply after the CJEU had given its judgment was to go back to court and request a judgment based on a breach of Article 260 – the requirement to take all necessary measures to comply with the previous judgment. However, no further sanctioning possibilities existed. This lack of enforcement capabilities other than a declaratory judgment by the Court has in the past sometimes led to Member States taking considerably long periods to comply with judgments, or complying only after something was promised in return. For years, academics and politicians alike had requested the introduction of sanctions, including the European institutions. However, for a long time the national governments had little interest in the introduction of sanctions, leading one author to comment: “[I]t may be questioned whether proposals for sanctions will not remain purely academic, at any rate for many years to come.” This remark was soon proven wrong, as is shown in the next sections.

5.1. Treaty on European Union

The Treaty on European Union in the early nineties brought the introduction of sanctions in Article 260(2) (then Article 228(2) EC). This article provides the Commission with the eventual possibility to “specify the amount of the lump sum or

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115 For example, it was only after six years that France complied with the judgment in Case C-152/78, Commission v France (Advertising of Alcoholic Beverages), [1980] ECR 2299.

116 As in the infamous case of Commission v France, where France refused to lift its ban on lamb and mutton from other Member States after a CJEU judgment. In the end, they had their way and a Union regime for lamb and mutton was established (Commission v France (1979)).

penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances” before the CJEU, upon which the Court of Justice may impose a lump sum or penalty payment on the non-compliant Member State. Although the Commission has not often asked for it, it has proven to be highly effective in inducing compliance. In most cases, Member States complied before the Commission had actually requested the CJEU for a judgment under Article 260.

The way the Commission can ask for the imposition of penalties is as follows: As with the Article 258 procedure, the Commission will need to send a letter of formal notice, requesting the Member State to submit its observations, including a warning to the Member State that penalties may ensue if compliance is not accomplished within a certain time-limit (Article 260(2)). If the Commission is not satisfied with the Member State’s observations or if the State does not reply, the Commission may bring the case before the CJEU and specify the amount of lump sum or penalty payments it considers appropriate. Before the introduction of the Lisbon Treaty in 2009, this article included an obligatory pre-litigation stage (the reasoned opinion) for the Commission. The removal of this stage means a reduction in the average duration of this procedure to between eight and 18 months.\footnote{\textit{Commission Communication 2010}, p. 2.}

The Commission stated in the past that it prefers penalty (penalty by day of delay after delivery of the Article 260 judgment) to lump sum payments (penalizing the continuation of the infringement between the first judgment on non-compliance and the judgment delivered under Article 260). In a 1996 Communication, the Commission stated: “the basic objective of the whole infringement procedure is to secure compliance as rapidly as possible ... [therefore] a penalty payment is the most appropriate instrument for achieving it”\footnote{European Commission Memorandum on applying Article 171 of the EC Treaty C 242/07.}. This again demonstrates the focus of the procedures on remedying situations of non-compliance, rather than sanctioning them.

The Commission has an elaborate system for calculating the amounts it requests. This calculation for penalties takes into account the seriousness of the...
PART II EU Compliance Mechanisms

matter, the duration of the non-compliance, the need to ensure deterrence, and the ability to pay of the Member State concerned.

Although the Commission had originally expressed a preference for penalty payments as mentioned above, it changed its opinion due to the outcome of Commission v France in 2005. The case concerned the non-implementation of a 1991 Court judgment by France. In that case the Court had found that France had failed to fulfill its obligations under certain control regulations for ensuring compliance with technical measures for the conservation of fishery resources. For eleven years France claimed it was doing everything in its power to comply with the judgment, however, despite the sending of a letter of formal notice, a reasoned opinion, and another supplementary reasoned opinion by the Commission, compliance was not reached. By the time the case came before the court in 2002, it had become obvious to the Advocate-General Geelhoed as well as the Court that France had structurally failed to comply with its obligations. In its judgment, the CJEU imposed a lump sum payment of its own accord for the first time, even though the Commission had recommended periodic penalty payments only. The idea behind the lump-sum payment was to impose a purely punitive measure, as well as to deter further non-compliance.

Subsequently the Commission stated it would propose a lump sum payment in every Article 260 case to specifically target cases of persistent non-compliance, which it views as “an attack on the principle of legality in a Community governed by the rule of law, which calls for a real sanction”. The judgment in Commission v France confirmed that penalties and lump sum payments can be applied cumulatively for the same infringement. One consequence of the inclusion of lump sum payments in the applications by the Commission is that it will no longer automatically withdraw its application when a Member State has recti-

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121 This includes the importance of the Community rules breached (especially infringements affecting fundamental rights or the four fundamental freedoms protected by the Treaty) and the impact of the infringement on general and particular interests (e.g. the loss of Community own resources, serious or irreparable damage to human health or the environment, etc.) on a scale of 1 to 20 (see European Commission Commission Communication on the updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings COM(2012) 6106 final).

122 On a scale of 1 to 3, calculated by 0.10 per month that passed after the delivery of the 258 judgment (ibid.).

123 A daily multiplier of currently €630,- (ibid.).

124 Based on the Member State’s GDP and its voting rights in the Council (ibid.).

125 Case C-304/02, Commission v France, [2005] ECR 6263.

126 Opinion of Advocate General Geelhoed, delivered on 29 April 2004 in Case C-304/02.

fied the non-compliant situation after referral to the Court but before judgment is delivered under Article 260. The imposition of a lump sum payment may still serve as a deterrent for future cases and an incentive for Member States to correct infringements more quickly.

As with the penalty payments, the calculation for lump sum payments also includes a factor for seriousness (on a scale of 1 to 20), the Member State’s capacity to pay, a basic multiplier (of 208), and a multiplier for the number of days elapsed between the date of the first judgment of the Court, pronouncing on the Member State’s non-compliance, and the date on which the Commission brings the action. The Commission has also set a minimum amount for lump sum payments in order to avoid the proposal of purely symbolic amounts that would have no deterrent effect. Lump sum payments may thus vary from (at least) €177,000 for Malta to €11,120,000 for Germany.

The Court of Justice is not under an obligation to impose these payments (“it may impose”), and if it does is not held to the amounts stipulated by the Commission in its request. The Court has stated to this effect: “it must ... be pointed out that the Commission’s suggestions cannot bind the Court and merely constitute a useful point of reference. [...] Similarly, while guidelines such as those in the notices of the Commission do not bind the Court, they do help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty.”

The Court has stated that the imposition of the payments is meant to place the Member State “under economic pressure which induces it to put an end to the infringement established”, and the penalties are therefore based on the degree of persuasion needed for the Member State to alter its conduct. The calculating method by the Court itself of penalty/lump-sum payments is similar to that of the Commission, including the same elements of seriousness, duration and the Member State’s ability to pay, although the outcomes do differ. In Commission v Greece, for example, the Commission requested daily penalty payments of €31,798.80, based on a seriousness coefficient of 11, duration coefficient of 1.1, and an ability to pay coefficient of 4.38, multiplied by a factor 600 to ensure

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128 Commission Communication 2012, p. 5.
131 This judgment was rendered before the revision of the factors used to calculate the penalties/lump sum payments requested by the Commission (Commission Communication 2012. Before this revision, the standard multiplier was 600 (now 630) for penalty payments and 200 (now 208) for lump sum payments.
deterrence. The Court in the end imposed penalty payments of €31,536. with factors of 8 for seriousness, 1.5 for duration, 4.38 for the capacity to pay, and a multiplier factor of 600. The explanation for the similarity in outcome, despite the difference in factors used, lies in the fact that the duration of the non-compliance had increased from 11 months at the time of request by the Commission, to more than 2 years at the time of the delivery of the judgment by the Court.

In the same case, the Court imposed a lump sum payment of €3,000,000. where the Commission had requested €3,420,780. Here the Court did not refer to the use of any factors or calculation method, although it did mention as relevant factors the duration of the infringement, the public and private interests involved, as well as the fact that the amount must be appropriate to the circumstances and proportionate to the breach and the capacity to pay of the Member State concerned.

The introduction of the possibility of penalty or lump-sum payments was seen as a way to improve the effectiveness of the infringement procedures, and especially prevent persistent non-compliance by Member States that otherwise may last for years. In practice it is felt that the introduction of sanctions has indeed had this effect. However, the possibility is not often used: In 2011, only two Court judgments were delivered under Article 260(2), one against Greece and the other against Italy. Moreover, some argue that the article has not yet reached its full potential, where one author compares it with a struggling teenager. It still offers the Member States the possibility of continued non-compliance, given the fact that several years will pass until the Court can impose penalty payments. Moreover, the Commission often chooses to bring several sets of cases under Article 258, instead of asking for penalties under Article 260 TFEU. Whether this is due to tactful behavior or doubt as to whether an earlier judgment has indeed been infringed, this may possibly weaken the effectiveness of Article 260. Moreover, the introduction of sanctions has not fundamentally changed the character of the remedies. There still is no compensation for past losses, but only punishment for non-execution of a Court judgment. Furthermore, Court judgments remain ex nunc and have no retrospective effect further than the origi-

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132 As confirmed by respondents #6 and #8.
133 Case C-407/09, Commission v Greece, [2011] ECR 2467, lump sum payment of €3,000,000.
134 Case C-496/09, Commission v Italy, [2011] not reported, lump sum payment of €30,000,000.
nal declaration of non-compliance by the Court. There is thus no punishment for the original non-compliant behavior.

Nevertheless, the article itself still offers the possibility of increased effectiveness of the infringement procedures. Commission sources indicate they believe the possibility of asking for sanctions has indeed increased the procedures’ effectiveness. Fines and penalties are paid within the deadlines, while relatively few 260(3) cases need to be started by the Commission at all.137 This may indicate that Article 260(3) has an effect in the actual application of the sanctions,138 but also especially in the deterrent effect that the possibility of application has on Member State behavior, just as Advocate General Geelhoed intended in his opinion in Commission v France.139

5.2. Changes Introduced by Lisbon

The Lisbon Treaty introduced changes to the infringement procedures in two respects: procedure and scope.

Procedurally two significant changes were made to Article 260 TFEU. First, as already mentioned above, the necessity for the pre-litigation stage of the reasoned opinion was removed from Article 260(2). The letter of formal notice, offering the Member State concerned the opportunity to submit its observations, is the only step required before the Commission is able to turn directly to the Court. Second, the Lisbon Treaty has added a new paragraph to Article 260:

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfill its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

138 In 2011, 77 cases were referred to the Court under Article 260(2), of which, in that year, a total of two judgments were rendered (European Commission 29th Report on monitoring the application of EU law (2011) COM(2012) 714).
139 Respondents #4, #5 and #6.
This paragraph effectively gives the Commission the opportunity to already ask the Court at the time of its application to the Court under Article 258 to impose a lump sum or penalty payment in the same judgment. However, this applies only to cases concerning the failure of the Member State to notify measures transposing a directive (which constitute around 1/3 of all active infringement procedures in a year). These payments are not meant as punishment, but as an incentive for the Member State concerned to comply as soon as possible.

The introduction of sanctions has given a sharper edge to the enforcement capabilities of the Commission under the infringement procedures. Moreover, it has somewhat diminished the influence of diplomacy and negotiation, which is such an important part of the first Article 258 stages. As an old Dutch proverb says: “Wie niet horen wil, moet voelen” (He who does not listen, must feel (the consequences)). Although the decision to start an Article 260 procedure falls under the Commission’s discretion, once it has taken the decision, the Member States had better listen, or feel the consequences. This possibility under Article 260(3) was used for the first time in 2011, with five Member States involved in nine cases. As noted earlier, Commission officials have indicated that the introduction of 260(3) has the potential of increasing the effectiveness of the infringement procedures.

The second important change introduced by the Lisbon Treaty concerns the scope of application of the procedures. Before Lisbon the infringement procedures could only apply to the Community side of legislation (the pre-Lisbon so-called first pillar), while the Lisbon Treaty has introduced the possibility of application of the procedures to the field of judicial cooperation in criminal matters and police cooperation as well (the former third pillar). However, the Court has “no jurisdiction to review the validity or proportionality of operations carried out by the police and other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States regarding the maintenance of law and order and the safeguarding of internal security” (Article 276 TFEU). Moreover, there is a five-year transitional period during which regarding the third pillar acquis already in force on the day the Lisbon Treaty came into force, the powers of the Commission and the Court remain as before, unless the act is amended or replaced after Lisbon.

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140 In 2010 non-communication cases accounted for 35 percent of all active cases at the end of the year (2010 Infringement Report, Statistical Annex).

141 Austria, Germany, Greece, Italy, and Poland. The proposed penalty payments (lump-sum payments were not requested) amounted to a maximum of €215,409.60 (2011 Infringement Report).

142 Respondents #3, #4 and #5.

143 Article 10(1) to (3) of Protocol 36 on transitional provisions.
5.3. Conclusions on Article 260

The introduction of sanctioning possibilities under Article 260 has hardened the infringement procedures to a considerable extent. Although the aim of the procedures is still to induce compliance with EU law as soon as possible and the penalties are not meant as sanctions for non-compliant behavior under Article 258, they do function as punishment for non-compliant behavior after the 258 phase. Persistent non-compliance with court judgments as in the case of Commission v France\textsuperscript{144} will not likely reoccur soon, now that the Court has shown unwillingness to accept this type of behavior. In this phase of the procedure, non-compliance is more likely due to intentional behavior rather than unintentional. Ample time is given to Member States to remedy non-compliant behavior before the request of an Article 260 court judgment.

Despite the fact that sanctions do not work retroactively, meaning they do not apply to non-compliance before an Article 258 judgment, they probably do have a deterrent effect in that phase as well. Knowing that the possibility of sanctioning exists, intentional non-compliance may be remedied sooner than without this option. Rather than awaiting a Court judgment to the same effect, Member States may choose to implement Commission suggestions sooner in order to avoid sanctions. However, the possibility of continued non-compliance remains, given the lengths of time involved in the Court procedures. Although Commission officials indicate they believe the introduction of sanctioning possibilities has a positive effect on compliance,\textsuperscript{145} this assertion has not yet been borne out by the available data to date, as closure rates at the different stages of the procedure have not changed significantly from before the introduction of the sanctions.\textsuperscript{146}

6. EXCEPTIONS TO THE INFRINGEMENT PROCEDURES

The procedure just outlined (Article 258 – 259 – 260 TFEU) is the official EU procedure aimed at inducing Member State compliance with Union Law. There are, however, a few exceptions to the application of the general procedure. Ibáñez has divided the exceptions in three categories: 1) where direct access to the CJEU is granted without a previous administrative procedure (a “fast-track” procedure),

\textsuperscript{144} Commission v France (2005).
\textsuperscript{145} Respondents #3 and #5.
\textsuperscript{146} For statistics, see the EU infringement Reports, available at: http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm.
2) where CJEU intervention follows a different kind of administrative procedure than the one laid down in Article 258, and 3) where under a different administrative procedure the role of the Commission has in part been taken over by the Council.\textsuperscript{147}

Treaty Exceptions to Article 258 can be found in Articles 106 (on competition rules), 108 (on State-aid), 114 (on the approximation of laws), 126 (on the Excessive Deficit Procedure), 271 (on the European Investment Bank and European Central Bank) and 348 (on the improper use of the articles on national security). This section will discuss these exceptions and how they work as compared to the Article 258 procedure. First the section focuses on the best-known and most elaborate exception to the procedures – the Excessive Deficit Procedure, after which the other exceptions are briefly explained.

6.1. The Excessive Deficit Procedure

Article 3 TEU states: "The Union shall establish an economic and monetary union whose currency is the euro". The Economic and Monetary Union (EMU)\textsuperscript{148} policy framework comprises a set of detailed Treaty provisions, which a) establish the European Central Bank (ECB) as an independent monetary authority for the euro area; b) elaborate a set of rules governing the conduct of national budgetary policies; and c) govern these exceptions and how they work as compared to the Article 258 procedure. First the section focuses on the best-known and most elaborate exception to the procedures – the Excessive Deficit Procedure, after which the other exceptions are briefly explained.


\textsuperscript{148} EMU consists of three stages: 1) movement of capital between Member States, closer coordination of economic policies and closer cooperation between central banks (complete in 1993); 2) convergence of the economic and monetary policies of the Member States (complete in 1998); and 3) irrevocable fixing of exchange rates and introduction of the single currency on the foreign markets and for electronic payments. Introduction of euro notes and coins (partly complete, with the exception of the UK and Denmark, who did not adopt the single currency under the opt-out clause; Sweden, following a referendum in 2003; and the new Members who joined the EU in 2004 and 2007 but have not yet met the convergence criteria required for joining the euro.)

\textsuperscript{149} Commission Communication: A Blueprint for a deep and genuine economic and monetary union. Launching a European Debate, pp. 1-3.

\textsuperscript{150} The EU budget is primarily funded from own resources (customs duties on imports from outside the EU, VAT (Value Added Tax), and own resources based on the gross national income of each Member State. 1% of the budget comes from other sources, such as taxes on EU staff salaries, contributions
that sound budgetary and economic policies are of particular importance in this area. The Stability and Growth Pact (SGP) of 1997 sets out the rules governing the coordination of budgetary policies.

The SGP consists of two parts, the so-called preventive arm (involving mutual surveillance of Member States), and the corrective (or dissuasive) arm (the Excessive Deficit Procedure (EDP)). The preventive arm (based on Article 121 TFEU) involves mutual surveillance on states. Member States must submit annual stability or convergence programs outlining medium-term objectives for a budgetary position close to balance or in surplus and for an adjustment path. Article 121 TFEU outlines how Member States shall coordinate their economic policies with the Council, which on recommendation from the Commission and after conclusions from the European Council, adopts recommendations outlining broad economic guidelines for the Member States. The Council subsequently monitors the economic developments in the Member States, as well as the consistency with the broad economic guidelines. When inconsistencies are identified, the Council, again on a recommendation of the Commission, may address recommendations to the Member State concerned and may decide to make its recommendations public. This multilateral surveillance procedure is in fact a mechanism working through the soft instruments of peer pressure and recommendations.

When a Member State has, despite the application of the preventive arm, reached a budgetary position that is not in line with the SGP, the corrective
arm comes into play. The basic aim of the EDP is for Member States to avoid excessive government deficits, in order to maintain stability and growth in the Member States under EMU. Article 126(10) TFEU prohibits the use of the Article 258 or 259 procedures when a Member State is in breach of this commitment: “The rights to bring actions provided for in Articles 258 and 259 may not be exercised within the framework of paragraphs 1 to 9 of this Article”.

Instead, Article 126(11) provides several measures the Council, not the Commission, may take in order to ensure compliance with the article. Since economic policy is seen as a politically sensitive area, the drafters of the Treaty have chosen for the intergovernmental Council to take decisions in this area instead of the supra-national Commission.

Although it is the Commission that monitors and examines compliance with budgetary discipline (Article 126(2)) and addresses opinions and recommendations on the situation to the Council, it is the Council that determines whether an excessive deficit actually exists and what action should be taken. First, the Commission prepares a report (Article 126(3)) when it considers a Member State is not capable of avoiding or already has an excessive deficit (with a reference value of 3% of GDP). Second, the Economic and Financial Committee provided for in Article 134 TFEU formulates its opinion on the report (Article 126(4)). Third, the Commission is obliged to address an opinion to the Council when it believes an excessive deficit exists or may occur (Article 126(5)). Fourth, the Council must consider any observations the Member State concerned wishes to make, and is subsequently obliged to make a decision on the existence of the deficit (Article 126(6)). The Council needs to make recommendations to the Member State with the excessive deficit, so the Member State has the opportunity to rectify the situation within a certain time limit (Article 126(7)). When the Member State fails to abide by these recommendations, the Council may make its recommendations public (Article 126(8)). Fifth, the Council may give notice to the Member State to take certain measures to remedy the deficit, and it may request the Member State to submit reports to examine the adjustment process (Article 126(9)). Finally, the Council may decide to apply one or more of the measures outlined in Article 126(11), the strongest of which is the imposition of fines. To this date such

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156 According to Article 16 TEU, the Council consists of a representative of each Member State at ministerial level who may commit the government of that State and cast its vote. In contrast to the Commission, its members are thus not politically independent of their national governments.
sanctions have yet to be imposed.\textsuperscript{157} The only actions that are allowed under the infringement procedures (Article 258 and 259 TFEU concern the failure to comply with sanctions imposed by the Council pursuant to Article 126(11)).\textsuperscript{158}

This procedure leaves much to the discretion of the Council, and thus to the Member States as represented in the Council. The Council decides whether there is an excessive deficit, whether it will request the Member State to take measures, and whether it will impose fines. This set-up caused significant problems at first and led to subsequent changes to the SGP, starting in 2003. In that year, the ECOFIN Council decided to put on hold the ongoing excessive deficit procedures for France and Germany, which led to a dispute between the Council and the Commission, eventually leading to a case before the Court of Justice. This situation led to the adoption of two Council Regulations in 2005, one altering the preventive arm (most importantly including a more precise definition of the medium-term objectives taking into account a country’s individual economic characteristics, while also taking into account its structural reforms)\textsuperscript{159}, and one altering the corrective arm (including changes concerning the exceptional circumstances clause and deadlines for correcting excessive deficits). However, the Council emphasized that the EDP’s function was to assist rather than punish, as well as to provide incentives for pursuing budgetary discipline through “enhanced surveillance, peer support and peer pressure”.\textsuperscript{160} The enforcement of the corrective arm thus remained as soft as before.

Due to the financial crisis that started in 2007, several important changes have been made in the area of the SGP and EDP. The crisis revealed the weaknesses of the SGP and especially its lack of enforcement possibilities. Two of the problems were 1) insufficient observance of the SGP by the Member States with the aforementioned weak enforcement of the preventive arm, and 2) a reliance on the soft instruments of peer pressure and recommendations for the coordination of national economic policies.\textsuperscript{161}

\textsuperscript{157} Although some countries came quite close: At the end of 2011, Olli Rehn, the European Commission vice-president for Economic and Monetary Affairs and the Euro, sent letters to the Finance ministers of five countries making clear that if they did not take measures to correct their excessive deficits soon, further steps including the possibility of sanctions would be undertaken. Four countries (Belgium, Cyprus, Malta and Poland) subsequently remedied the situation within two months. (See European Commission press release “Belgium, Cyprus, Malta and Poland took effective action to correct deficit while Hungary’s measures are insufficient” (http://europa.eu/rapid/press-release_IP-12-12_en.htm, last accessed January 2013).

\textsuperscript{158} Ibáñez (2000), p. 158.

\textsuperscript{159} Regulation 1055/05.

\textsuperscript{160} Presidency Conclusions European Council, Brussels 23 March 2005, 7619/1/05 REV 1, p. 31.

\textsuperscript{161} Commission Communication: A Blueprint for a deep and genuine economic and monetary
Reforms started in 2010 with the Task Force on Economic Governance and the European Commission discussing proposals that resulted in the so-called Six Pack, consisting of five regulations and one directive. The Six Pack reinforces both arms of the SGP by ensuring stricter application of the fiscal rules through precise quantitative definitions, an operationalization of the debt criterion as well as the gradual imposition of sanctions for Euro-area Member States to a maximum of 0.5% of GDP. Moreover, the Six Pack introduces reverse qualified majority voting in the Council of Ministers for sanctions, meaning the Commission can now impose sanctions on a Member State unless the Council decides through a reversed majority voting system to reject the Commission’s proposal. A minority of Member States can thus agree on the Commission’s proposals, while a qualified majority is needed to block it. However, the Council is still able to amend the Commission recommendation with a (normal) qualified majority.

In the wake of the Six Pack, the Member States negotiated the so-called Fiscal Compact as part of the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union (TSCG). The TSCG was signed by all Member States except the Czech Republic and the UK in March 2012, and entered into force on 1 January, 2013 after ratification by 16 countries. The Treaty is an intergovern-
mental agreement (not EU law) that is binding on euro-area Member States only. Some provisions in the TSCG are more stringent than those of the Six Pack, requiring the signatories to enshrine the country-specific medium-term objectives in national binding law, while the Member States will support the Commission in its proposals or recommendations in the Council if a euro-area Member State is in breach of the deficit criterion, through a kind of reverse qualified majority voting applying to all stages of the EDP, even if not foreseen by the Six Pack.166

In November 2011, a further two regulations were proposed by the Commission and subsequently negotiated by the Council, Commission and Parliament, complementing the SGP’s requirement for surveillance, for euro-area Member States only.167 This so-called Two Pack, which entered into force on May 30, 2013, entails strengthening the monitoring and enhanced surveillance procedures for Member States experiencing severe difficulties with financial stability. Strict deadlines were introduced at all steps of the EDP, while all relative reports are to be made public. Moreover, ahead of parliamentary adoption all Member States of the euro area have to present their draft budgetary plans for the forthcoming years to the Commission and their euro area partners, according to a common timetable.168

Although the SGP and EDP cannot be subject to the Commission’s infringement procedures, the recent amendments under the Six Pack, Two Pack and the Fiscal Compact have hardened the procedure and increased the possibility of enforcement by the Commission, while strengthening its role as Guardian of the Treaty. The Commission has made proposals for hardening of the procedures even further and further deepening the EMU. It has, among other things, mentioned the extension of the competences of the Court of Justice – including the

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166 For more details, see the explanatory page of the European Commission on Economic Governance: http://ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_pack_en.htm, and the TSCG itself.


168 Commission Communication: A Blueprint for a deep and genuine economic and monetary union. Launching a European Debate, p. 5.
option of deleting Article 126(10) TFEU, and thus admitting infringement proceedings in this area.\footnote{Ibid., p. 39.}

6.2. Other Treaty Exceptions

Aside from the extensive SGP and EDP and the recent developments in that area, there are a few other Treaty exceptions to the application of the infringement proceedings. Whereas the EDP provided a larger role for the Council, to the detriment of the Commission’s powers in that area, these other Treaty exceptions for the most part have the opposite effect. Except for Article 271, the Commission is either provided with a fast-track procedure or given more possibilities to supervise Member State compliance.

Article 106 on public undertakings offers an alternative procedure for the Commission when a Member State is not in compliance with the rules that govern Member State behavior toward undertakings under their influence. In 106(3), the Commission is given the possibility to address directives or decisions to Member States to ensure the applications of the provisions of the article. This article can thus be seen as an extra phase in ensuring compliance – if the Member State concerned does not comply with the decision or directive given under this article, an Article 258 procedure can be started to ensure compliance. However, it is not meant to ensure compliance with Article 106 itself, but with the decisions and directives issued under 106(3).

Article 108 TFEU on state aid provides a (frequently used) fast-track version of the procedure for States who do not comply with the Commission’s decision to abolish or alter state aid that has been found incompatible with the common market. Under this article, the Commission keeps under review all systems of state aid existing in the Member States. This review is carried out in cooperation with the Member States and the Commission can propose any appropriate measures required. When the Commission finds that state aid is not compatible with the common market (as specified in Article 107), it can give notice to the Member State concerned and subsequently decide that the State must abolish or alter such aid within a certain time limit. When the State does not comply with

\footnote{The influence of the public authorities of a Member State (State, regional, local, or other), can occur by virtue of either their ownership of these companies, their financial participation therein or the rules that govern them.}

\footnote{“The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States” (Article 106(3) TFEU).}
this decision within the time limit, Article 108(2) provides a fast-track procedure (fast-track because it skips the reasoned opinion): “the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union directly”.

There are thus three conditions for this fast-track procedure: the Commission must i) establish the incompatibility of the aid, ii) give notice to Member States to submit their comments, and iii) decide on abolition or modification of the aid. When these three conditions are fulfilled, and the decision under iii has not been complied with, the Commission or any other interested State may refer the matter to the Court of Justice. The procedure is somewhat complicated with regard to Article 108(3). Here the Commission depends on notifications by the Member State as to any plans for new or alterations to existing aid. The CJEU decided, however, that when aid has been granted or altered without notification, the Commission may issue an interim decision prohibiting the aid for the period needed to examine the compatibility. The Member State must suspend payments during this period, and if it does not do so, the Commission may bring the matter directly before the CJEU.

Article 114 on the approximation of laws and Article 348 on national security have a similar procedure concerning the abuse of particular derogating provisions. Article 114(9) implies the possibility for derogation under certain circumstances, while Article 348 addresses Commission supervision over the application of Articles 346 and 347 on the possibilities of derogation from Treaty articles on the basis of national security. If these articles are misused by the


173 “By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided in this Article” (Article 114(9) TFEU). The powers referred to in Article 114 include the power to maintain national provisions on grounds of major needs, or relating to the protection of the environment or the working environment. To date, Article 114(9) has never been applied.

174 “By way of derogation from the procedure laid down in Articles 258 and 259, the Commission or any other Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 346 and 347” (Article 348 TFEU). Only one case has been brought under this article, Case C-120/94, Commission v Greece, [1996] ECR I-1513. Here the Commission started a case against Greece concerning certain measures imposed by Greece against the Former Yugoslav Republic of Macedonia (FYROM). Greece had imposed an embargo against FYROM and justified this on the basis of Article 348, since it believed that certain elements in FYROM’s constitution, the appearance of the sun of Vergina in FYROM’s flag as well as the inclusion of the term “Macedonia” in FYROM’s name constituted a threat to national security, hinting at territorial claims. The Court in a preliminary ruling ruled against the Commission’s request for interim measures. The case was later discontinued. Greece protested
Member States, Article 114 and 348 offer the possibility for the Commission to skip the administrative phases and bring the matter directly before the Court of Justice. With regard to Article 348, a provision is added that the ruling of the CJEU will be made in camera, since questions of national security are best not heard in public.

Article 271 concerns obligations under the Statute of the European Investment Bank. The powers normally conferred on the Commission under Article 258 are transferred to the Board of Directors of that bank by Article 271(a). The same goes in case of national central banks, where these powers are conferred upon the Council of the European Central Bank by Article 271(d). The rest of the procedure, however, is similar to the Article 258 procedure (except that Article 271(d) concerns the obligations of national central banks under the Treaty and the Statute of the ESCB, instead of Member States).

6.3. Conclusions on Treaty Exceptions

Several exceptions to the application of the infringement procedures in the Treaties were presented in the previous sections. It became clear that the largest exception, the SGP and EDP, originally involved softer procedures where the role of the Commission in the infringement procedures had been reduced to making a proposal on the breach of EU law and on sanctions to the Council. Recent developments have led to an increased role for the Commission in this area, greater possibilities for the direct imposition of fines by the Commission, and less reliance on soft instruments. The other Treaty exceptions for the most part involve a type of fast-track procedure for the Commission, or, in the case of the European Investment Bank and the national Central Banks, a transfer of the powers under the infringement procedures from the Commission to the Board of Directors of the EIB or the Council of the ECB, respectively. The procedures remain the same otherwise.

particularly heavily against the use of the sun of Vergina by FYROM, as it is regarded as a national symbol in Greece. FYROM used the symbol in its flag between 1991 and 1995, after which it agreed to change its flag due to Greece’s protest, while negotiations between the two countries were started under the auspices of the UN.

175 “... the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258” (Article 271(a) TFEU).

176 “... the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258” (Article 271(d) TFEU).

177 See also Article 35.6 ESCB Statute.
Chapter 3  EU Infringement Procedures

Of all the exceptions to the infringement procedures, the most interesting for the purpose of this study are the EDP and Article 108 on state aid. The EDP merits attention because of its elaborate separate procedure as well as the recent changes to the article, but even more so due to the frequent application of the procedure since the onset of the 2008 financial crisis. Article 108 is interesting, since it is applied all the time in practice. When all the exceptions are examined together, however, they can be divided into three categories: 1: a fast-track procedure (Article 108, 114, 348); 2: a different administrative procedure (Article 106); and 3: a more political procedure where the role of the Commission has been limited in favor of the Council or other bodies (EDP, Article 271). An explanation for the existence of these different procedures can be found in the character of the underlying obligations.

The possibility for fast-track procedures found in Articles 108, 114 and 348 can be explained by the importance of achieving expedited compliance, given the nature of the underlying obligations. For example, the Court has stated that Article 108 sees to the compatibility of state aid with the common market, which is a dynamic concept and to be examined in light of the ever-evolving common market. Similarly, the Court found that Article 114’s special procedure is warranted given the fact that the underlying problems in such cases concern “facts and conditions which may be both complex and liable to change rapidly”. Moreover, the article concerns derogation from an essential Treaty principle of free movement, warranting control by the Court through an expedited procedure.

In contrast, the reason for Article 348’s expedited procedure is not found in the character of the underlying obligations as such, but in the fact that Articles 347 and 348 already provide the Member States with the opportunity to consult with each other and the Commission, as well as to take such steps as are necessary to prevent the internal market being affected by any measures taken under Article 346. The preliminary steps that are part of the official infringement procedures are thus replaced to a certain extent by these options under Articles 347 and 348.

The second category, where Article 106 TFEU is found, is not a real fast-track procedure as it is not possible for the Commission to skip any of the steps of the classic infringement procedure. This may mean that this exception may actually prolong the entire procedure, by adding an extra step. On the other hand,
through this added administrative procedure it becomes possible to avoid the infringement procedures altogether. If the use of Article 106(3) is indeed successful, it may provide a faster way of solving the problem. Moreover, the procedure allows room to remedy more complex situations, it allows the Commission to clearly determine which measures the Member State has to adopt in order to conform with EU law, and, in contrast with the classic infringement procedure, it can also be used against national measures not yet in force. The Court has pointed out that the purpose being achieved by an Article 106(3) procedure (adopting a directive defining a Member State’s obligations under Article 106) is in fact different from that of an infringement procedure (a finding of breach of Union law). The reason for giving the Commission this possibility in Article 106(3), lies with the fact that this article aids the effective functioning of all other Treaty articles, with emphasis on competition rules as it is situated in the TFEU chapter on competition. It in fact concretizes the general duty of sincere cooperation as laid down in Article 4(3), and thus warrants providing the Commission with an extra opportunity to define Member State obligations in order to perform its function as Guardian of the Treaties.

The third and final category finds its rationale in the politically sensitive character of the underlying obligations combined with practical circumstances. The EDP, for example, concerns monetary and budgetary rules. Regarding any political considerations, it has been argued that in economic matters, especially when many member-states are involved, discretion becomes more important than rules. It is therefore politically speaking often more feasible to provide the Member States with such discretionary powers. Moreover, at the time of drafting the EDP general economic policy and budgetary powers had not been transferred to the Union. It would have been unrealistic to endow the Commission with strong powers to oversee adherence to the SGP, given the linkages between monetary, economic and financial policies where competences are divided between the Member States and the Union. At the time it was a logical step to give this supervisory task to the Member States, collectively represented in the Council. The recent financial crisis has shown the drawbacks of assigning this task to the Member States, as was shown in the above section on the EDP.

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184 Schwarze (ed) (2012), p. 1229. Member States cannot be allowed to circumvent their Treaty obligations through state enterprises and enterprises to which they have granted special or monopoly powers.
Chapter 3  EU Infringement Procedures

The exceptions in this section will not be discussed any further, as they are precisely exceptions to the object of this study: the classic infringement procedures. However, they have shown that there is a certain link between the character of the underlying obligations (political, complex, urgent) and the set-up of a compliance system. This is an interesting observation, as the impact of this element is also found when studying the effectiveness of the infringement procedures. The next section will now perform that particular analysis.

7. THE EFFECTIVENESS OF THE INFRINGEMENT PROCEDURES

Now that the set-up, functioning, character and the exceptions of the infringement procedures have been outlined, an analysis of their effectiveness may be undertaken. In chapter 2.1 of this dissertation, four steps were formulated that will help determine the effectiveness of compliance mechanisms: A: the goal, B: the compliance, C: the effectiveness, and D: the comparison. In this current chapter steps A, B and C are examined, while D will be addressed for all mechanisms at the same time in the concluding chapter of this thesis.

7.1. The Goal of the Infringement Procedures

According to Article 258 TFEU, the primary aim of the infringement procedures is to make Member States comply with and fulfill their obligations under the Treaties. The aim of the procedures is not to punish Member States for their non-compliant behavior, but to ensure that the behavior is ended as quickly and effectively as possible. Moreover, the procedures are intended to remedy current and prevent future non-compliant behavior.

The wording of Articles 258 and 260 already show that the target is not perfect compliance in the Member States, but rather a state of compliance that is deemed acceptable by the Commission as Guardian of the Treaties. At all steps of the procedure it is left to the Commission’s discretion to decide whether or not to take action. Despite the changes made to the procedures over the past decades – such as the greater involvement of complainants, a greater divulging of information to the parties as well as the public in general, the involvement of the European Ombudsman or even the European Parliament – the Commission’s discretion is still an important element in the procedures, as the Commission as well as the Court of Justice (and the European Ombudsman and the European Parliament, for that matter) regularly remind us.
7.2. Compliance

Since the aim of the procedures is to induce compliance by Member States with EU law, four compliance questions need to be answered regarding the Member State obligations, the character of these obligations, the definition of non-compliance and the causes of non-compliant behavior.

Expected behavior
The first question asks which obligations Member States are expected to adhere to. An infringement is defined in Article 258 TFEU as the “failure to fulfill an obligation under the Treaties”. As was explained at the beginning of this chapter, an obligation under the Treaties refers to any obligation under European Union Law, covering all rules of EU law: primary legislation, secondary legislation and supplementary legislation. This includes both binding as well as non-binding acts (such as opinions or recommendations), and equally covers both acts and omissions.

Hard or soft obligations
The second question pertains to the character of these underlying obligations. As was mentioned above, an “obligation under the Treaties” encompasses both binding as well as non-binding acts, meaning that these obligations can be of a hard or a softer character. Infringement procedures, however, can only be started when there is alleged non-compliant behavior with respect to hard legal obligations, since non-binding or soft law can never be subject to judicial proceedings. The obligations that are relevant for the application of the infringement procedures are therefore necessarily of a hard character.

Actual behavior given the element of discretion
The third question, then, concerns the determination of non-compliant behavior – when is an EU Member State non-compliant? In this respect, the element of discretion plays an important role. As was explained, the Commission has discretion at all steps of the procedure to decide whether and when it will proceed with the next step or close the case. This means, practically speaking, that it is the Commission that decides whether or not there has been a breach of obligations under the Treaty that should be remedied. Ultimately, if and when the Commission has decided to lodge an application with the Court of Justice, it is the Court of Justice that makes an objective determination of the existence of non-compliant behavior.
Chapter 3  EU Infringement Procedures

Except for those cases concerning non-communication of transposition measures, where there is a quasi-automatic start of the procedures, this discretion often leads to the decision not to start or to discontinue infringement procedures. There are many reasons for not pursuing a certain case of non-compliance, either because the case at hand is not suitable for the application of an infringement procedure and may better be solved through other channels (“small infringements”), or because of capacity problems on the side of the Commission, which must prioritize certain cases over others due to financial, time or other restrictions, or maybe due to less transparent political reasons. The Commission has committed itself to informing complainants of their reasons for not pursuing a case, for example, but in practice this does not always mean that this information reflects the actual reasoning behind such decisions.\textsuperscript{186} The element of discretion therefore plays a large role in the application of the infringement procedures and the determination of the existence of non-compliant behavior.

Intentional or non-intentional non-compliance
The last compliance question refers to the underlying reasons for non-compliant behavior. As stated before, the decision by the Court of Justice under Article 260 is objective in nature, meaning the Court does not take into account the underlying reasons for the non-compliant behavior, intentional or unintentional. However, the procedures themselves implicitly do take this into account by means of gradually increasing the level of hardness of the steps leading up to the top of the pyramid. As described in the model in chapter 1, the pyramid shows there are four basic steps to compliance: prevention, monitoring, a legal framework and sanctions.

*Prevention* in terms of preventive capacity building and rule clarification that reduce the risk of violations due to incapacity or inadvertence (as defined by Tallberg)\textsuperscript{187} is as such not a part of the infringement procedures. The procedures come into play when non-compliant behavior has already occurred. Nevertheless, the procedures may have a preventive aspect since their mere existence will, at least to a certain extent, prevent states from showing non-compliant behavior. When states know that non-compliance may invoke judicial procedures that take

\textsuperscript{186} There was for example one inquiry by the European Ombudsman, which found that although the reason given by the Commission to the complainant stated that it found no breach of obligations, there was in fact documentation from within the Commission that acknowledged there was indeed a case of non-compliance. The reason for closing the case was therefore not the absence of non-compliance, but other non-disclosed reasons (for more on this inquiry, see the discussion in Varnay (2006)).

\textsuperscript{187} Tallberg (2002).
years, take up resources and may end in the imposition of sanctions, they might think twice before intentionally breaching their obligations. Moreover, the infringement procedures started against one Member State, when publicized, may alert another Member State to their possible (unintentional) non-compliant behavior as well and induce compliance in this way.

Monitoring in order to enhance the transparency of state behavior and expose violators is quite difficult under the infringement procedures. As was explained earlier, the Commission has no investigative units on the ground, so to speak, and monitoring therefore relies on complainants and other channels to ensure non-compliant behavior is caught. Monitoring with regard to non-communication of transposition measures is something that the Commission can do and does in an automated manner. However, once non-compliant behavior is detected, Commission monitoring is possible in some sense, since the Commission will monitor the compliance progress of the Member State that showed the non-compliant behavior.

In the early, pre-judicial stages of the infringement procedures, this monitoring step plays an important role. With a view to solving breaches of obligations under the Treaties in an amicable and non-adversarial manner, the early stages entail the exchange of information between the Commission and the Member States, and offer the opportunity for Member States to mend those breaches that were either unintentionally or intentionally made. The informal consultations with the Commission in the early stages of the procedure make it possible to weed out those cases that have arisen due to legal uncertainty or misunderstandings. The cases for which the more formal part of the proceedings are started are then usually those where non-compliant behavior is either intentional or where the Member State does not agree with the Commission as to whether its behavior is in fact non-compliant. In the prejudicial part of the procedures, the Commission uses both soft measures, such as naming-and-shaming through press releases, and hard measures, such as official reasoned opinions and the threat of imposing sanctions if necessary, to induce compliance. The fact that the Commission can in fact “back up” or increase its pressure with judicial proceedings and sanctions opens up the possibility for Member States to negotiate solutions with the Commission. This means that when a case is closed in the preliminary stages of the procedure, it is not always perfect compliance that has been reached, but rather an acceptable level of (non-)compliance. This is possible given the Commission’s discretion regarding the decision whether to take the case to the next level or not.

A legal system that permits cases to be brought against non-compliant states and that further clarifies existing rules is the hallmark of the infringement pro-
This is where the Court renders its objective judgment of whether or not a state of non-compliance exists. As stated above, this objective declaratory statement does not take reasons for non-compliance into account.

Sanctions, the last step to compliance, was added to the infringement procedures at quite a late stage, but is currently used more and more often by the Commission. The application of lump-sum as well as penalty payments, including the more direct route of asking for these sanctions in case of non-communication of transposition measures, have led to a sanctioning as well as a deterrent function of these sanctions.

The above elements demonstrate that the causes for non-compliance (intentional or non-intentional) are relevant only in the early stages of the infringement procedures. As a case goes through the different steps of the procedure, it becomes less important what the underlying reasons for non-compliance are. Throughout the infringement procedure ample opportunity is given to remedy those situations where non-compliance was unintentional. This explains the turn to the imposition of lump-sum payments on those states that have shown particular reluctance in complying with Court judgments, as was seen in Commission v France. Non-compliance in this stage of the procedures is almost assumed to be intentional, for which a pecuniary sanction is deemed appropriate.

At the preliminary stage, it is the Commission that decides when there is a potential case for non-compliance, and whether or not to pursue this non-compliant behavior. Through clarifications, the exchange of information and discussions with the Commission, those cases where Member State’s non-compliance was unintentional can usually be eliminated. Of course some cases will not be solved, for example those where neither the time nor the financial capacity to solve the problem before the end of the deadline given by the Commission are available. On the other hand, by using different types of pressure (through e.g. naming-and-shaming or the threat of judicial proceedings) and through negotiation, many of the intentional cases of non-compliance can also be remedied. Those remaining cases concerning unintentional or intentional non-compliance, or where the belief exists that the behavior in fact does not constitute non-compliance, are solved through the application of the hard judicial proceedings up to and including the imposition of sanctions. At the judicial stage of the procedures, the causes for non-compliance become almost irrelevant given the objective nature of the Court’s decision. Then again, harsher measures are applied to those states that have failed to comply with the Court decision for a protracted

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period, since this kind of behavior is seen to be intentional, or avoidable at the least.

Concerning the character of the underlying obligations – these are necessarily hard and binding, otherwise the infringement procedures could not be started. So, also in those cases where the Commission applies managerial methods to induce compliance in the prejudicial stages, these methods are applied to hard legal obligations. In conclusion: With the infringement procedures, managerial-type efforts are indeed made to solve most non-compliance cases which were unintentional, while enforcement-type mechanisms are applied to remedy intentional non-compliance or otherwise unsolvable unintentional non-compliance.

7.3. Conclusions on Effectiveness

Now that the goal of the infringement procedures has been discussed as well as the character of the underlying obligations and causes for non-compliance, the effectiveness of the procedures can be analyzed.

In chapter 1 effectiveness was defined as the degree to which objectives are achieved, relating the input or output to the final policy objective (the outcome). The goal of the infringement procedures is compliance. This is not necessarily an outcome of perfect compliance, but rather a state of compliance deemed acceptable by the Commission as Guardian of the Treaties, given the level of discretion left to this supranational institution. This level of discretion has in practice led to the application of managerial-type mechanisms and the possibility for negotiations between the Member States and the Commission. These managerial stages seem to work quite effectively in practice, since only five percent of all opened infringement cases makes it to the judicial stage, where further determination of a state of non-compliance is left to the objective judgment of the Court. This means that probably, according to the Commission, 95% of all cases are no longer non-compliant, or are deemed to be acceptable cases of non-compliance. However, without the existence of the judicial stage as well as the possibility of sanctions, this percentage would probably be lower. This is also shown by the fact that before the introduction of sanctions, for example, 10% or more of the cases started would end up in court. Moreover, there has been a reduction in the average length of time from the start of the procedures until compliance is achieved, relating the input or output to the final policy objective (the outcome).

189 And also a state of compliance that is deemed acceptable by other Member States; otherwise, they could start an Article 259 procedure themselves.
achieved.\textsuperscript{190} The Commission believes that the newly added fast-track procedure of Article 260(3) will further speed up the average time of the infringement procedures.\textsuperscript{191}

The infringement procedures aim to induce compliance with EU law through a combination of management and enforcement (the front side of the compliance pyramid in chapter 1). This means: if possible in an informal setting of cooperation and communication (management in the preliminary stages), otherwise by enforcement through judicial proceedings and if necessary through the imposition of lump-sum and/or penalty payments.

Once again, the purpose of the infringement procedures is not to reach perfect compliance, but rather a level of compliance as deemed acceptable by the Commission. Given this level of discretion left to the Commission, conclusions cannot be drawn as to the capacity of the infringement procedures to induce compliance by Member States with EU law in general. This remains true even given the increased transparency and diminished secrecy surrounding Commission discretion over the past decades. When the effectiveness of the infringement procedures is compared to the alternative procedures in the next chapters, therefore, this element needs to be taken into account.

8. CONCLUSIONS

The EU infringement procedure is the central EU mechanism for inducing compliance with EU law. It can be set in motion when “the Commission considers that a Member State has failed to fulfill an obligation under the Treaties” (Article 258 TFEU), and includes obligations under EU primary, secondary or supplementary law. The fact that the Commission, a supranational institution, decides on a Member State’s compliance with its obligations is essential in the procedures.\textsuperscript{192} The infringement procedure is a unique example of a procedure that combines managerial and enforcement elements to induce compliance with a

\textsuperscript{190} It is difficult to prove a one-on-one causal relationship between the introduction of the sanctions and the mentioned reductions. Moreover, the reductions may have been due to other, parallel developments in the application of the infringement procedures, such as the introduction of stricter deadlines as such by the Commission, and stricter adherence to them.

\textsuperscript{191} European Commission Commission Communication on the Application of Article 260 of the Treaty on the Functioning of the European Union. Up-dating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings. SEC(2010) 923/3.

\textsuperscript{192} And the CJEU in the judicial stage, of course. However, cases will never make it to this stage if the Commission does not declare initially and throughout all subsequent phases up until the judiciary phase that according to them the Member State is not in compliance.
Member State’s binding legal obligations under EU law. When the procedures are analyzed by applying the compliance model and pyramid that were developed in chapter 1, the following can be concluded.

First, although it is the Commission that determines whether there is a case of non-compliance, it is the Court of Justice that will make the final decision on the issue, if the procedure arrives at this final stage. In contrast to the Commission, which has discretion in its determination of the existence of a case of non-compliance, the Court will make an objective determination. Thus the reasons for the existence of non-compliance are not of importance to the Court – they will merely rule whether there is non-compliance or not. Whether the non-compliance is intentional or involuntary is irrelevant.

Second, it is interesting to note that the official infringement procedure has developed over the years into a much harder mechanism than it originally started out as. This can be deduced i) from the fact that there is a possibility for the Court of Justice to impose (financial) sanctions if non-compliance persists after the Court has established its existence, ii) the fact that the room for discretion for the Commission, although still there, has been limited somewhat over the years, not least by the Commission itself, and iii) from the fact that elements have been introduced into the system that are geared towards speeding up the process, such as shortening reaction deadlines, fast-track procedures such as Article 260(3) or the semi-automatic start of certain kind of procedures, thereby leaving less room or time for managerial solutions for certain problems.

Third, the procedures become “harder” throughout the entire process: first discussions, room for explanations and information dissemination, followed by official communications, eventually possibly leading to adjudication or even the imposition of penalties.

In short therefore, the infringement procedures represent a complete compliance pyramid where soft as well as hard steps are taken to induce compliance – apparently irrespective of the underlying softness of the obligations or the reasons for non-compliance. Although the procedures have become harder over the years, the importance of the managerial steps due inter alia to Commission discretion cannot be ignored, given the fact that 95% of all cases are solved before the CJEU renders judgment. The preliminary phase has become even more important especially due to the hardening of the procedures. With the threat of Court judgment and the possibility of sanctions looming in the background, Member States will sooner avail themselves of the possibility to solve problems amicably. The next chapter will show how the managerial aspects of the pyramid

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193 Those meant to target the non-communication of transposition measures for directives.
are much stronger for the softer mechanisms that function alongside the harder infringement procedures.
CHAPTER 4

Compliance Mechanisms in the EU
Behavior can be changed more easily by the power of persuasion than by the persuasion of power.

Chapter 4 Compliance Mechanisms in the EU

1. INTRODUCTION

In the infringement procedures, or rather the detection of infringements, individual complainants play an important part. As stated before, the Commission does not have its own investigative unit, and therefore depends heavily on information from others about possible infringements. It was also seen above that non-communication accounts for a large part of all infringement procedures, but that this involves an almost automatic procedure. Databases are kept on transposition deadlines with all relevant Directorate Generals (DGs), and if a Member State has failed to notify the Commission the measures it has taken to implement a directive before the deadline has passed, the DGs are automatically warned of this fact. Infringement procedures are then usually started within one to three months of the transposition deadline. Cases based on complaints, on the other hand, require actual investigation on the side of the Commission.

The important role played by complainants and the constantly high number of complaints is one of the reasons why the Commission has decided to set up new, alternative problem-solving mechanisms for dealing with complaints, notably SOLVIT and EU Pilot. Another alternative mechanism is the Internal Market Scoreboard (IMS). The IMS is not meant to deal with complaints, but is a peer pressure-inducing mechanism that works through the publication of half-yearly reports on implementation and infringement procedures.

It is interesting to take a closer look at how these alternative mechanisms work, since they could possibly help to prevent the necessity for infringement procedures based on complaints or non-communication. By lowering the amount of infringement procedures, the Commission will have more time and resources to spend on other cases (maybe thereby also starting procedures in those cases where it would otherwise have decided to use its discretionary power to undertake no action). All these factors could improve compliance with EU law by the Member States. Section 2 will briefly explain how these alternative mechanisms work, while their influence on the official infringement procedures will be discussed in the next sections. The final sections will discuss the effectiveness of the alternative procedures in inducing compliance with the underlying obligations.

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1 An earlier version of this chapter was published as Koops, C.E., 'EU Compliance Mechanisms: The Interaction between the Infringement Procedures, IMS, SOLVIT and EU-Pilot' (2011) Amsterdam Law School Research Paper No. 2011-42.

2 Although the number has declined somewhat over the past years (as will be shown and discussed later in this chapter), complaints still account for around 40% of all infringement cases.
2. COMPLIANCE MECHANISMS IN THE EU

Before turning to a detailed analysis of the alternative mechanisms, the rationale for the existence of the additional compliance mechanisms is discussed first, as is their legal basis.

2.1. The Rationale for Additional Compliance Mechanisms

There are several reasons for the establishment of alternative compliance mechanisms within the EU. The fact that 95% of all infringement cases are closed in the pre-judicial stage does not mean that cases are solved quickly. On average, an internal market infringement procedure, for example, takes two years to be closed in the informal stage – almost half of all cases take more than two years. The judicial stage is not much quicker; here, too, the average time for a Member State to comply with the Court ruling is over one and a half years. For citizens, businesses and other complainants this timeline is often too long. They will have felt the negative consequences of late or incorrect transposition during the average two to four years that it takes for cases to be handled by the Commission in the infringement procedures. This situation is aggravated by the fact that the Commission has room for discretion in deciding which possible infringements to pursue, or whether to continue with a case or close it.

To avoid, for example, situations where a complainant has to wait for years before the infringement situation is ended, or where a complaint – for whatever reason – does not lead to a case handled by the Commission, as well as for time and budgetary reasons, several alternative compliance mechanisms have been established by the Commission over the past decade or so.

First, the Internal Market Scoreboard was set up in 1997 to inform Member States as well as the public of the infringement situation in the EU. The intention was – through peer pressure and the dissemination of best practices – to induce greater compliance with EU law in the Member States. Second, SOLVIT was designed in 2002 as a fast, low-cost alternative dispute settlement mechanism to help citizens and businesses when they encounter problems due to misapplication of Internal Market rules. Through SOLVIT, many suspected infringements

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3 See the EU Infringement Reports, available at http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm
4 On Commission discretion, see the previous chapter.
5 It is estimated that the cost savings due to SOLVIT amounted to €128 million in 2009 (European Commission SOLVIT 2009 Report. Development and Performance of the SOLVIT network in 2009 (2010)
can be resolved quickly and effectively without direct involvement of the Commission. Third, EU Pilot was introduced in 2008 to provide solutions to problems arising from the misapplication of EU law (other than Internal Market rules), to obtain quicker and better responses to enquiries for information, and to work more closely and informally with the Member States.

The reason for focusing on these three mechanisms (SOLVIT, EU Pilot and the IMS) is that they are the main alternative problem-solving mechanisms for the Internal Market. There are several other mechanisms that also deal with this area, but they are not meant to target the application and implementation of EU law. One could mention the ECC-net for example, which helps European consumers when they encounter problems with cross-border purchases, or FIN-net, targeted at handling disputes between consumers and financial service providers. Although the problems handled within those systems all involve the incorrect application of EU rules, they are not meant to solve the problems that result from the incorrect application or implementation of EU law by a Member State.

2.2. Compliance Mechanisms’ Legal Basis

The compliance mechanism discussed in the previous chapter, the infringement procedures, has a firm legal basis in Articles 258-260 TFEU. However, the alternative procedures have no such Treaty basis, and their origins must be sought in secondary EU legislation.

The basis on which IMS, SOLVIT and EU Pilot were founded is mainly located in Commission Communications. For SOLVIT, this was complemented by a (legally non-binding) Commission Recommendation in 2001, setting out the detailed operation of the national SOLVIT Centers, as well as the operation of coordination centers and the database. In March 2002, the Council in its turn endorsed the existence of the SOLVIT Centers by asking Member States to “take appropriate measures to ensure that the existing Coordination Centers take active part in the SOLVIT Network...”.

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There is thus no formal legal basis for the mechanisms, other than Article 17(1) TEU where the Commission shall “ensure the application of the Treaties ... [and] oversee the application of EU law”. The systems are seen as informal systems without the need for a formal legal basis, since all Member States are already under the legal obligation to implement and apply EU law correctly. Moreover, the three systems have no binding effect – if a Member State is unwilling to cooperate in these informal networks, they have the right to do so. The informal character of the procedures means that national or infringement procedures can still be started, regardless of the outcome of procedures under the alternative mechanisms.

However, since IMS, SOLVIT and EU Pilot are meant as informal procedures, they should not be used while formal proceedings are already underway. The infringement procedures, with their formal legal basis in Articles 258-260 TFEU and with enforcement capabilities including the Court of Justice imposing lump-sum or penalty payments, are of a different nature. Nevertheless, the principle of sincere cooperation, as laid down in article 4(3) TEU, holds true for all mechanisms. This means that the Member States have to take any measures appropriate to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the Union institutions. Cooperation with mechanisms such as SOLVIT or EU Pilot can be seen as one of such appropriate measures.

3. IMS

One of the cornerstones of the European Union is the internal market and the free movement of goods, persons, services and capital. To keep a check on progress by the Commission, the Council and the Member State with regard to the internal market, the IMS has provided the public and the Member States with twice-yearly reports since 1997. The origins of the IMS can be found in the Commission’s Communication on the Single Market Action Plan, where it stated that it would “regularly publish and draw to the attention of each Internal Market Council a “Single Market Scoreboard” containing detailed indicators of the state of the Single Market and of Member States’ levels of commitment to implementing the Action Plan”.

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As the name indicates, the IMS covers only EU law in the area of the internal market. The stated purpose of the IMS is to

first, offer a picture of the current state of the Single Market and secondly to gauge the degree to which Member States, the Council and the Commission are meeting the targets laid down in the Action Plan.\(^\text{11}\)

The IMS is therefore not officially meant to pressure Member States into complying with EU rules on the Single Market, but simply to show progress made by the Member States in this respect.

The information in these IMS reports covers, for example, statistics on the implementation of directives (per directive and per MS), on (in)correct transposition, and on non-communication as well as on infringement procedures concerning breaches of single market rules. The aim of these reports is not only to provide information, but also to induce compliance with EU law through a certain amount of peer pressure (the influence and persuasion exercised by one’s peers) and naming and shaming. The only actors involved in the IMS system are the Commission and the Member States, but the impact of the IMS reports can only be achieved by dissemination of the rankings through channels such as the press. Public naming and shaming, also in the eyes of the other Member States, adds greatly to the pressure felt by the Member States.

The scoreboard (or \textit{scareboard} as it has also been called)\(^\text{12}\) provides much detailed information and the rankings of Member States on most fronts. As the Commission itself stated:

\begin{quote}

The purpose is to put greater pressure on states by way of transparency, which is one of the keys to getting member states to implement directives. It means that a member state not only sees its own position, but also that of other member states, and obviously member states do not like to see themselves at the bottom of the list.\(^\text{13}\)
\end{quote}

An example of how Member States are ranked in the IMS reports can be seen in Figure 4.2, which shows the implementation delays in months for each Member State, and any changes from the previous IMS report. It can be observed, for example, that Belgium’s average transposition delay increased around three months


\(^{13}\) Tallberg (2002), p. 63.
PART II EU Compliance Mechanisms

since the previous report, while Sweden almost halved its average delay during the same period. 14

Another example from the IMS is shown in Table 4.1 below. This table shows at a glance which states are performing well, and which are not. Germany, for example, performs particularly well according to the scoreboard for 2012 from which the table was taken. All indicators for this Member State show numbers either on or below EU average, while Belgium, for example, performs quite badly with five of the eleven indicators mentioned above average. 15

A component that was recently added to the IMS is Member States’ success stories. These stories show how some Member States have been able to reduce their transposing deficit, or how they are planning to handle an existing negative situation. They relate, for example, how Portugal was able to reduce its transposition deficit in 2010 due to the introduction of ‘SIMPLEGIS’. This program was established to simplify legislation, make laws more accessible and improve law enforcement. 16 As part of this program, the government set up a “Regulations Systems Control”, an automatic and centralized control of the transposition of EU directives. This system registers the ministry and person responsible for draft-

14 Figure taken from European Commission (2012) Internal Market Scoreboard 25.
15 Interestingly, Belgium shows not only the smallest decrease in infringement cases, but also has the second highest absolute number of infringement proceedings pending. Half of these cases are related to taxation issues.
### Table 4.1 - Internal Market Enforcement Table

<table>
<thead>
<tr>
<th></th>
<th>BE</th>
<th>BG</th>
<th>CZ</th>
<th>DK</th>
<th>DE</th>
<th>EE</th>
<th>IE</th>
<th>EL</th>
<th>ES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Transposition deficit</strong></td>
<td>1,90%</td>
<td>0,70%</td>
<td>0,60%</td>
<td>0,30%</td>
<td>0,90%</td>
<td>0,20%</td>
<td>0,30%</td>
<td>0,50%</td>
<td>0,40%</td>
</tr>
<tr>
<td><strong>Progress over the last six months (change in the number of outstanding directives)</strong></td>
<td>-3</td>
<td>-3</td>
<td>-18</td>
<td>-3</td>
<td>-3</td>
<td>-10</td>
<td>0</td>
<td>-10</td>
<td>-8</td>
</tr>
<tr>
<td><strong>Number of directives two years or more overdue</strong></td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Transposition delay on overdue directives (in months)</strong></td>
<td>11,3</td>
<td>10,2</td>
<td>14,9</td>
<td>7,4</td>
<td>10</td>
<td>10,3</td>
<td>7,9</td>
<td>8,2</td>
<td>6,9</td>
</tr>
<tr>
<td><strong>Compliance Deficit</strong></td>
<td>0,90%</td>
<td>0,90%</td>
<td>0,70%</td>
<td>0,60%</td>
<td>0,70%</td>
<td>0,60%</td>
<td>0,60%</td>
<td>1,30%</td>
<td>0,70%</td>
</tr>
<tr>
<td><strong>Development of infringement cases since Nov. 2007</strong></td>
<td>-3%</td>
<td>NA</td>
<td>-35%</td>
<td>-31%</td>
<td>-31%</td>
<td>-57%</td>
<td>-56%</td>
<td>-23%</td>
<td>-45%</td>
</tr>
<tr>
<td><strong>Number of pending infringement cases</strong></td>
<td>64</td>
<td>25</td>
<td>20</td>
<td>18</td>
<td>44</td>
<td>9</td>
<td>26</td>
<td>68</td>
<td>62</td>
</tr>
<tr>
<td><strong>Average speed of infringement resolution (in months)</strong></td>
<td>34</td>
<td>24,6</td>
<td>31,9</td>
<td>30,7</td>
<td>29,7</td>
<td>20,1</td>
<td>33,7</td>
<td>24,3</td>
<td>29,3</td>
</tr>
<tr>
<td><strong>Early resolution rate</strong></td>
<td>18%</td>
<td>25%</td>
<td>6%</td>
<td>17%</td>
<td>17%</td>
<td>25%</td>
<td>20%</td>
<td>15%</td>
<td>21%</td>
</tr>
<tr>
<td><strong>Duration since Court’s judgments (in months)</strong></td>
<td>13,7</td>
<td>NA</td>
<td>NA</td>
<td>8,2</td>
<td>14,8</td>
<td>NA</td>
<td>23,1</td>
<td>17,9</td>
<td>21,8</td>
</tr>
</tbody>
</table>

1 Partial figure taken from IMS 25, p. 26. Light grey indicates numbers below EU average; medium grey around average (+/- 10%), dark grey above average.
ing the transposition, sends out early warnings for milestones to be reached and improves monitoring in order to foresee and solve delays and other problems regarding transposition.¹⁷

The idea behind the sharing of this and other success stories is that they might serve as an example for other Member States still struggling with transposing EU legislation. This sharing of “best practices”, originally applied in firms and businesses, has long been used successfully in international organizations to inspire and instruct Member States as to how one can most effectively tackle a certain problem.¹⁸ The IMS has been thought to work quite effectively in inducing compliance with Union law on the internal market through its peer pressure and shaming effects.¹⁹ The Commission itself, in any case, is quite positive about the effectiveness of the system.²⁰ Whether this is corroborated by the analysis in the current research will be examined in the final sections of this chapter.

4. SOLVIT

One of the ways in which the Commission has tried to solve problems that arise for individuals and businesses from the misapplication of internal market law is SOLVIT. This project, which started in July 2002, was set up “to help citizens and businesses when they run into a problem resulting from possible misapplication of Internal Market rules by public administrations in another Member State”.²¹ SOLVIT is officially an alternative informal dispute settlement system, in which the Commission is generally not involved. The idea is that through SOLVIT, mis-

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¹⁷ Ibid.
¹⁸ One example of an organization which has institutionalized the idea of best practices is the Organization for Economic Cooperation and Development (OECD). For some examples of the use of best practices in the OECD, see e.g. OECD, ‘OECD Best Practices for Budget Transparency’ (2001) 1 (3) OECD Journal on Budgeting, or the results from the best practices roundtables on competition policy, found online at http://www.oecd.org/document/38/0,3746,en_2649_201185_2474918_1_1_1_1,00.html.
¹⁹ See e.g. Pagani (2002). This article compares the OECD peer review process with soft mechanisms in other organizations, among which the IMS.
²⁰ See e.g. the IMS Scoreboard IMS 25.

In fact, an earlier version of SOLVIT existed from 1997, but was deemed ineffective by all concerned. The Commission therefore proposed a newer, enhanced version of this network, effective as of 2002, and confirmed by a Commission Recommendation setting out the principles for the system (Commission recommendation of 7 December 2001 on principles for using “SOLVIT” - the Internal Market Problem Solving Network).
application of EU law is remedied in an informal, quick and effective manner. Instead of filing a complaint with the Commission, citizens and businesses (who, as stated before, account for almost 50% of all new infringement procedures) can take their information inquiries and problems directly to the Member State.

However, the Commission coordinates the network, provides the database facilities and if necessary helps to speed up the resolution of problems. The Commission also sometimes relays a complaint it has received itself to SOLVIT, if it thinks the problem could be solved in a satisfactory manner without its own involvement. The Commission thus uses its discretionary powers to not start infringement procedures under Article 258 TFEU by forwarding certain cases to a non-treaty based system. However, the Commission always remains involved in the procedures to verify whether the offered solutions are in compliance with EU law. Moreover, the Commission always retains its prerogative to start an Article 258 procedure if it considers this necessary (as stated by the Commission: “All proposed solutions should be in full conformity with Community law. The Commission reserves the right to take action against Member States whenever it considers that this may not be the case. The SOLVIT Centre is thus not to be seen as a replacement of the 258 procedure”).

Since the Commission is still there, albeit in the background, Member States may be more inclined to find solutions to the problems quickly than when citizens come to them without recourse to SOLVIT – even more so since the Commission can still start an infringement procedure when it is deemed necessary.

The scope of SOLVIT is narrowed to Internal Market issues only, and excludes any non-communication cases. Obviously, the complainant plays a very important role in this system. Contacts are directly between the Member State and the complainant as well as between Member States, while the Commission plays a more supporting role. The most important areas where complaints were filed in 2010 were: Social Security (471 cases – 34%), Residence rights (306 cases – 23%) and the Recognition of professional qualifications (220 cases – 16%).

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22 Commission recommendation of 7 December 2001 on principles for using ‘SOLVIT’ - the Internal Market Problem Solving Network, II(G)(1).
23 More on this later on in the chapter when discussing the interaction between the infringement and alternative procedures (section 8).
24 As stated earlier, non-communication cases account for over 30% of all infringement procedures. The Commission, however, has a separate system dealing with non-communication cases, where, once the deadline for implementation has passed, the procedure starts semi-automatically. The Commission verifies the measures taken in the Member States with regard to implementation every two months.
Briefly, the system is set up as follows: When an individual has a complaint concerning the application of internal market rules, she can lodge this complaint at the SOLVIT center of her own country (the country of which she is a national: the “Home” Center).\(^\text{26}\) The Home Center will check whether the problem does indeed concern internal market rules and whether all necessary background information is complete. The case will then automatically be forwarded through an online database to the SOLVIT center in the country where the problem occurred (the “Lead” SOLVIT Center). The two SOLVIT Centers will work together to solve the problem within a target deadline of 10 weeks. Given this short deadline, the SOLVIT centers are allowed to refuse cases that are very complicated, or involve issues of non-conformity of national law with EU law and require a change in national law or other implementing provisions (the so-called SOLVIT+ cases). These more law-based non-compliance cases would be too difficult to handle with informal means within ten weeks. However, many centers do sometimes accept these cases and are therefore able to also offer more structural solutions and not only solve the individual case at hand. Furthermore, the Commission intends to provide the possibility for SOLVIT Centers to solve such problems in a more structured manner.\(^\text{27}\) When cases are refused by the SOLVIT Centers, they are referred to the Commission.

In 2010, most cases were solved before the 10-week deadline, while only 7% of the cases remained unresolved within the SOLVIT system.\(^\text{28}\) Figure 4.3 shows the increasing importance of the SOLVIT system over the past six years.\(^\text{29}\)

\(^{26}\) The SOLVIT Centers are usually part of the Ministries of Economic or Foreign Affairs (with some exceptions, see http://ec.europa.eu/solvit/site/centres/addresses/index.htm for the locations of the Centers.

\(^{27}\) Respondent #1.

\(^{28}\) 2010 SOLVIT Report. Cases that are not resolved by SOLVIT can be referred to the Commission, however, the parties to the dispute can still always have recourse to the national court system. One example is Case C-68/12, Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s. [2013] not yet published. In this case the Czech and Slovak SOLVIT Centers could not agree on a solution to the dispute at hand. This prompted the complainant to start a case before the Slovak courts, which in turn referred the case to the CJEU for a preliminary ruling.

Chapter 4 Compliance Mechanisms in the EU

The biggest problem with the SOLVIT system is the number of cases submitted to the centers that are outside the SOLVIT competence. In 2009, 64% of cases submitted to SOLVIT were outside its remit. This adds significantly to SOLVIT’s workload, since all of these cases need to be examined in order to determine whether they should be handled by SOLVIT, and if not, to direct them to a more appropriate address. Interestingly, the number of new SOLVIT cases per year has increased from 180 in 2002 to almost 1400 in 2010. Moreover, its annual caseload

Figure 4.3: Infringement Cases Compared with SOLVIT Cases

At the time of writing this chapter, the infringement report for 2010 was the last publicly available where the relevant and comparable statistics were provided (2010 Infringement Report). The 2011 and 2012 reports do not include statistical annexes as had been provided in previous years. There is for example no information on how many of the received complaints led to the official opening of an infringement procedure (by sending a letter of formal notice), or in which stage of the procedures cases were closed (2011 Infringement Report; European Commission 30th Report on monitoring the application of EU law (2012) COM(2013) 726 final). This makes detailed comparison with earlier years based on these publicly available reports impossible. Also, the latest available SOLVIT report is from 2010, while limited additional data can be found in SOLVIT Evaluation 2011 and European Commission (2012) Making the Single Market deliver. Annual governance check-up 2011 (Luxembourg: Publications Office of the European Union).

30 2010 SOLVIT Report.
31 This problem may be solved in the near future. In 2008, the Commission published an action plan to help citizens and businesses better understand and make better use of their rights in the EU. The plan includes the setting up of a single contact point (a common Single Market Assistance Services webpage), where citizens will be helped directly, or referred to the instance (e.g. SOLVIT, Eurojus, Europe Direct Network) that may best serve them. This will ensure that many cases outside SOLVIT’s remit will not go to SOLVIT but directly to the appropriate service (European Commission Commission Staff Working Paper: Action plan on an integrated approach for providing Single Market Assistance Services to citizens and business SEC(2008) 1882).
PART II EU Compliance Mechanisms

has now surpassed the total amount of new infringement cases based on complaints in the area of the internal market, and at the end of 2010 stood at circa 1363 SOLVIT cases versus 244 infringement cases that were opened in the same area.32

SOLVIT does not have a direct influence on the infringement procedures. It should be seen as a complement to the official system, since it can filter out those cases that can be solved more quickly and easily than through the official procedures, and those cases that would probably have never gone beyond the administrative phase of Article 258.

Moreover, even though most centers do accept SOLVIT+ cases, that is, cases that require more structural solutions and could thus possibly better be dealt with under the infringement procedures, the total number of these cases is insignificant in comparison to the regular SOLVIT cases. However, given the (according to the figure above) decreasing number of new infringement cases based on complaints in the internal market, SOLVIT has probably been able to provide an effective alternative. A more detailed analysis of the effectiveness of the SOLVIT system follows below in section 8.

5. EU PILOT

EU Member States and Commission authorities are meant to work together to ensure understanding and application of EU law.33 However, in the case of the infringement procedures, this cooperation was never officially structured. The Commission nevertheless felt that, as the SOLVIT system had shown in the case of Internal Market rules, many of the implementation problems that citizens face regarding other areas of EU law could and should be solved quickly through increased initial information exchange and cooperative problem solving.34 This is why the Commission launched EU Pilot in April 2008 “to test increased commitment, cooperation and partnership between the Commission and Member States”.35 The project was first mentioned in a Commission Communication in

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32 This number includes all actual SOLVIT cases, thus excluding the 64% of cases that are outside SOLVIT's remit. The infringement cases are based on cases involving complaints concerning internal market issues, as a proxy for the same types of cases that would fall under SOLVIT.
33 As follows from e.g. Article 4(3) TEU: “Pursuant to the principle of sincere cooperation, the EU and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”
34 Commission Communication 2007. In fact, EU Pilot was meant to be a system similar to SOLVIT, working as its counterpart for non-Internal Market issues (respondents #1 and #4).
order to “resolve issues in a more timely fashion and to reinforce the handling and management of existing procedures”. The idea of the system is to provide solutions to problems arising in the application of EU law, to obtain quicker and better responses to enquiries for information, as well as to work more closely and less formally with the Member States. This method would help correct infringements of EU law at an early stage wherever possible, without the need for recourse to infringement proceedings.

In 2008, 15 Member States volunteered to participate in the test project. The way the system works is as follows. Either upon receiving a complaint or of its own accord, the Commission may decide that contact with a Member State would help in resolving the problem, or might provide useful information concerning the implementation or application of EU law. The issue and all other information the Commission has received will then be entered in the EU Pilot database. The complaint or enquiry will subsequently be examined by the Commission and forwarded to the EU Pilot Central Contact Point of the Member State concerned. The complaint will be accompanied by the questions as identified by the Commission. Once entered into the EU Pilot database, the Member State has ten weeks to send a reply, preferably providing a solution to identified problems. Again through EU Pilot, the Commission will be informed of the proposed solution by the MS, and will evaluate whether this solution is in conformity with EU law. If the Commission decides to accept the position expressed by the Member State it will subsequently inform the complainant of the action taken, and if the complainant does not respond within four weeks with new information, the case will be closed. If the Commission is not satisfied, it can ask for more information, reject the answer and inform the Member State that further action needs to be

37 Austria, Czech Republic, Denmark, Germany, Finland, Hungary, Ireland, Italy, Lithuania, the Netherlands, Portugal, Slovenia, Sweden, Spain and the United Kingdom. The project has now left the test phase and includes all Member States (2011 Infringement Report).
38 In fact, EU Pilot can be seen as an interactive database, where two parties (the Commission and the Member State) can exchange information on identified issues of EU law.
39 The Member State’s EU Pilot Central Contact Point is usually part of the State’s Ministry of Foreign Affairs, or another government office that occupies itself with European affairs (EU Pilot Evaluation Report 2010, pp. 2-4).
40 The issue, especially when based upon a complaint received from an individual or business, often needs to be rephrased to clearly identify the problem. To clarify the issue, or to receive a satisfactory answer or solution, the Commission will ask for more information or even more directly for a proposed solution to the identified problem.
taken, or – in case an infringement is detected – decide to launch an infringement procedure.\textsuperscript{41} In general, cases should be dealt with within 20 weeks.\textsuperscript{42}

The two areas where most questions and problems were entered into EU Pilot were Environment (36\%) and Internal Market (21\%), while 60\% of all cases were based on complaints, 20\% were enquiries, and 20\% were cases started on the Commission’s own initiative.\textsuperscript{43} Given the scope of EU Pilot, however, Internal Market questions that concern bad application and were not subject to any formal infringement proceedings should be forwarded to the SOLVIT network. In 2010 for example, of the 4035 cases entered into the Commission’s complaint handling system CHAP,\textsuperscript{44} 22 cases were forwarded to SOLVIT, and 686 to EU Pilot.\textsuperscript{45} By 2012, this number rose to 1405 new files opened in EU Pilot.

While EU Pilot is aimed at informally, quickly and effectively solving problems arising from the misapplication of EU law just like SOLVIT, it differs from that mechanism in two main respects. First, it does not cover issues of bad application of the law regarding the internal market (which is SOLVIT’s only subject). Second, the system works directly between the Commission and the Member States. The direct involvement of the Commission remains much greater, therefore, than in the case of SOLVIT where cases are handled between the respective Member State SOLVIT centers and the complainant. When citizens or organizations are willing to reveal their identity, EU Pilot contacts may be directly between the Member State and the complainant. However, a copy of the Member State response is always sent to the Commission, which remains involved at every step. When the complainant wishes to remain anonymous, all correspondence goes through the Commission. With SOLVIT, all contacts always directly involve the complainant. By eliminating the Commission step, so to speak, and opening more direct lines between the parties involved, the effectiveness of the problem-solving is probably increased.

However, given the less direct involvement of the Commission, it is unclear to what extent SOLVIT may induce compliance with EU law more effectively than under EU Pilot. It could very well be the case that through SOLVIT individual

\textsuperscript{41} If urgency is required, the Commission may decide to launch an infringement procedure right away, without going through the steps in EU Pilot. In 2012, 334 files were closed in EU Pilot by launching formal infringement procedures. Only two infringement procedures were started that had not gone through EU Pilot (2012 Infringement Report, p. 8).
\textsuperscript{42} Ibid., p. 7.
\textsuperscript{43} EU Pilot Evaluation Report 2010.
\textsuperscript{44} On CHAP see chapter 3, fn 39.
\textsuperscript{45} European Commission (2011) Reinforcing effective problem-solving in the Single Market (2011). More on the interaction between SOLVIT and EU Pilot below in section 6, where it is shown what improvements can be made to this interaction.
problems are solved while structural non-compliance remains, whereas under EU Pilot the solutions are scrutinized by the Commission who oversees compliance with EU law in general. One could argue that actual compliance goes further under EU Pilot than under the problem-solving mechanism of SOLVIT. On the other hand, with SOLVIT the Commission is not completely out of the picture, since it coordinates the network and helps speed up the resolution of problems when needed. Moreover, solutions under SOLVIT do need to be in conformity with EU law and the Commission is notified of them.

The Commission’s evaluation report from 2010 concluded that the EU Pilot system makes a positive contribution to answering enquiries and resolving problems. However, some problems may be pointed out. First, a solution to the problem may not be found, and the Commission will need to examine the matter along the lines of Article 258 anyway. Second, a number of Member States are hesitant to maintain direct contact with complainants, since they prefer an objective institution to mediate. Third, the results so far show that the system works well for some countries, but not so well for others – mostly due to the set-up of responsibility structures in the Member States. Fourth, some complainants were not informed of the existence of EU Pilot, and have complained they get answers from the Member States while they thought they were in contact with the Commission. Just like some Member States, complainants may prefer to be in contact with a neutral institution instead of with the Member State they complain about.

Some possible implications of the process may need further evaluation. First, if the complaint is not solved under EU Pilot, a 258 procedure may have to be initiated anyway. EU Pilot will in such cases thus merely have prolonged the 258 procedure, since none of the steps of the subsequent 258 procedure can be skipped. It would then have been faster to start the infringement procedures directly instead of going through the EU Pilot procedure. Nevertheless, had the EU Pilot procedure been successful, the problem would have been solved much more quickly than if it had gone through the lengthy and cumbersome infringement procedure, where moreover the role of the complainant would have been reduced significantly if not eliminated entirely. Furthermore, preliminary con-

46 Respondents #2 and #9.
47 Respondents #1 and #3. For SOLVIT, contact is always between the SOLVIT Centers, the complainant and the Home Center. The complainant does not contact the Lead Center directly, only through the Home Center.
48 The system does work in an anonymous matter; no private information will be divulged to the MS if not expressly authorized by the complainant.
49 Smith (2008).
tact in the form of the administrative letter was always made between the Commission and the Member State before an infringement procedure was officially started (the pre-258 phase).\(^{50}\) Thus, EU Pilot has institutionalized this part of the procedures and made them more efficient and transparent. Moreover, in cases of obvious infringement or with urgency, the EU Pilot phase can be shortened or skipped altogether. Seen in this light, EU Pilot has probably made the infringement procedures work more effectively.

Second, the Commission has outsourced its responsibility for dealing with complaints to precisely the entity that committed the infraction.\(^{51}\) However, this second point may also not necessarily be a problem. The Commission continues to be involved in the proposed solutions, and evaluates whether the complaint has been solved. Furthermore, given the hesitance of Member States to enter into direct contact with complainants under EU Pilot, the Commission often needs to play an even more active role. Furthermore, as said previously, an Article 258 procedure can still be initiated, thus involving the Commission to the full extent.

As mentioned above, the Commission’s evaluation report from 2010 concluded that the system makes a positive contribution by answering enquiries and resolving problems. Its second evaluation report indicates that the system makes an important contribution towards the effectiveness of the infringement procedures. Now that it has become an integral part of the procedures and any new possible cases that fall within its remit are entered into the system, it can be seen how this new way of handling cases has improved the speediness and transparency of the system. After the responses by the Member States, 68% of all cases handled in the system were closed without the need to launch infringement procedures.\(^{52}\) The amount of infringement procedures has declined over the same period of time, indicating that the introduction of EU Pilot may indeed have had a positive effect on the effectiveness of the procedures. The system makes it easier and more transparent for Member States to clarify and solve some issues that previously were left until the first steps of the infringement procedures. Moreover, the system has introduced an additional preliminary step, which has less of an official feel to it. The belief is that Member States are more inclined to respond to requests through this system than they were in the earlier system, where the

\(^{50}\) See chapter 3, section 2.2 on the preliminary, pre-258 phase.

\(^{51}\) Smith (2008), pp. 775-779.

\(^{52}\) 2012 Infringement Report, p. 7. Although this is over two thirds of all EU Pilot cases, it is a decrease from previous years. In 2011 the solution rate was 72.5% (ibid.), and in 2010 even 81% (2011 Infringement Report, p. 8).
Commission addressed such requests to the Member States through official letters. Figure 4.4 shows how EU Pilot works in practice.\footnote{Figure taken from EU Pilot Evaluation Report 2010.}

One important element is the position of the complainant under EU Pilot. The original expectation was that the complainant would be able to play a larger role in the new system than in the original infringement procedures. In prac-

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure4.4.png}
\caption{EU Pilot in Stages}
\end{figure}
tice this has not occurred to the extent expected. What EU Pilot has changed, nevertheless, is that it ensures the Commission will take action on complaints, that it will engage the Member State and produce an assessment of the Member State’s reply. Moreover, in some cases there is indeed direct contact between the complainant and the Member State. In this manner, complainants are now more able to influence the Commission’s decision-making process. Moreover, a means is now provided for complainants to activate processes of compliance dialogue between the Commission and Member States. As with SOLVIT, EU Pilot offers a channel for complainants to not only voice their complaint, but also to stay more actively involved throughout the procedure.

6. THE INTERACTION BETWEEN SOLVIT AND EU PILOT

As was mentioned before, the Commission is supposed to forward cases that fall under SOLVIT’s remit to that system. To this end, the Commission has established a few criteria to determine whether cases should be referred to SOLVIT or entered into the EU Pilot system, reproduced in Table 4.2. However, it has been pointed out that these criteria may be quite difficult to apply before the facts of the case are clear and have been analyzed to some extent, which is only done within the realm of the EU Pilot or SOLVIT systems. A decision on whether to enter a case in EU Pilot or forward it to SOLVIT is thus best taken by a cooperative effort of the systems at Commission level. However, interviews with those responsible within the Commission for both SOLVIT and EU Pilot have revealed that this cooperation may be insufficient. Moreover, national SOLVIT Centers have indicated that the two systems are not well linked, meaning cases are dealt with under the EU Pilot system that could have been dealt with more effectively under SOLVIT; that the criteria are not clear enough; cases are being entered into both systems simultaneously; cases that SOLVIT was not able to solve are subsequently not entered into EU Pilot or are entered into the system without taking into account the analysis and facts provided by SOLVIT. Nor do all national SOLVIT Centers cooperate with EU Pilot in the same manner, with some Centers

55 Ibid.
56 Respondents #1 and #8, and confirmed by the information in ibid.
not even being aware of any need to do so, while other Centers have organized regular informal meetings and exchange information with EU Pilot.  

57 It is thus clear that, although the scope of the two systems theoretically differs and no overlap should exist except in exceptional cases, in reality the two systems are often applied to the same cases. A greater interaction between the mechanisms should increase the efficiency of the systems, since they can then refer cases to each other, while concentrating on those cases that fall under their own remit.

7. THE CHARACTER OF EU COMPLIANCE MECHANISMS

Before the effectiveness of the described compliance mechanisms is discussed, it is important to determine the character of the different procedures. It was seen earlier that the infringement procedures have both a softer side (primarily seen in the informal, preliminary phase), as well as a hard side (with increasing hardness throughout the formal phase, with the judicial procedure and the

57 This information is all taken from ibid., where interviews were held with both Commission Officials as well as national SOLVIT Center employees.
possibility of imposing fines at the end). Moreover, an increase in the degree of hardness was detected over the past decades, given the introduction of sanctions, a decrease in the room for discretion of the Commission and the introduction of fast-track elements in the procedures. This current section will comment on the degree of softness of the alternative mechanisms, as well as their relation to the infringement procedures.

7.1. Degree of Softness

To show how the alternative systems interact with the infringement procedures and each other, it is possible to rank them in terms of ‘softness’, as shown in Figure 4.5 below.

The IMS is a scoreboard, a mere presentation of facts in such a manner that it might induce compliance through peer pressure. SOLVIT is a more interactive system, where all actors actively look for solutions to problems that have arisen. Some pressure can be exerted by the SOLVIT centers, especially with the threat of Commission involvement in the background. It is obvious from the success stories quoted on their website and in their yearly reports that most cases concern ignorance of EU law or unwillingness to apply it on the part of national authorities. SOLVIT, by providing accurate information on EU Law, is a great help in this regard. EU Pilot, although on paper it looks very similar to SOLVIT, has in fact become a replacement of the preliminary phase of the infringement procedures.
This means that the involvement of the Commission and the threat of infringement procedures are no longer in the background, but a logical next step if EU Pilot does not provide a solution, thereby lowering the threshold between the soft and the hard phases. As was remarked earlier, 68% of all cases are closed during this informal stage. In terms of softness, therefore, it is clear that IMS is the softest system with no enforcement capabilities, while EU Pilot is probably the least soft, given its function as a portal or a first step towards the infringement procedures.

The infringement procedures themselves also go through stages of softness, where the formal phase gets less soft with each passing of a deadline within the phase, and the judicial phase is objective and hard especially given the possibility of imposing sanctions.

7.2. Alternatives or Complements?

The fact that all systems involve the same actors, and some cover the same areas of EU law, does not mean they work as mere alternatives. They work as complementary systems, still leaving room for infringement proceedings if unsuccessful. On the other hand, once infringement proceedings have been started for a certain issue, the other systems are no longer available. Infringement proceedings thus overrule the workings of the other mechanisms. It is in the Commission’s own interest, however, to let the complementary systems handle the issues first, given their effectiveness in terms of cost and time reduction when they are indeed able to solve the problem. Moreover, many of the issues entered into SOLVIT or EU Pilot would never end up as infringement procedures anyway. One example of such a case is one of SOLVIT’s 2009 success stories in their yearly report, where SOLVIT discovered that a Czech national employed in a Dutch company did not get Dutch sick pay after falling ill at the end of his working period because the Dutch health authorities had paid the money into the wrong bank account. Now this case, of course, would never have led to an infringement procedure.

The example just given also exemplifies how the influence of the alternative mechanisms on the infringement procedures can either be positive or neutral. Positive, since they work as complementary systems, with the same aim, scope and actors as the infringement procedures. They thus might reduce the number of infringement procedures started in these areas – especially since the scope of

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59 The same holds true if national procedures have been started concerning the same issue.
SOLVIT and EU Pilot is officially the misapplication of EU law, which represents 73% of all infringement procedures. A neutral influence, however, since the nature of the issues brought to SOLVIT or EU Pilot may differ from those subject to infringement procedures. First, since SOLVIT or EU Pilot complainants are not the same as those who would have brought the case in question to the Commission. Second, since the Commission has complete discretion in whether or not to start or continue infringement procedures. Given the Commission’s time, budget and political considerations, it probably would not have made many SOLVIT or EU Pilot-type cases the subject of infringement procedures. The next section determines how the different mechanisms interact in reality, and how effective the alternative mechanisms therefore are in terms of diminishing the number of infringement procedures.

8. THE INTERACTION WITH THE INFRINGEMENT PROCEDURE

Now that the previous sections have shown how the different systems work and what place they occupy in the EU legal system, a preliminary investigation can be made into how these mechanisms interact. The three alternative mechanisms discussed above are meant as alternatives or complements to the infringement procedures. Alternatives, since complainants have the option of going to SOLVIT or EU Pilot in order to find a solution to their problem more quickly and effectively, instead of making their issue the subject of a possible infringement procedure. Complements, since the IMS, SOLVIT and EU Pilot are systems that work alongside the infringement procedures to induce Member State compliance with EU law. Infringement procedures can still be commenced at any time at the discretion of the Commission.

The previous section showed how the aim of all mechanisms is ultimately the same: achieving compliance with EU law by the Member States. To see how effective the alternative mechanisms are in terms of achieving compliance, the number of infringement procedures opened yearly could be used as a proxy. To thus determine whether these newer systems have indeed i) had any influence on the infringement procedures, and ii) attained their goals of leading to quick and effective problem-solving in the EU, some of the statistics available on the four systems will be examined here.

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60 2009 Infringement Report.
61 As compliance is difficult to measure as such, the number of infringement procedures is often used as a proxy, see e.g. Börzel (2001).
Figure 4.6 below shows the number of new cases opened each year under the different mechanisms. For the IMS, since no actual cases are handled, the number of non-communication cases was taken as a proxy, since this is the main target of the IMS scoreboard.

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63 Unfortunately, the data needed to make an accurate figure were not available. It was only from 2001 onwards, that the Commission has provided data on the infringement procedures by sector as well as by origin of the procedure. Previous data do not provide this information by sector, only on an aggregate basis. Moreover, the data provided by the Commission in its infringement reports are not presented in any consistent manner. The publicly available data for 2011 and 2012 are not comparable to earlier years, due to this inconsistent presentation (see supra fn 28).
8.1. Some Data on the Infringement Procedures and Alternatives

To ascertain what influence the alternative systems have had on the infringement procedures, a start is made by taking a look at the historical data regarding the infringement procedures. Figure 4.7 below shows the effects of the introduction of the three different systems that are discussed here: IMS, SOLVIT and EU Pilot. This figure shows the infringement procedures started between 1995 and 2010 in all areas of EU law. The effects are not that obvious. However, without wanting to draw any conclusions on causality, one can see the following happening in this figure.\(^64\)

**Internal Market Scoreboard** – After the introduction of IMS (1997), the number of infringement procedures due to non-communication by Member States went down slightly for a while. The IMS provides information on the implementation of directives and the number of infringement procedures. It could be that the peer pressure induced by this system has led Member States to address late implementation of directives and thereby prevented the start of infringement procedures.

**SOLVIT** – After the introduction of SOLVIT in 2002, the number of cases started based on complaints by EU citizens went down. This downward trend is continued until 2010, the last year for which data are available.\(^65\) Since SOLVIT is in-

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64 In making these remarks, any changes such as the enlargement of the Union in 1994, 2004, and 2007 have not yet taken into account.

65 At the time of writing this chapter, the infringement report for 2010 was the last publicly available where the relevant and comparable statistics were provided (2010 Infringement Report). As explained above, the 2011 and 2012 reports do not include statistical annexes as had been provided.
tended for individuals and companies to solve their complaints through use of the SOLVIT system, this could be explained by the fact that the introduction of the SOLVIT system has led to fewer complaints by individuals to the Commission directly.

**EU Pilot** – Since the data are currently available only until halfway through 2011, no strong conclusions on the influence of the EU Pilot system (2008) can be made as yet. Moreover, during the first year of the project, only 15 Member States were involved in the EU Pilot project. Based on the little data that is available, the observation can be made that the number of cases based on complaints as well as the number of non-communication cases have gone down drastically, while cases on the Commission’s own initiative show almost no change. The reduction of the number of infringement procedures based on complaints is what would be expected to happen, given the purpose of the EU Pilot system. Why non-communication cases have gone down cannot be explained by the introduction of the new system. This effect can possibly be explained by the distortion caused by the EU enlargement in 2007 from 25 to 27 Member States, causing a rise in non-communication cases in that year, and a subsequent decline after the new Member States had time to adapt to the new legislation. A similar effect is seen with the previous enlargement in 2004.

8.2. First Distortion: EU Enlargement

One obvious factor influencing the statistics for the infringement procedures is the number of EU members. Most notable in the above figure is the influence of the three EU enlargements (1994, 2004, and 2007). Since all new Member States had to accept and effectively implement the *acquis communautaire* on accession, it is not surprising this implementation would lead to a higher number of infringements of EU law in the years following accession.

Figure 4.8 below therefore shows the same analysis as was made above, but only for EU-15, thereby eliminating the effects of EU enlargement. In the figure the same effects can be seen, but somewhat more explicitly, as seen in Figure 4.7.

We still see a temporary decrease in the number of non-communication cases after the introduction of IMS, as well as a large, continual decrease in the number of cases based on complaints after the introduction of SOLVIT and EU

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in previous years, making detailed comparison with earlier years based on these publicly available reports impossible (see *supra* fn 28).
PART II  EU Compliance Mechanisms

Pilot. The large peaks in 2004 and 2007 have now disappeared. Instead, three new peaks in procedures can be observed: 1996, 2000 and 2003, corresponding to three peaks in cases based on non-communication in the same years. These types of cases therefore seem to be the most volatile of the three. Cases detected by the Commission remain more or less stable, while cases based on complaints do fluctuate, but not nearly as much as non-communication. This anomaly will be discussed later on.

8.3. Internal Market

Given the lack of data on the EU Pilot system due to its novelty, it would be more interesting to look at IMS and SOLVIT in particular in more detail. These are both systems that are targeted for legislation in the internal market area, so any ef-
ffects of these mechanisms should be magnified when internal market data alone are looked at. Figure 4.9 below shows the results for that analysis.

This figure only shows EU Pilot and not the IMS. Unfortunately, the data needed to make an accurate figure for IMS and SOLVIT together are not available. It was only from 2001 onwards that the Commission provided data on the infringement procedures by sector as well as by origin of the procedure. Previous data do not provide this information by sector, only on an aggregate basis. From Figure 4.9 can be drawn only the conclusion that in 2004 there was a notable increase in the number of non-communication cases, which could well be explained by the EU enlargement in the same year. It is also seen that the number of cases based on complaints from individuals has gone down steadily since 2002, the time of the introduction of the SOLVIT system. However, this does not occur in such a distinct manner as was expected, given the system’s aim and scope. Nevertheless, given the fact that the number of cases based on own-initiative or on non-communication has remained relatively stable or even gone up (when the spike in 2004 is left out) between 2001 and 2009, while the cases based on complaints have diminished, this is an interesting result.

Furthermore, a sharp decline can be observed in the number of cases based on complaints after 2008. An explanation for this may be found in the introduction of EU Pilot. Although the system is not meant to target all Internal Market issues, it does serve as a sort of signposting service. It was seen earlier that in the first year of EU Pilot’s existence, 21% of all cases concerned Internal Market cases. If cases concerning bad application are submitted to EU Pilot, these are forwarded to the relevant SOLVIT center. The amount of cases forwarded to SOLVIT, however, is negligible. Moreover, if these complaints concern, for example, non-conformity of national legislation with EU legislation, they do fall within the scope of EU Pilot, hence explaining the 21%. Possibly, the handling of these types of complaints through EU Pilot explains the decline in Internal Market infringement cases based on complaints.

8.4. Second Distortion: Number of Directives

The difficulty with basing any conclusions on the figures above lies in the fact that other elements apart from the introduction of the compliance mechanisms may cause any and all of the changes observed. The distortion caused by the two EU enlargements during the course of the observations has already been men-

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tioned and accounted for. However, another problem is the number of directives that need to be implemented in the Member States. The larger the number of directives, the larger the number of possible infringement procedures, especially around the time of the transposition dates. This might explain the peak observed in the year 2003. In all three figures above, a significant increase in the number of cases based on non-communication by the Member States could be seen – the number more than doubled in all three figures. When Figures 4.7 and 4.9 are looked at, this could be interpreted as caused by the upcoming enlargement of the EU, since the upward trend continues in 2004 as well. However, Figure 4.8 shows that it is in fact a single occurrence in 2003 only for EU-15.

When a closer look is taken at the underlying data, the cause of this anomaly still cannot be determined: While the relative number of instances of non-communication went down from the year 2002 to 2003, the absolute amount of non-communication cases (the number of directives for which the Commission had not been notified of implementing measures before the transposition deadline) also went down, but only marginally. The fact that in percentages the Member States performed much better than in absolute numbers is explained by the total

![Figure 4.10: Absolute Non-Communication 2002-2003 (number of directives)](image)

![Figure 4.11: Relative Non-Communication 2002-2003 (percentage of directives)](image)
number of directives that were to be implemented in the respective years by the Member States. This number went up from a total of 1585 in 2002 to 2553 in 2003.

The figures below show the difference between non-communication cases in numbers (Figure 4.10) and percentages (Figure 4.11) for the Member States. As is clear from these figures, the number of non-communication cases, in absolute as well as in relative numbers, has gone down from 2002 to 2003. Why then, when in fact the Member States performed better in 2003 than in 2002, had the amount of infringement procedures based on non-communication almost doubled?

In order to find the reason for the dramatic increase in infringement procedures in 2003, the areas of (then) Community law that formed the basis for the procedures need to be examined. Figure 4.12 shows where the differences can be found. In 2003, the number of infringement procedures based on non-communication more than doubled in the area of Health and Consumer Protection as well as the Internal Market, and more than tripled for Energy and Transport. The increase in these three areas accounts for almost 70% of the total increase of cases between 2002 and 2003.

There were 43 directives in the area of Health and Consumer Protection with a transposition deadline in 2002. For 23 of these 43 directives, infringement procedures were started. In 2003, there were 44 directives in the same area with a transposition deadline in that year. Of these, 30 gave rise to infringement procedures. However, for a further 9 directives with a transposition deadline in 2002, infringement procedures were also started in 2003. These directives all had a transposition deadline in November or December 2002. This is an unusual number of directives with a transposition deadline so close to the end of the year, with the effect that for 2002, only 23 directives led to the start of infringement
procedures, while in 2003, 39 directives had the same effect. If the earlier mentioned 9 directives with an infringement procedure in 2003 had had a transposition deadline earlier in 2002, the numbers would have been more equal: 32 in 2002 and 30 in 2003. If it turns out that the same facts hold true for the other areas where infringement procedures were started, this would explain the one-time anomaly in 2003.

As this detailed investigation of the 2003 peak has shown, it is very difficult to base conclusions on the mere observation of data concerning the infringement procedures. This analysis offered one possible explanation for a certain anomaly, without knowing for sure whether this is true. The next paragraph will therefore discuss what these observations can tell us and what they cannot.

8.5. Third distortion: Data Imperfections

The previous paragraph has shown that no clear-cut answers can be found by casual observation of the available data. The statistical analysis has shown that some observations can be made based on aggregate data. When the data for EU-15 only were analyzed, it was possible to filter out some of the interference caused by EU enlargement. However, internal market data for EU-15 alone could not be examined, since the information is not freely available on that level. The data for the internal market for all EU members, theoretically interesting as this is where you would most likely see any effects of the IMS and SOLVIT, were available from 2001 onwards only. Moreover, the figure revealed no real difference between all sectors and the internal market. Furthermore, when the attempt was made to determine what caused certain anomalies in the data, even more confounding evidence was found, due to the lags between non-communication and the actual start of infringement procedures. An additional obstacle was encountered in the way the statistical information is provided by the Commission in its yearly infringement reports. For the purpose of the above analysis, data were only comparable between 2001 and 2010. In the years outside that time-period, the statistics were either presented in a different manner, or in less detail.\(^{67}\) Some of the problems are thus caused by the way the available data are presented by the Commission, while other problems stem from practical issues such as time lags and Commission discretion. Nevertheless, two conclusions can be drawn at this time.

First of all, there is no obvious statistical link between the two types of mechanisms. This means that the alternative mechanisms probably should be seen

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\(^{67}\) See for example supra fn 28 or fn 63.
as complementary systems alongside the infringement procedures. The SOLVIT program, for example, is frequently used and has more respondents each year. The yearly number of SOLVIT cases is now almost equal to the amount of infringement procedures based on complaints. Nevertheless, although the number of infringement procedures based on complaints has gone down over the years since the introduction of SOLVIT, this has not happened to the extent expected, given the success of SOLVIT.

If SOLVIT were an actual alternative to the infringement procedures, this could mean that it would be equally successful without their existence. It is highly probable, however, that the remaining possibility of an infringement procedure serves as an incentive for the Member States to deal with complaints through SOLVIT to prevent an infringement procedure (which would be much more time consuming and costly). On the other hand, the Commission established the SOLVIT network because it does not have the time or budget to have all complaints lead to an infringement procedure. The Commission, as Guardian of the Treaties, therefore also has an incentive to have as many complaints as possible solved through cost-reducing SOLVIT-type mechanisms. This trade-off obviously also plays a role in the interaction between the systems, but does not show as such in the data.

On the other hand, if the alternative mechanisms did not exist, more complaints would be made to the Commission. The Commission has only limited resources, and would thus have to prioritize even more than it already does. This would leave a greater opportunity for non-compliance with EU law by the Member States, since the probability of getting caught diminishes. This is of course a marginal issue, but does play a role in the investigation.

Second, even if a firm link between the two types of mechanisms could be established, the use of the systems and the number of procedures are no indication of absolute compliance with EU law. Due to the outlined inconsistencies in the reported data and given Commission discretion, not to mention the fact that not all actual infringements are detected, the reported number of infringement procedures is no reliable indicator for compliance. However, it can say something about relative compliance (sectoral, over time, or between countries). Since any effect of the alternative mechanisms on the infringement procedures is necessarily relative – the effectiveness of the infringement procedures before and after the introduction of an alternative, for example – this is not a real problem. The next section will analyze the three alternative systems from the viewpoint of the compliance model developed in chapter 1.
9. EFFECTIVENESS

In chapter 2.1 four steps were formulated that help to determine the effectiveness of compliance mechanisms: A: the goal, B: the compliance, C: the effectiveness, and D: the comparison. As in the previous chapter, steps A, B and C will briefly be examined here, while D will be addressed in more detail for all mechanisms combined in the final comparative chapter of this thesis.

9.1. The Goal of the Compliance Mechanisms

The goals of the compliance mechanisms differ for all three. The aim of the IMS is to offer an overview of the state of the Single Market and the degree to which Member States have implemented measures targeting the Single Market. It intends, through naming-and-shaming and peer pressure, to induce compliance with Internal Market rules. SOLVIT then aims to help citizens and businesses when they run into problems resulting from possible misapplication of Internal Market rules by public administrations in another Member State. EU Pilot in its turn is aimed at providing solutions to problems arising from the application of EU laws and obtaining quicker and better responses to enquiries for information. It can be seen as a replacement of the first, informal step of the infringement procedures, targeting all areas of EU law, except those covered by SOLVIT – unless SOLVIT has been unable to solve the problem and referred the case (back) to the Commission.

The goals of the different procedures are therefore not the same. The IMS shows the rate of transposition of Internal Market directives, as well as the progress concerning infringement procedures in the same area. By showing detailed information on these topics, it aims to induce compliance with Internal Market rules through naming-and-shaming and peer pressure. Its goal is to increase compliance by Member States with EU law in this area. SOLVIT targets the same area (the Internal Market), but its aim is not to increase compliance as such, but rather to help citizens and businesses when they encounter problems. The goal is thus not to reach general compliance (except in some exceptional cases in SOLVIT+), but rather compliance vis-à-vis individuals and businesses. Reaching compliance in general is rather a collateral gain than a target as such. EU Pilot, then, is aimed at everything not covered by SOLVIT, and as a preliminary step in the infringement procedures is primarily targeted at inducing compliance by Member States.
9.2. Compliance

As was done in the previous chapter for the infringement procedures, four compliance-related questions are asked here regarding the Member State obligations, the character of these obligations, the definition of non-compliance and the causes of non-compliant behavior.

Expected behavior
The first question asks which obligations Member States are expected to adhere to. These obligations are the same as for the infringement procedures, although they are nowhere formally stated. The three alternative procedures target the obligations under the Treaties, although they are narrowed to those obligations falling under the Internal Market only for IMS and SOLVIT, and specifically everything except the Internal Market (for the most part, excepting non-communication and some other cases) for EU Pilot.

Hard or soft obligations
The second question pertains to the character of these underlying obligations. Again, as with the infringement procedures, the underlying obligations are of a hard character only. Soft law can never be binding in Court, and thus also cannot fall within the scope of SOLVIT and EU Pilot. It could potentially fall under IMS, but in practice IMS targets the transposition of directives and the progress concerning infringement procedures, and therefore also those obligations that are hard.

Actual behavior given the element of discretion
The third question concerns the determination of non-compliant behavior – when is an EU Member State non-compliant? It was concluded that the target of SOLVIT is problem solving and not compliance as such. However, it is the non-compliant behavior of Member States that leads to the problems that SOLVIT aims to solve, and therefore indirectly also is a target of SOLVIT. So when, under these three mechanisms, is a Member State non-compliant? Under EU Pilot and IMS this is the same as for the infringement procedures: when the Commission believes a Member State may not be compliant. Under SOLVIT, non-compliant behavior exists when an individual or business encounters problems due to the misapplica-
tion of internal market rules and this misapplication is recognized by the SOLVIT Centers. There are thus two steps here: 1. An individual or business encounters problems; and 2. These problems are seen as caused by the misapplication of internal market rules. Only then, under the remit of SOLVIT, is a Member State non-compliant. This is therefore a very narrow scope, but one which still leaves room for discretion, especially in the way the problem is solved. Perfect compliance is not demanded: SOLVIT is aimed at solving problems – even if a problem can be solved in a particular case, a Member State can still be in non-compliance with EU law. However, since the Commission always remains part of the system, it is still able to weed out those cases where non-compliant behavior remains a problem, either by referring it back to EU Pilot or the infringement procedures directly.

**Intentional or non-intentional non-compliance**

The last compliance question refers to the underlying reasons for non-compliant behavior, whether it concerns intentional or unintentional non-compliance. For IMS and SOLVIT, it does not really matter what the underlying reasons are. For IMS only the state of play at the time of printing of the scoreboard is interesting. It is often pointed out what the underlying reasons may be for Member States lagging behind concerning the transposition deficit for example, but this has no influence on where the Member State is placed on the Scoreboard. For SOLVIT, theoretically all that matters is that the problem is solved for the individual or business concerned within the set deadline. Knowing the underlying reasons may sometimes help to solve the problem, but has no influence on the application of the system. On the other hand, if there are underlying reasons for the non-compliance that need to be addressed before a problem can be solved, these reasons do play a role in solving the problem. However, the entire purpose of SOLVIT is to solve problems through managerial-type efforts without recourse to enforcement. It is thus a very effective way to efficiently remedy unintentional non-compliance. Sometimes it is not possible to solve the problem under SOLVIT precisely because of the underlying reasons, and the case needs to be referred to the Commission in that case (or is at times handled as a SOLVIT+ case).

For EU Pilot on the other hand, this is quite different. EU Pilot has become the first, informal step in the infringement procedures – meaning the part of the procedures that is the most managerial in character. Here discussions, negotiations, consultations, dialogue, information-sharing and so on are very important, and do take into account the underlying reasons for non-compliance in so far as to help the Member States in reaching compliance without recourse to the harder steps of the procedures.
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When the four basic steps towards compliance are examined (prevention, monitoring, legal framework and sanctions), a picture emerges that is very different from the complete front side of the pyramid for the infringement procedures. The last two steps (a legal framework and sanctions) do not appear on these sides of the pyramid, except maybe through referring cases to the infringement procedures themselves. On the other hand, the steps of prevention and monitoring do play an important role. Prevention is especially visible for the IMS, where the aim is to induce compliance with EU law without recourse to the infringement procedures through naming-and-shaming and peer pressure. EU Pilot, as the first, informal step of the infringement procedures, also aims to prevent the formal steps of the procedure by trying to remedy non-compliance in this first stage. Monitoring is also visible with these procedures, but, as with the infringement procedures, the reliance on citizens, businesses and other players from outside the EU institutions is significant. SOLVIT acts only in response to problems brought to it by citizens and businesses, while EU Pilot in its turn relies in great part on the same sources. The IMS, then, is aimed at the monitoring of states, showing who lags behind and who are the frontrunners, showing all actors which are the Member States with the largest problems in this area.

9.3. Conclusions on Effectiveness

We have seen that in contrast to the infringement procedures, the alternative procedures use managerial techniques alone to induce compliance with the underlying hard obligations. There is in fact no enforcement side to these alternative mechanisms. Moreover, the underlying reasons for non-compliance play a greater role than in the infringement procedures, especially with EU Pilot. It needs to be kept in mind, however, that the infringement procedures, with their hard enforcement side including judicial procedures and the possibility of sanctions, are always looming in the background. All cases of non-compliance targeted by the alternative mechanisms can become the subject of the official infringement procedures at any time. To speak in pyramid terms: The case can always jump from the three alternative sides to the front side of the pyramid. Since Member States know this, it is likely that this influences the effectiveness of the alternative procedures and vice versa.

Now, how effective are these alternative procedures, or phrased differently: To what extent do these procedures reach the goals they set out to achieve? SOL-
VIT, although not yet very well known among its target group,\textsuperscript{68} is quite effective, given its ability to solve the problems that are brought to it mostly within the set deadline, and to the satisfaction of its clients. SOLVIT officials themselves believe the system to be effective. On the SOLVIT website for example, they are proud of their “effective problem solving in Europe”. The system is probably quite effective in what it aims to do (and also probably more so than through the infringement procedures), solving individual complaints, given a solution ratio of over 80%.\textsuperscript{69} Moreover, the users of the system (individuals, businesses as well as the Member States) perceive the system as functioning effectively. This feeling of effectiveness is strongly linked to the system’s success rate as well as its ability on average to solve problems within the deadlines.\textsuperscript{70}

The IMS, in its turn, is quite effective in showing the Member States and other actors concerned the state of the Single Market, which is its official purpose. What exactly its effect is on Member State compliance remains uncertain, however, since peer pressure and naming-and-shaming work beneath the surface, parallel to other developments. It remains unclear, therefore, whether for example compliance by Member States who lagged behind on previous scoreboards has improved due to the fact that they were shown as laggards on the scoreboard, or due to other reasons.

The effectiveness of EU Pilot can be measured to some extent by looking at the percentage of cases closed in EU Pilot without referral to the formal parts of the infringement procedures. According to the Commission, 68% of cases are closed after consultations under EU Pilot. When this is compared to the pre-EU Pilot figure shown above regarding closure rates (Figure 4.3 in chapter 4), it was seen that only 34% of all cases were closed before the start of the procedures' official phases. Given the fact that EU Pilot is able to solve double that percentage, one could tentatively conclude that EU Pilot is indeed quite effective. It seems as though the managerial-type methods that these three alternative mechanisms apply are quite effective in inducing compliance by Member States with obligations of a hard nature, irrespective of whether this concerns intentional or unintentional compliance. For many cases, they are the only steps to compliance without recourse to the actual infringement procedures.

\textsuperscript{68} SOLVIT Evaluation 2011

\textsuperscript{69} A satisfactory solution is found in 80% of all cases brought to the SOLVIT Centers (ibid.).

\textsuperscript{70} The European Commission undertook a comprehensive analysis of the functioning of the SOLVIT system, where interviews were held with and surveys sent to the users and stakeholders of SOLVIT. For statistics from this evaluation of the SOLVIT system, see ibid.
10. CONCLUSIONS

This chapter has investigated the role of three alternative compliance mechanisms in the EU: the Internal Market Scoreboard, SOLVIT and EU Pilot. It was shown that, taken together, these systems have a similar aim, scope, and actors as the official infringement procedures. Theoretically, their effective functioning should induce compliance and thereby reduce the number of infringement procedures started each year by the Commission under Article 258 TFEU. When the data available for these four systems were looked at, some evidence was found that the systems indeed reduce the number of the infringement procedures, especially in cases of SOLVIT and EU Pilot. However, given the problems regarding the available data and the short time EU Pilot has been in existence, it is difficult to prove there is an actual firm statistical link between the two types of systems.

Nevertheless, the alternative systems probably do lead to increased compliance in the EU. It was established that statistics could not teach us much on actual compliance with EU law, since infringement procedures are a poor indicator of absolute compliance. They do not capture undetected non-compliance, nor is it clear how much non-compliance remains due to the Commission’s discretion, for example. The effectiveness of the alternative systems, however, especially SOLVIT and EU Pilot, can be found precisely in a higher detection rate after their introduction. The number of cases entered in these systems has increased dramatically, while for SOLVIT at least the decrease seen in the infringement procedures is not of equally dramatic importance. This could mean that different types of cases are brought to SOLVIT by different types of complainants. These complainants would probably not have submitted their complaint to the Commission, nor would that type of case often actually have led to infringement procedures. The decrease in infringement procedures after the introduction of EU Pilot is much sharper – however, EU Pilot has only existed for a few years and no robust conclusions can as yet be drawn from the available data. SOLVIT and EU Pilot offer a more informal channel to file complaints, thereby lowering the barrier for both complainants and Member States. The EU’s alternative compliance mechanisms thus do lead to increased absolute compliance in the EU.
Comparative Conclusions Part II
This Part has described and analyzed the set-up and functioning of the EU infringement procedures and three alternative EU compliance mechanisms. Conclusions were drawn as to their effectiveness in inducing compliance with the rules of the European Union. The aim of this comparative conclusion at the end of part II on EU compliance mechanisms is to briefly summarize the most salient points made in the previous chapters, and in doing so compare the findings for the four mechanisms and draw conclusions.

First of all, it was found that the infringement procedures – evolving, modified and added to over the years – are quite effective in inducing compliance with EU law. The early phases of the procedure in particular play an important role, as most cases are closed during that time. Only 5% of all cases make it to the judicial phase. This confirms the importance of managerial-type efforts, such as take place in the administrative phase. The introduction of sanctions and the simultaneous application of lump-sum as well as penalty payments are thought to have added to the procedures’ effectiveness. Not only may they have a deterrent effect in the earlier stages, they also could shorten the duration of non-compliant behavior.

Over the years, the infringement procedures have gradually developed into a harder system, with more transparency, less room for Commission discretion and the added element of sanctions. This broadening of the enforcement side of the system has had a positive effect on compliance with EU law over the years. On the other hand, the hardening of the system has gone hand in hand with an increased focus on the managerial phases of the mechanism. Member States, not wanting to be “punished” by the application of hard enforcement elements, will try and solve issues concerning alleged non-compliance in an earlier phase. The deterrent effect of the enforcement side of the system increases the need for the management side. In terms of the compliance pyramid, the two bottom steps of the pyramid of prevention and monitoring have been expanded so as to provide a broader base for the upper two steps of a legal system and sanctions.

The importance of the managerial elements is even more obvious from the introduction of alternative compliance mechanisms. Although not all systems that were analyzed earlier have the same direct aim of increasing compliance with EU law, the eventual outcome of the procedures must be in conformity with EU law. These systems, although not meant as replacements of the infringement procedures, partly function as an alternative mechanism and partly as a complementary route to compliance.

The IMS, through transparency, naming-and-shaming, ranking and peer pressure, pushes Member States toward compliance. SOLVIT offers quick and effective solutions to problems encountered by citizens and businesses in the internal
Comparative Conclusions Part II

market. EU Pilot also aims to resolve issues in a timelier manner and thereby reinforce the management of the existing procedures. Given the fact that all three procedures have the same ultimate effect of inducing compliance, as well as a similar scope and participating actors as the infringement procedures, it is clear that there will be some interaction between the four mechanisms. It was found that although there is no obvious statistical link between the infringement and alternative mechanisms, and the underlying data for statistical analysis are not unambiguous, the tentative conclusion can be drawn that the introduction of the newer systems has indeed influenced the functioning of the infringement procedures. For all three mechanisms, albeit to different extents, the number of infringement procedures has decreased permanently since their introduction.

When all four systems are examined together, some differences are found when analyzing the compliance elements. Although the expected behavior, the character of the obligations and the element of discretion are the same for all four mechanisms, the IMS is the only system not really taking unintentional behavior into account. This means that managerial-type efforts should play a larger role in EU Pilot, SOLVIT and the infringement procedures than in IMS. This explains why the effect of IMS on the functioning of the infringement procedures is quite small, as it depends almost fully on management elements such as peer pressure and transparency. Almost fully, since the possibility of the application of an infringement procedure always looms in the background. Since the IMS targets non-implementation of directives, where a semi-automatic procedure including a fast-track sanction option exists for non-communication cases, there is quite a strong enforcement element available as a back-up. If IMS does not have the intended effect, therefore, recourse can and will be taken to the infringement procedures.

A comparison of the extent to which the four studied mechanisms work effectively is difficult to make. Is EU Pilot less effective than SOLVIT in inducing compliance, since SOLVIT has a solution rate of 80% while EU Pilot has a closure rate of only 68%? Is the IMS not effective, since its effect on compliance cannot be quantified at all? And are the infringement procedures effective given the fact that only 5% of all cases reach the judicial phase, and in the end compliance with court judgments is reached in all cases? Of course these types of conclusions cannot be drawn merely on the basis of the statistics available. However, it is possible to analyze how the mechanisms influence each other’s functioning.

The interaction that was shown to exist between the functioning of the infringement and the alternative procedures is an important element in inducing compliance with EU law. On the one hand, it is difficult to draw conclusions on the exact influence of the alternative systems on the effectiveness of the infringe-
ment procedures. It is, for example, a matter of speculation what number of cases now solved by SOLVIT would have gone on to become infringement procedures based on complaints. It is also unclear which part of these SOLVIT cases concerns a similar problem as under existing infringement procedures, which could thus have been solved simultaneously in one case under the Article 258 procedure.

On the other hand, the total amount of possible infringement cases has been reduced by the introduction of the alternative systems, thereby releasing Commission resources to focus on those cases that fall outside the alternatives’ remit or that beg special attention. Moreover, the alternative procedures have increased the detection rate of non-compliant behavior by appealing to a different audience than under the infringement procedures. Vice versa, the effectiveness of the alternative procedures is influenced to a great extent by the existence of the enforcement possibility of the infringement procedures. It is precisely the interaction between the managerial type systems and the enforcement procedures that explains the effective functioning of all four. In terms of the compliance pyramid, not only the managerial bottom steps of the front side of the pyramid have been expanded, but those of the other sides as well. The alternative mechanisms, on the other hand, may not include the enforcement-type upper two steps of the pyramid, but can rely on the mere existence of the legal system and sanctions contained in the infringement procedures. If needed, a switch from the alternative side to the front side can thus always be made.

The next chapters turn toward an evaluation of compliance mechanisms in other international organizations. Of course, the findings for the EU may not be comparable to compliance mechanisms in other international organizations. Aside from the fact that the EU is quite unique in the existence of a supranational Guardian of the Treaties, differences exist as to the character of the underlying obligations, the role of the element of discretion and many other things. Nevertheless, the interaction between the systems in those organizations, or the lack thereof, also offers an explanation for the effectiveness of their compliance mechanisms in a fashion similar to the findings for the EU.
PART III
Compliance Mechanisms in International Organizations
Introduction to Part III
The previous Part II analyzed several compliance mechanisms within the European Union, with a focus on procedures that target compliance with Internal Market rules. The last section of part II compared the three mechanisms discussed in the last chapter (IMS, SOLVIT and EU Pilot) with the treaty-based mechanism: the infringement procedure. To enrich this comparison and to be able to draw more robust conclusions as to the effective functioning of the four mechanisms, it is important that similar constructions are examined in other international organizations, as well as how they function in that context. As explained in Part I of this thesis, the organizations chosen for comparison are the World Trade Organization, the International Monetary Fund and the Organization for Economic Cooperation and Development.

The manner in which compliance mechanisms exist and function in the EU is more or less unique to the EU. No other international organization has a system similar to the EU infringement procedures, in which a supranational body is responsible for ensuring the application of the rules of the organization and has the possibility of taking non-compliant Member States to Court. Most systems of other international organizations – if they have a compliance mechanism at all – function more along the lines of a dispute settlement system. These systems focus on solving disagreements between Member States as to the correct application or interpretation of the rules of the organization, rather than on upholding the rules of the organization as such.\(^1\) This type of (dispute settlement) system could be compared to the (rarely) used system of Article 259 TFEU, where an EU Member State can take another Member State to court when it believes the Member State has not fulfilled its duties under EU law.\(^2\) Other organizations work with peer review or peer pressure systems\(^3\), while yet other organizations do not have any system in place to make sure that Member States follow the rules of the organization. As has been theorized before, to some extent this has to do with the type of underlying obligations with which the Member States have to comply.\(^4\) Usually it can be said that the harder the underlying obligations, the harder the underlying compliance mechanism, which entails that the mechanism will then more likely be an enforcement rather than a management-type mechanism.\(^5\)

In chapter 1 the focus of the research was defined as assessing “the effectiveness of a complementary set of rules meant to induce Member State compliance with the primary set of rules of an international organization”. This current

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1. As e.g. in the WTO, as will be discussed later in this chapter.
2. A few important differences exist here as well, which will be discussed in more detail below.
3. As e.g. in the OECD.
4. See chapter 1 in this thesis.
5. Ibid.
Part III

Chapter will delve deeper into the types of complementary sets of rules, or compliance mechanisms, available in three international organizations. The three organizations to be discussed (the OECD, WTO and IMF) are particularly suitable for this comparative analysis for two reasons. First, they focus on international economic law, as did the mechanisms analyzed for the EU internal market in the earlier chapters; second, these organizations work with mechanisms that are similar to the alternatives used in the EU, such as (out of court) dispute settlement or peer review. The similar scope and type of mechanisms thus offer an opportunity for comparison.

The OECD produces mostly soft law in the form of non-legally binding recommendations, and has no official compliance mechanism available to induce compliance with the few binding legal acts that it does produce. Rather, the OECD relies on a system of benchmarking, peer review and peer pressure to increase compliance with the organization’s official acts. As an organization working mainly through soft law and without an official compliance mechanism, it serves as an interesting comparison for, for example, the EU’s Internal Market Scoreboard. The IMS also relies on a system of review and peer pressure to induce compliance.

The WTO is an organization that also applies a similar peer review mechanism (the Trade Policy Review Mechanism). Unlike the OECD, however, it does have a large body of enforceable legal rules, as well as a functioning dispute settlement system. In some ways it is therefore comparable to not only the IMS but also the EU Internal Market’s other compliance mechanisms, in that it encompasses more steps of the compliance pyramid.

The IMF, finally, on the one hand has no hard enforcement mechanism, although it applies surveillance systems leading to soft obligations. On the other hand, it does have particularly hard rules and an enforcement mechanism in one particular area which, however, is separate from its general functioning – the Balance of Payments programs.

Given the different approaches of these three international organizations to compliance, the prevalence of both hard and soft law, as well as the interaction between different compliance mechanisms within the organizations themselves, they are thus particularly suitable for comparison with the European Union internal market compliance mechanisms.

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To illustrate, at the time of writing, there were 178 Recommendations in force versus 29 legally binding decisions (OECD website: <http://webnet.oecd.org/OECDACTS/Instruments/ListByTypeView.aspx>, accessed May 2013).
In general international law there is no one supranational institution that is responsible for overseeing adherence to the rules, nor do international organizations generally have such enforcement bodies. What happens, however, when there is a member of an International Organization that does not abide by the rules and when there is no supranational institution to enforce these rules? It was seen in the earlier chapters that the effectiveness of the alternative EU mechanisms for the Internal Market can be explained in part by the fact that the official infringement procedures exist as “back-up” in the background, while at the same time the Commission keeps an eye on the functioning of the alternative mechanisms. The question is then: How effectively do systems similar to such alternative mechanisms function in international organizations when there is no simultaneous existence of an official enforcement back-up mechanism?

This chapter is set up as follows. This introduction will first give an overview of compliance mechanisms in international law in general, where a distinction is made between internal and external supervision, judicial and non-judicial mechanisms, and dispute settlement and enforcement mechanisms. The next chapter will proceed to examine the systems within the chosen organizations in more detail; the OECD in chapter 5, the WTO in chapter 6 and the IMF in chapter 7. Each chapter applies the framework for compliance and effectiveness to these mechanisms, after which the conclusions to this part III will form a comparative analysis of the findings in the three chapters.

**Compliance mechanisms in international organizations**

Before an analysis can be made of the compliance mechanisms available in the three international organizations under review in this chapter, some remarks need to be made about compliance mechanisms in international organizations in general. In international organizations compliance mechanisms can be classified in different ways, whereby three important distinctions can be made: 1. internal or external supervisory mechanisms; 2. judicial, quasi-judicial or non-judicial mechanisms; and 3. dispute settlement or enforcement mechanisms.

1. Internal vs. external supervisory mechanisms

A first way to classify compliance mechanisms is through determining the scope of the systems in terms of supervision. Internal supervision is the supervision of the organization by the organization itself, or: the overseeing of compliance by an international organization with its own acts. This concerns, for example, acts by subsidiary organs overseen by principal organs, Member States, or individuals.

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Part III

In some cases a specific organ is established to perform internal supervision, as for example in the case of the World Bank. The World Bank Inspection Panel is a complaints-driven impartial fact-finding body that reviews projects funded by the World Bank to analyze whether the Bank has followed its own operational policies and procedures.\(^8\)

*External* supervision, on the other hand, concerns the supervision of compliance with the acts of the organization by the Member States of the organization to which the acts are addressed.\(^9\) This supervision can be exercised either by the organization itself or by the Member States, both, or “outsiders”, such as individuals, businesses, NGOs and so on. This dissertation focuses on compliance by the Member States with the legal obligations of an international organization, and thus external supervisory mechanisms only.

2. Judicial, quasi-judicial, non-judicial mechanisms

A second important distinction can be made between judicial or quasi-judicial mechanisms on the one hand and non-judicial mechanisms on the other. The difference can be found, simply put, in the bindingness of the ultimate decision and the independence of the adjudicating body. Non-judicial entities are usually considered representative of, or at least not completely independent from, the interests of their respective governments, while (quasi-)judicial entities are assumed to act objectively, independently of the governments from which the bodies’ members originate.\(^10\)

*Judicial supervision* can be seen as “supervision exercised by independent and impartial persons or bodies that are competent to give, on the basis of facts determined by due process, legally binding judgments”.\(^11\)

*Non-judicial supervision*, then, is the supervision “exercised, in the last resort, by a politically dependent organ of an international organization, which by way of...”

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\(^8\) Other examples include OIOS, the UN Office of Internal Oversight Services, established in 1994 by the UN’s General Assembly to perform e.g. investigations of possible misconduct by UN staff (ibid., pp. 874-875). Administrative tribunals have also been established, for example, to address challenges by employees against the acts of the organization (such as the World Bank Administrative Tribunal or the International Monetary Fund Administrative Tribunal), or the possibility to challenge the legality of acts, such as provided for within the EU by Article 263 TFEU to privileged, semi-privileged and non-privileged applicants under certain conditions (“the Court of Justice of the European Union shall review the legality of legislative acts, ... intended to produce legal effects vis-à-vis third parties.”).

\(^9\) Ibid.


of a procedure which is, in general, not well-defined comes to a binding decision or non-binding recommendation, depending on the constitutional powers of the organ”.

The Project on International Courts and Tribunals (PICT) classifies existing, extinct, aborted, dormant and proposed judicial and non-judicial bodies. The PICT identifies judicial bodies as those entities that:

1. Are permanent institutions;
2. Are composed of independent judges;
3. Adjudicate disputes between two or more entities, at least one of which is either a State or an International Organization;
4. Work on the basis of predetermined rules of procedures; and
5. Render decisions that are binding.

Quasi-judicial supervision is a hybrid form falling between judicial and non-judicial supervision, where the decision taken is always final, and the body taking the decision is relatively independent of Member State influences. The “quasi” predicate comes from the fact that these entities do not satisfy any or all of the PICT’s five criteria, for example the second criterion of independent judges. The members of the judicial body need not necessarily be judges (in the sense of “persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law”). Rather, their independence is (relatively) ensured through, for example, the selection of specialists in the field of law relevant for the organization or dispute at hand, but in any case not by the fact that they are accredited government representatives.

Given the above definitions for non-, quasi- and judicial supervision, mechanisms relying on peer review and peer pressure or other soft mechanisms do not fit within these categories. Peer review in the context of international organizations has been defined as “the systematic examination and assessment of the performance of a State by other States, with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with

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12 Ibid., p. 18.
13 A graphic representation of this classification (the PICT Synoptic Chart) can be found at http://www.pict-pci.org/index.html (accessed November 2013).
15 Article 3, ICJ Statute.
established standards and principles.”  It is a non-adversarial process, relying on mutual trust and a shared confidence in the process. There are thus two reasons why peer review mechanisms fall outside the categories discussed above. First, since there is no specific relatively independent “body” to which the task of supervision has been delegated, the Member States themselves are relied upon for mutual supervision. Second, these soft mechanisms cannot yield binding or final judgments or recommendations given their “soft” character. Thus, a fourth category is needed to describe these kinds of mechanisms, which can be said to be a form of structured, institutionalized diplomatic or inter-state supervision.

As will be shown later in this chapter, this dissertation covers mechanisms of all four types: judicial supervision as exercised in the European Union, quasi-judicial supervision as seen in the WTO, non-judicial supervision as seen in the IMF and inter-state supervision as seen in the EU, the WTO, the IMF and the OECD.

3. Dispute settlement vs. enforcement mechanisms
A third distinction can be made between dispute settlement systems on the one hand and pure enforcement mechanisms on the other. Dispute settlement can be defined as the settlement of a dispute between two or more Member States of an organization. As one author stated, “one of the most useful functions of a regional organization is to provide its members with a forum for consultation and negotiation in actual or potential dispute situations”. Originally, dispute settlement was the primary function of international courts and tribunals. One example of an organization in which the compliance mechanism can be seen as a pure dispute settlement mechanism (as opposed to an enforcement mechanism) is the WTO. Article 3(7) of the Dispute Settlement Understanding explicitly states that “the aim of the dispute settlement system is to secure a positive solution to a dispute”.

An enforcement mechanism, on the other hand, is not focused on the relationship between two Member States, but rather on achieving compliance with the...
rules of the organization by the Member States. This can be done through adversarial procedures, where one Member State takes another State to Court in order to induce compliance with the rules allegedly not followed by the other State. The mechanism can also function by assigning the task of supervision to a relatively objective body (such as the European Commission as Guardian of the Treaties), which can take an allegedly non-compliant State to Court to induce compliance with the rules of the organization.

One can thus make a distinction between a dispute settlement system, which concerns bilateral actions between Member States and aims at solving problems on a bilateral level, and an enforcement system, which aims at compliance in general on a collective level, going above and beyond the some of the individual state’s interests. This is what is referred to as the bilateral or collective nature of Treaty obligations. The EU could be seen as a system in which the obligations are of a collective nature, while the WTO for example can be seen as a typical example of obligations of a bilateral level, even though some obligations may have certain collective features.23

In neither case is it necessary for the “accusing” body (either the Member State or the independent body) to have a personal interest in the case, but rather a community interest or organizational interest can apply. This can of course coincide with a personal interest of the accusing State, but does not need to be demonstrated.24 This coinciding of interests can be seen in the European Union. As explained in chapter 3, Article 258 TFEU concerns the supranational possibility of the European Commission to take non-compliant Member States to the Court of Justice, while Article 259 TFEU offers the same possibility to Member States themselves. In this case Article 259 TFEU is not meant to settle disputes between Member States but to solve cases of “alleged infringement” – where one Member State believes another Member State has failed to fulfill an obligation under the Treaties. There is thus no need for the complaining Member State to prove individual involvement or personal injury. The infringement procedures, including Article 259, are therefore classified under the header of enforcement or compliance mechanism, and not dispute settlement. This chapter looks at both dispute settlement and enforcement mechanisms, insofar as the outcome of the procedures can lead to increased compliance with the rules of the organization.

24 As for example with the European infringement procedures, where a case can be brought if the Commission (Article 258 TFEU) or a Member State (Article 259 TFEU) believe a Member State has failed to fulfill its obligations under the Treaties.
For example, in the WTO dispute settlement system the aim is to settle disputes: A Member State can start a case only when it believes that any benefits accruing to it under the covered agreements are being impaired or nullified by measures taken by another Member State. When a mutually acceptable solution can be found, the first objective of the dispute settlement mechanism is to secure the withdrawal of the measures if they are found to be “inconsistent with the provisions of any of the covered agreements.” More on the WTO specifically follows in the sections below, but it is already clear that although the aim of the system is to settle disputes, the logical de facto outcome is increased compliance with the rules of the organization.

The next sections will discuss the different mechanisms as they exist in the OECD, the WTO and the IMF, followed by an analysis of their effectiveness.

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25 The covered agreements are listed in Appendix 1 to the DSU, and include the WTO Agreement, the Multilateral Trade Agreements (including the GATT, GATS, TRIPS and the DSU) and Plurilateral Trade Agreements. The only multilateral Trade Agreement, which is not covered, is the Trade Policy Review Mechanism (TPRM), which will be discussed in section 3.2 below.

26 Article 3.2 DSU. However, from EC – Bananas III, Appellate Body Report, European Communities – Report for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997 it has become clear that the Appellate Body takes a broad view of this notion. It was satisfied in this case with the fact that the complainant was a producer and potential exporter of a certain product.

27 Article 3.7 DSU.
CHAPTER 5

OECD
We do beauty contest line-ups. We have a graph with countries, good ones and bad ones. Exactly what the OECD is always doing. And they are quite good at it: they have to be because it’s their only power.

Respondent #8.
1. INTRODUCTION

The OECD is an international organization that exemplifies how compliance with rules can be induced without the existence of a dispute settlement or judicial system, or indeed any type of official compliance mechanism for that matter. This section sets out the history and goal of the organization, its functioning, legal instruments and organizational set-up as well as its manner of inducing compliance with the organization’s rules and regulations, insofar as these exist.

2. ABOUT THE OECD: HISTORY AND FUNCTIONING

After the Second World War the Organization for European Economic Cooperation (OEEC) was established in 1948 to administer American and Canadian aid under the Marshall Plan for the reconstruction of Europe.¹ In 1960 the organization was reformed and given the new name of Organization for Economic Cooperation and Development (OECD).² By then its scope had developed from reconstructing Europe to helping its Members achieve sustainable economic growth and employment, as well as offering assistance and expertise to over 100 developing and emerging market economies. Article 1 of the OECD convention sets as the aims of the organization: “to promote policies that support economic growth, boost employment, raise living standards, maintain financial stability, assist other countries’ economic development, and contribute to growth in world trade”.³ The aims of the organization are thus no longer European, as at the time of the Marshall Plan, but rather global.⁴ This is also reflected in the Membership of the Organization. Whereas the OEEC Convention was open to “any signatory European Country”,⁵ the OECD allows for Membership by “any Government” by unanimous invitation of the Council.⁶ The Organization now includes countries such as Mexico, New Zealand and the United States.

¹ Convention on the Organisation for European Economic Cooperation, April 16, 1948, 888 UNTS 141 (OEEC Convention). The Marshall Plan, officially known as the European Recovery Program, provided administrative, technical and financial assistance (worth $13 billion) to 16 European nations (including Germany) after the Second World War.
³ Ibid.
⁵ OEEC Convention, Article 25.
⁶ OECD Convention, Article 16.
In order to achieve the aims mentioned in Article 1 of the Convention, the OECD engages in identifying good practices while providing a setting where governments can compare policy experiences, seek answers to common problems, and co-ordinate domestic and international policies. The organization has several instruments to induce compliance, with mutual examination by governments, multilateral surveillance and peer pressure to “conform or reform” as its most effective instruments.

The OECD can be seen as a forum where peer review can act as a powerful incentive to improve policy and implement “soft law” — non-binding instruments that can occasionally lead to binding treaties. For example, the OECD conducts in-depth research and investigation, drafting and composing commentaries and other written documents, which are often used as the basis for treaties of other international organizations (such as, for example, the Model Tax Convention), or are treaties in their own right (such as the OECD Convention on Bribery, for example). In this manner the OECD performs the preliminary tasks leading to new international treaties. However, the main tasks of the OECD lie in the regular drafting of reports on the general economic situation in its member countries as well as other publications totaling more than 250 per year. Examples of these reports are the Economic Survey, Economic Outlook, OECD Factbook, Going for Growth, the working papers of the different departments and many more.

2.1. Institutional Structure

To understand how the peer review method in the OECD works, a brief overview of the organization’s institutional structure and its main organs is needed. The

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8 Ibid., p. 13.
9 The OECD members as well as other States use the regularly updated “OECD Model Tax Convention on Income and Capital” as a model convention on how to mitigate the effects of double taxation. The pattern of the Convention, and in most cases also most of its provisions, are used as a basis for bi- and multilateral tax treaties regulating issues of double taxation.
10 The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions contains standards to criminalize bribery of foreign public officials, and measures to effectively implement these standards. It has currently been ratified by the 34 OECD Member Countries (Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States), as well as six non-member countries (Argentina, Brazil, Bulgaria, Colombia, Russia and South Africa).
OECD currently has 34 Member States.\footnote{See previous footnote.} Each Member State is represented by an OECD delegation, which is composed of high-ranking national officials and headed by an OECD ambassador. The principal organs of the organization are the Council, the Committees and the Secretariat.

The Council is the organization’s principal decision-making organ: Comprising all Members as well as a representative from the European Commission, it is “the body from which all acts of the Organization derive”.\footnote{OECD Convention, Article 7.}

The Committees are composed of experts and specialists representing Member States. They provide the possibility for consultation between the Member States on specific topics, which contributes to shaping the policies of the Members in these areas. The OECD currently has about 250 Committees, working groups and expert groups, which meet to advance ideas and review progress in specific policy areas, such as economics or trade.

The Secretariat, then, supports the activities of the Committees and provides research and analysis. The head of the Secretariat is the Secretary-General, who also serves as chair of the Council, and can submit its own proposals to the Council or any other body of the organization.\footnote{Article 10(2) OECD Convention.} The Secretariat has 11 Directorates, the most important of which is the Economics Department – which some call “the very essence of the OECD staff’s self-definition”.\footnote{Marcussen, M., ‘Multilateral surveillance and the OECD: playing the idea game’ in K. Armingeon and M. Beyeler (eds), \textit{The OECD and European Welfare States} (Edward Elgar, Cheltenham 2004), p. 22.}

Marcussen makes a distinction between two layers of the OECD organizational structure, where the first layer is political, deliberative and consultative, with national civil servants and national politicians as its main actors.\footnote{Ibid.} The OECD itself has described this layer as a permanent intergovernmental conference with an increasingly complex structure of groups, parties and committees. The second layer is administrative, analytical and data-processing – meaning the OECD Secretariat.\footnote{OECD The \textit{OECD Committee Structure - A Review} p. 12, as cited by Marcussen (2004), p. 22.} The interaction between the political and administrative layers becomes clear when the peer review process of the Country Surveys is examined. In this process, the administrative level in the shape of the Country Studies Branch of the Economics Department has the responsibility for writing the country surveys. The Economic and Development Review Committee, part of the organization’s political layer, has the responsibility for the multilateral surveillance procedure.
Before this process is examined in more detail, a brief discussion is warranted of the peer review process in the OECD in general.

2.2. OECD Instruments

The primary purpose of the OECD is not to produce legal norms. However, various legal instruments do exist within the organization in several different forms. In order to achieve the aims set out in the OECD Convention, the organization may take binding decisions, make recommendations and enter into agreements with Members, non-Member States and other international organizations. The Acts of the Organization, as they are called, thus consist of decisions and recommendations.

The OECD does not often take decisions, but when they are taken by mutual agreement they are binding on the Members. However, these decisions are binding only upon those Members that have voted for them, as according to Article 6(2): “If a Member abstains from voting on a decision or recommendation, such abstention shall not invalidate the decision or recommendation, which shall be applicable to the other Members but not to the abstaining Member”. In fact, one could say that the decisions of the OECD are not really binding as such, but more akin to conventions drafted by the organization and subsequently submitted to its Members for ratification. This is even more so given the fact that decisions are only binding until the Member State has complied with the requirements of its own constitutional provisions.

There are four types of OECD decisions: decisions which are binding on the Members once implemented; decisions approving agreements with its Members, non-Members and international organizations; decisions on internal matters concerning the work of the Organization (called Resolutions); and decisions providing for communications to non-Members or to international organizations.

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18 Article 5 of the OECD Convention.
20 A total of 29 Decisions are recorded on the OECD website: (<http://webnet.oecd.org/OECDACTS/Instruments/ListByTypeView.aspx>, accessed May 2013).
21 OECD Convention, Article 6(1).
22 There are a few exceptions to this rule, e.g. Article 16 dictates that decisions on membership shall be taken unanimously. Members can abstain from voting, but the decision will apply notwithstanding to the abstaining Member, in derogation of Article 6.
24 OECD Convention, Article 6(3).
The second type of Act of the Organization is the OECD Recommendation. Such Recommendations are “submitted to the members for Consideration in order that they may, if they consider it opportune, provide for their implementation”. Recommendations are not legally binding, but there is an expectation that Member Countries will do their best to implement Recommendations, since they can be seen as representing the political will of the Member States. The moral force that ensues from a Recommendation, therefore, usually entails that a Member State will abstain from voting when a Recommendation is adopted if they do not plan to comply with it.

Recommendations in general are usually defined as “non-binding suggestions of international organs”, thereby emphasizing their non-legally binding nature. A definition that puts more focus on the possibilities a recommendation offers, refers to “une invitation à adopter un comportement déterminé, action ou abstention”. These recommendations are thus of a soft-law nature, not enforceable in any court, but aim to have a strong influence on the Member countries’ policies and actions. The fact that recommendations are not legally binding does not mean they have no effect on the Member State’s behavior at all – otherwise, what would the rationale for adopting recommendations be? As Schermers put it: “The existence of a legal obligation provides merely one of many reasons for observing a rule and indeed, in international law, where sanctions often prove to be illusory, the legal obligation may not even be the prime motivation behind norm compliance”. He lists several factors contributing to the adherence to a non-binding norm such as a recommendation, such as the constitutional provisions underlying the powers of the organ that adopted the recommendation, the structure of the organization, the method of enactment (the participation, voting manners and the status of the individuals voting), formal acceptance of recommendations, the need for a rule, others’ application of a certain rule, the moral or legitimizing effect of the adoption of recommendations by international organizations, or the restatement of previous resolutions or recommendations. This issue of compliance with non-binding norms will be addressed below in the

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29 Virally, M., ‘La valeur juridique des recommandations des organisations internationales’ (1956) 2 Annuaire français de droit international, as quoted by Schermers and Blokker (2011) on p. 767.
section on compliance.\textsuperscript{31} For now it is important to realize that the OECD uses as its main instrument a soft-law and thus legally non-binding recommendation.

Other OECD instruments are Declarations, Arrangements and Understandings, Treaties and Conventions, Agreements and Guidelines.\textsuperscript{32} Except for Treaties/Conventions, these instruments do not constitute formal acts of the organization and are not intended to be legally binding, but are noted by the OECD Council, while their implementation is monitored. Treaties and Conventions, while concluded in the Organization’s framework, are free-standing Agreements that are legally binding on the Parties, which may include non-OECD Members.\textsuperscript{33}

Given the soft-law nature of the recommendation and most other instruments used by the organization, it is logical that the OECD uses compliance mechanisms that fit this soft-law nature. The OECD can be seen as the prime example of an organization working almost exclusively through the use of peer review and mutual surveillance instruments. Even the accession process for new members applies a peer review method: A prospective member’s policies in various areas are reviewed to assess its position with respect to relevant OECD instruments, standards and benchmarks.

3. PEER REVIEW

We have seen in the earlier sections that the main instrument used by the OECD is the Recommendation. The prevalence of this legally non-binding, soft-law instrument to some extent explains the use of soft compliance mechanisms like peer review and mutual surveillance. The type of underlying obligations within an international organization determines the effectiveness of the compliance mechanism in that organization to a large part. In general: Soft obligations call for soft(er) mechanisms.\textsuperscript{34} Given the importance of soft-law mechanisms in the OECD, this section will discuss firstly the general notion of peer review and its

\textsuperscript{31} Section 5.

\textsuperscript{32} The OECD website lists the adoption of 179 recommendations since 1961, as well as 29 Decisions, 1 Agreement, 3 Arrangements, 6 Conventions, 4 DAC Recommendations, 25 Declarations and 2 Guidelines (http://webnet.oecd.org/OECDACTS/Instruments/ListByTypeView.aspx, accessed June 2013).

\textsuperscript{33} Bonucci (2004), p. 2. An important example of such a Treaty concluded in the framework of the Organization is the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997 (Bribery Convention). This Convention has currently been ratified by 40 Countries, including 6 non-Member States.

\textsuperscript{34} See chapter 1, Theoretical Background.
application within the Organization, and secondly one particular example of a peer review system: the Economic Survey.

3.1. OECD Peer Review

Above peer review was defined as “the systematic examination and assessment of the performance of a State by other States, with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with established standards and principles.”

Peer review in the OECD is used for several purposes, which include i) Policy dialogue, where information and views on policy decisions are exchanged between participating countries; and ii) Transparency, where the reviewed country has the opportunity to present and clarify national rules, practices and procedures, and to explain why and how the country applies these. The information gained from these reviews is usually kept in a database and made available to both other member countries and the public through, for example, the OECD website; iii) Capacity building, where peer review is used as a mutual learning process in which best practices and methodologies are exchanged between Member States; iv) Compliance, where the soft nature of the peer review system and its corollary, peer pressure, can induce compliance through assessing and encouraging trends towards compliance, rather than a static view of the situation at a certain moment in time. This dynamic interpretation, which is usually absent from harder enforcement systems, allows for a more flexible approach towards non-compliance. Moreover, the enhanced communications and information sharing between countries during the peer review process can help to clarify and explain differences, thereby creating the opportunity to rectify instances of non-compliance before they actually occur.

Peer reviews are held in several different areas in the OECD. The most notable are: the Economic Surveys by the Economic and Development Review Committee (EDRC), focusing on economic performance; the peer review of the

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36 “A soft means of persuasion” which is the result of Member States’ scrutiny and review of their peers through a mix of formal recommendations and informal dialogue, public scrutiny, comparisons and ranking, usually combined with the involvement of the press and other media in making the results of the peer reviews public (see ibid., p. 263).
37 Although e.g. the Commission has a certain amount of discretion in the different steps of the infringement procedures, which also offers the possibility to take certain trends towards compliance (e.g. implementation) into account. The line between soft and hard systems itself may thus be seen as flexible.
Development Assistance Committee (DAC), which revolves around the characteristics of effective development cooperation systems in order to make donor action more coherent and effective\(^{39}\); the OECD Environmental Performance Reviews Program, which aims to improve countries’ performance in meeting environmental (domestic and international) objectives\(^{40}\); or the Country Reviews on Regulatory Reforms, which seek to help countries develop, implement and maintain good regulatory practices.\(^{41}\)\(^{42}\) Other OECD publications and reports often include quantitative studies such as the Economic Outlook, which provides economic projections (forecasts) twice a year for OECD countries and regions. These are short-term projections, usually for the next two to two-and-a half years. The different departments within the OECD also focus on different areas in several publications, where special working groups may be established to investigate a particular area at the request of a member country. Areas besides economics include the environment, governance, innovation, employment, finance, education, and so on. At the core of all these publications is the interaction and cooperation between all Members of the OECD, the countries examined as well as their peers, and the fact that comparisons are made between all countries, which are examined either in light of each other’s performance, against certain objective benchmarks or against established scoreboards.

Usually the peer review process has three basic phases:

- **Preparation:** The first phase of review consists of background analysis and some form of self-evaluation by the relevant country, including the gather-

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\(^{39}\) OECD donor countries that make part of DAC account for more than 90% of official development assistance worldwide. The Development Co-operation Directorate assists with policy formulation and coordination, as well as information systems for development (see The OECD: Organisation for Co-operation and Development, p. 18).

\(^{40}\) Supported by the Environment Directorate which e.g. compiles environmental data and indicators and produces future-oriented outlooks of environmental conditions (ibid., pp. 22-23).

\(^{41}\) As part of the tasks of the Public Governance and Territorial Development Directorate, the OECD works with members as well as non-members to support countries to develop and implement good regulatory practices, and to assist governments in improving regulatory quality (see OECD website on regulatory policy: <http://www.oecd.org/gov/regulatory-policy/>, accessed June 2013.

\(^{42}\) These are four examples of peer review processes within the OECD. There are many more; the OECD in its study on peer review lists a total of 68 different types of peer review mechanisms within 12 different areas (Economics; Environment; Development; Public Management; Trade; Financial, Fiscal and Enterprise Affairs; Science, Technology and Industry; Education, Labor and Social Affairs; Agriculture/Fisheries; Territorial Development; Nuclear Energy; and International Energy), Annex A of OECD (2003) L’examen par les Pairs: un Instrument de l’OCDE Pour La Coopération et le Changement , pp. 23-33.
ing of documentation and data, as well as the filling out of an (elaborate) questionnaire.

- **Consultation:** In this second phase, the examiners together with the Secretariat perform consultations, in contact with the Member State, carrying out on-site visits that sometimes include consultations with interest groups, civil society and academics. In the end, a draft report is written by the Secretariat.

- **Assessment:** The final phase of review is where the elements of peer review and mutual examination are most explicit. Here the draft report is discussed in the plenary meeting of the body responsible for review; it may be adapted following discussions or sometimes even negotiations, and is finally adopted (or merely noted) by the body as a whole – including the examined country itself.43

In order to show how the OECD works in practice, the next section discusses the Organization’s most important and well-known publication: the Economic Survey.

### 3.2. An Example: The Economic Survey

One of the goals of the OECD is “to promote the highest sustainable growth of [Member State] economies and improve the economic and social well-being of their peoples” through “consultation and co-operation”.44 In order to achieve the aims of the organization, the Members of the Organization have agreed to keep each other informed and provide relevant information to the OECD, to consult together, carry out studies and to cooperate closely.45 The Economic Surveys are an important example of how this cooperative and informational obligation is implemented by the Member States.

The Economic Surveys are individual country surveys46 that are published every 12 to 18 months. They identify the main economic challenges faced by the country in question, analyze the policy options the country faces, and assess a

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43 Pagani (2002).
44 Pre-amble, and also rephrased in Article 1 of the OECD Convention.
45 Article 3 OECD Convention.
46 The countries surveyed are the OECD Members, although similar reports (Economic Assessments) are made for the Accession Counties (Chile, Estonia, Israel, Slovenia and Russia), and the so-called Enhanced Engagement Countries (Brazil, China, India, Indonesia and South Africa). There is also a special Survey for the Euro area.
country’s performance in relation to broad economic guidelines. The Surveys evaluate national performance in light of international best practice and provide specific policy recommendations based on empirical analysis.\footnote{Armingeon, K., ‘OECD and national welfare state development’ in K. Armingeon and M. Beyeler (eds), \textit{OECD and European Welfare States} (Edward Elgar, Cheltenham 2004), p. 226.} The surveys are coordinated by the EDRC, which is composed of one member from each OECD country plus the European Commission.\footnote{The EDRC is composed of the Economic Counselors of the permanent delegations of Member States and the European Commission in Paris as well as observers from the Bank for International Settlements (BIS), International Monetary Fund (IMF), World Trade Organization (WTO), World Bank, European Free Trade Area (EFTA), and the Russian Federation (Woodward, R., ‘The OECD and Economic Governance: Invisibility and Impotence?’ in K. Martens and A. Jakobi (eds), \textit{Mechanisms of OECD Governance: International Incentives for National Policymaking} (Oxford University Press, Oxford 2010), p. 1.)} The Economic Surveys, also called country reviews, are at the basis of the OECD’s peer review system. Every two years a country’s policies are reviewed by the EDRC, often with a detailed analysis of one specific structural area (such as housing, health, or education). Usually two members of the EDRC are appointed as lead examiners for each review, who work together with the member country’s permanent delegates to the OECD, sometimes assisted by government experts.

When the OECD had just been founded in the early 1960s, the focus of the surveys was mostly on short-term macroeconomic developments. Over the years the focus has shifted more towards the Members’ structural policies and linkages with macroeconomic performance.\footnote{This involves a wide range of policy areas including labor markets, competition, innovation, human capital, financial markets, sustainable development, social security, taxation, health care and public spending. The Economic Surveys aim to clarify links between structural policies in these areas and macroeconomic performance (OECD website: <http://www.oecd.org/eco/surveys/abouteconomicsurveysandtheedrc.htm> (accessed May 2013).} This shift in focus has also entailed a shift in the goals and aims of the peer reviews. No longer is the motive to gain a better understanding of how individual country experiences fit into the international outlook; it is rather to learn from particular national experiences. The detailed analyses in the country reports are based, among other things, on cross-country analysis. This way, the reviewed country can learn from the experience in other Member States, while at the same time serving as an example for its peers. For a Member State to have its policies examined in a comparative and quantitative framework can be quite helpful in setting a country’s policies towards better and sustainable macroeconomic performance. One possible drawback of this cross-country analysis is its relative simplicity, as these types of reports are not always able to properly account for country-specific situations.

49 This involves a wide range of policy areas including labor markets, competition, innovation, human capital, financial markets, sustainable development, social security, taxation, health care and public spending. The Economic Surveys aim to clarify links between structural policies in these areas and macroeconomic performance (OECD website: <http://www.oecd.org/eco/surveys/abouteconomicsurveysandtheedrc.htm> (accessed May 2013).
The EDRC’s multilateral surveillance process can be split into five stages. 50

1. The country desk economists of the country studies branch of the Economics Department investigate which topics should be focused on during the review, taking the political, organizational and functional conditions in the OECD and the country under review into account. 51

2. Data are collected in the surveyed country, also involving the national civil servants of the country under review. During this stage, several questionnaires are sent to the surveyed country, and on-site visits are made to carry out interviews and in-depth discussion with national authorities.

3. A first complete draft survey is drawn up, consisting of three parts: one part of assessment and recommendations; an annex showing the actions taken to follow the policy recommendations of the last review; and one or more in-depth structural chapters. 52

4. The EDRC meets, and after some introductory statements the actual examination begins. Two selected examining countries ask critical questions of the delegates of the country under review, first on the macroeconomic issues, then on the structural issues. At the end of all discussions, conclusions are drawn as to the consensus that has arisen on the issues. After the examination, the draft is revised in consultation with the country under review and the recommendations of the Committee.

5. The permanent members of the EDRC can comment on the revised report, which in the end will be adopted unanimously by the committee. The final report is thus one on which all members of the OECD agree. This means that the country under review also agrees with the policy recommendations in the report, and thus retains shared “ownership” of the report. 53 By endorsing the findings and recommendations in the publication, the country under review also commits itself to acting on the recommendations. This is not only

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50 Corresponding to, but a more detailed version of, the three phases mentioned earlier: preparation, consultation and assessment.

51 Typically, this means that a list of interesting topics is composed, which can be investigated for several countries in order to make cross-country comparisons possible (Marcussen (2004), p. 26).

52 See e.g. the last survey for the Netherlands, which includes a chapter on Assessment and Reforms highlighting trends and prospects; an annex on the progress on structural reform, showing that on some points the policy recommendations have been followed up and on other points no or other action has been taken; and three structural chapters on the business sector, the Dutch labor market and health care reform (OECD (2012) OECD Economic Surveys: Netherlands ).

due to pressure from its peers in the OECD, or wanting to do better than its neighbors (since comparisons are made with one’s peers), but also due to the stimulus of domestic public opinion, since almost all results of OECD peer reviews are made publicly available.

The Economic Survey is thus a collaborative effort of the country under review, examiners from other Member States, the Secretariat as well as all OECD Member States as represented in the EDRC. The question is of course in how far the reports are able to influence a country’s policies in the areas where recommendations are made. Is the method of mutual surveillance and peer review as is practiced in the OECD (and exemplified by the Economic Survey) an effective method to induce compliance with or adherence to the recommendations and other instruments of the organization?

4. OECD COMPLIANCE

The OECD Convention does not refer to compliance as such. This is not surprising, seeing as the OECD is an organization driven by mechanisms such as peer review, transparency, recommendations, dialogue, in-depth analyses or mutual surveillance. These softer techniques, intended to steer Member States in a certain direction, are a good match with the softer, non-binding type of obligations under OECD rules – as opposed to hardcore enforcement.

The OECD Convention comprises 21 articles, only a few of which contain some kind of obligation, and then usually worded in such terms as “the Members agree to promote”, “achieve”, “contribute”, “pursue policies” and so on. The only article that comes close to conferring binding obligations on the Members, and where non-compliance could thus occur, would be Article 3, where Members are to keep each other informed, consult together and cooperate closely. However, even these obligations would be hard to put into enforceable terms, since it is impossible to state unambiguously what exactly constitutes cooperation, consultation or information. Furthermore, even if a Member were in non-compliance with these obligations, there is no dispute settlement system or a supranational body that decides on the issue of non-compliance.

54 Article 3 OECD Convention, “With a view to achieving the aims set out in Article 1 and to fulfilling the undertakings contained in Article 2, the Members agree that they will: (a) keep each other informed and furnish the Organisation with the information necessary for the accomplishment of its tasks; (b) consult together on a continuing basis, carry out studies and participate in agreed projects; and (c) co-operate closely and where appropriate take co-ordinated action”.

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Despite the lack of an enforcement system within the OECD, compliance with the rules and recommendations of the organization itself is believed to be surprisingly large:

The organization has been able to impose a general standard of concurrence in its activities which is not without its impressive qualities.\textsuperscript{55}

Adherence to [the OECD’s non-binding instruments] is not legally required, but, in practice, those instruments are among the most successful (in terms of compliance) international legal instruments.\textsuperscript{56}

On a pu constater que la faiblesse de ses pouvoirs ne faisait pas obstacle à l’efficacité de [ses] action[s].\textsuperscript{57}

However, no studies can be found that actually evaluate the effectiveness of the procedures applied by the OECD.\textsuperscript{58} It can be said that OECD studies do have some impact on the policies of the Member States, but it is unclear whether this is due to the persuasive force of the content of the policy advice and the outcomes of the studies the organization performs, or rather due to the effective workings of the OECD’s soft compliance mechanisms. Furthermore, as a part of the review process the Member State under review works together with the reviewers, as can be seen for example with the Economic Survey process. This gives the Member State some measure of ownership of the report, thereby increasing the chances of the report’s policy recommendations actually being implemented in the Member State. In fact, the final report also needs to be approved and adopted by the relevant examining body as a whole – including the examined Member State itself, given the OECD method of decision-making by consensus.

On the other hand, given the involvement of the Member State in question, the advice regarding certain (sometimes critical) elements may also have been adapted precisely \textit{due to} this influence of the Member State. It is not unlikely that this sometimes means that certain advice fits the current behavior of the relevant Member State, or its planned future behavior, rather than modifying

\begin{thebibliography}{99}
\bibitem{55} Sands and Klein (2009).
\bibitem{58} Only one study comes close to such an analysis, where an evaluation was made of the extent to which OECD recommendations were followed by the Member States, see Armingeon and Beyeler (eds) (2004).
\end{thebibliography}
it.\textsuperscript{59} When the OECD Convention is examined in light of the theories discussed in this dissertation,\textsuperscript{60} it could be stated that the depth of coordination (the extent to which a treaty requires states to depart from what they would have done in its absence) is quite small. Just as the OECD convention itself in fact codified existing behavior, as well as the intention to intensify this existing behavior of sharing information and coordinating certain policies, the same may hold true for the OECD country reports and other peer reviews. These reports may reflect to some extent the already existing economic policies and intended future economic policies of the country under review.

Another explanation for the allegedly high effectiveness of OECD recommendations in achieving policy changes in the Member States can be found in the so-called degree of misfit between the policy advice on the one hand and the domestic policies, politics and institutional arrangements on the other.\textsuperscript{61} The higher the degree of misfit, the larger the adaptational pressure on the Member State: A certain degree of misfit is necessary for any change in policy to occur. In other words, when the domestic arrangements and plans already entail or foresee certain policy changes, a recommendation concerning similar policy changes will seem highly effective. In reality, though, the recommendation contained no real new advice, and thus yields a false positive. This idea of a degree of misfit differs from the concept of depth of coordination in that it concerns the fit with not only the content of the policy recommendations, but with the institutional processes and reception as well.

There are two elements to the misfit concept. First, policy misfit; this concerns the rules and regulations of the organization versus domestic policies. The content of this element largely corresponds to the depth of coordination concept. Second, institutional misfit; this challenges domestic rules and procedures and the collective understanding attached to them.\textsuperscript{62} One could thus argue that the degree of misfit between policy and institutional aspects between the OECD and the Member States may be very low, thereby explaining the concordance between the OECD policy recommendations and the domestic policy changes. When the degree of misfit is greater, the adaptational pressure on the Member States should also be greater. However, in the OECD there is no such corresponding increase. It is shown that in those areas where the misfit is greatest between


\textsuperscript{60} See chapter 1, Theoretical Framework.


\textsuperscript{62} Ibid.
the OECD and the Member State, the necessary corresponding policy changes are least observed. This is most evident when looking at the institutional misfit. For example: In those countries where trade unions traditionally have strong positions, recommendations regarding the flexibilization and decentralization of wage bargaining is most opposed (e.g. in France, Belgium and the Netherlands); wage policies are opposed that are not in accordance with procedures of institutionalized cooperation between social partners and the government (e.g. in Belgium, the Netherlands and Ireland); recommendations concerning the reduction of public regulations are opposed in those countries where the regulations are seen to belong to the realm of state responsibilities (e.g. the health sector in France, or the inflow of low-skilled foreign labor in Switzerland).

Practically speaking, one could attempt to gain some insight into the effectiveness of the OECD instruments by examining in how far their policy recommendations and other advice and suggestions have been followed up by the country under review. In fact, this is also something that the OECD does itself, for example in the Annex to their Economic Surveys on structural reform. Taking a look at the recommendations made for the Netherlands in the Economic Surveys for that country between 2004 and 2012, it is evident that the OECD indicates what action has been undertaken on certain past recommendations as well as a current assessment of these actions. In 2012, for example, the Dutch authorities had undertaken no action for 16 out of the 41 recommendations from the previous Survey.

Moreover, the OECD criticizes several similar policy issues in multiple or all surveys between 2004 and 2012. For example, the issue of childcare has been a recurring theme for the past ten years. In 2004, the OECD recommended implementing a unified subsidy for childcare and implementing national regulation in order to make childcare more affordable. In 2006, it advised reducing the taper rate for withdrawing childcare subsidies in relation to household income. In 2008 it was recommended to lower the marginal effective tax rates over the income spectrum. In 2012, it was recommended to reduce the effective marginal tax rate for second earners by making childcare support provisions more dependent on secondary earner’s income than family income. Given the lack of action taken on all these points except for the first of 2004, it is not clear in how far the OECD was able to influence Dutch policy on the issue of childcare, and the corresponding theme of women’s labor participation.

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63 For these and other examples, see Armingeon (2004), pp. 235-236.
64 Given the current plans for reductions in childcare support, one could say that the follow-up on the 2004 recommendation has been short-lived.
## Table 5.1: Non-implemented OECD Recommendations (for 14 selected MS)\(^1\)

<table>
<thead>
<tr>
<th>Recommendations which were not followed</th>
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<tr>
<td>Introduce greater wage differentials</td>
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<td>Decentralize/deregulate wage setting/flexibility of collective agreed wages</td>
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<td>Offer less early retirements</td>
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<td>Encourage a more flexible labor market</td>
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<td>Cut back minimum wage</td>
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<td>Scale back social security benefits/duration of benefits</td>
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<td>Reduce government spending</td>
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<td>Tax the self-employed sector</td>
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<td>Renegotiate wage settlements for reducing consumer spending</td>
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<td>Introduce premiums/limits to overtime in respective collective agreements</td>
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<td>Tackle fiscal crisis and unemployment (wage constraints, cuts to health and education transfers)</td>
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<td>Introduce residential property taxes</td>
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<td>Require rationalization for labor market training schemes</td>
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<td>Introduce wage moderation measures</td>
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<td>Put in place measures to reduce expenditures and inequalities</td>
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<td>Reform unemployment insurance/offer shorter duration of benefits</td>
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<td>Liberalize employment protection regulation</td>
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<td>Introduce various tax reforms</td>
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<td>Remove obstacles to part-time employment</td>
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<td>Raise participation of women and support family policies</td>
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<td>Introduce better linkages between contributions and benefits in the pension system</td>
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<td>Control social security tax evasion</td>
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<td>Increase the standard/effective age of retirement</td>
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<td>Increase funding rate of pension</td>
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<td>Reform the housing market (more labor mobility)</td>
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<td>Reduce cost of public pension schemes by minimum pension</td>
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<td>Introduce estate charges to finance institutional care services</td>
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<td>Introduce more competition and market rules in health services</td>
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<td>Introduce active purchasing of health care</td>
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<td>Collect fees for training</td>
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<td>Provide students with loans instead of grants</td>
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Limited research has been done on the extent to which actual policy developments in a country are in accordance with the OECD policy recommendations.\textsuperscript{65} One study examined the recommendations made by the OECD in its Economic Surveys and contrasted them with reforms actually realized in 14 Western European welfare states over the span of 30 years. The objective was to give an impression of the extent to which ideas put forward by the OECD could have been received and accepted by national governments. Table 5.1 shows which OECD Recommendations were not implemented by these 14 Member States in those years.

The studies found that 8 of the examined Member States adhered to half or more of the recommendations, while the other 6 corresponded with the advice 50\% or less of the time. Overall, however, these results are not that bad: Only a total of 66 times were recommendations not followed out of a total of 658 possible follow-ups (47 recommendations \times 14 countries). This means that in fact, recommendations were followed in about 90\% of all cases, which is quite a good result.

When asked what national authorities actually do with the OECD recommendations, once the Economic Survey has come out, one government official stated:

\begin{quote}
We duly receive the OECD [delegation]. We are grateful for their good work, which helps us in keeping our own analyses at a high level. We say that we are very much reform-minded, while we are also in a political situation where support for reform is very important. We point out that the OECD’s analysis could need some improvement on several aspects. Then we discuss
\end{quote}

\textsuperscript{65} Armingeon and Beyeler (eds) (2004).
for a bit and say our friendly goodbyes. Two years later we do the same thing all over again.  

The theories explained above on depth of coordination and the need for a degree of misfit can explain to some extent how in many cases the policy recommendations made by the OECD seem to be implemented, while in fact such policy changes might also have been observed without the OECD’s advice. However, it can also be argued that the degree of misfit, at least on the policy side, or the depth of coordination is so small precisely due to the influence of the OECD. Maybe the impact of the policy advice should not be analyzed as outlined in the reports and recommendations after they are published; rather, the focus should be more on what happens during the process of drafting and discussing while the review takes place. This process can take up to 18 months in total, and is repeated every two years. One could say it is an almost continuous process of review.

As a national government official stated: “the more important part of the review may be the review itself in Paris, where the Netherlands has to defend itself against critical questions from its peers”. Academic literature refers to this process phenomenon as “playing the idea game” or the “power of ideas”, where a process of learning takes place, and where exposure to and discussion of new ideas can alter beliefs and conceptions on what one’s own beliefs are or should be.

Marcussen defines three dimensions of OECD governance: cognitive, normative and legal. The legal dimension is rather weak, as only a small number of authoritative instruments (such as decisions) are passed by the OECD Council and these are binding only on those countries that voted for them. The OECD’s strength rather lies in the cognitive and normative dimensions. The cognitive dimension refers to the OECD’s capacity to forge a sense of identity among its members, creating a club of like-minded countries. Normative governance, then, is about the development and diffusion of ideas and norms through discussions and peer review. These two dimensions together create an environment where

66 Respondent #10.
67 Ibid.
69 Grinvalds, H.S., The Power of Ideas: The OECD and Labour Market Policy in Canada, Denmark and Sweden, PhD Dissertation, Department of Political Studies, Queen’s University, Kingston, Ontario, Canada (2011).
adherence to the policy advice and suggestions by the OECD is the most likely, given the softness of the underlying obligations – as the next section will show.

5. THE EFFECTIVENESS OF OECD COMPLIANCE MECHANISMS

Now that the workings and character of the OECD’s compliance mechanism has been examined, an analysis of its effectiveness may be undertaken. In chapter 2.1 of this dissertation, three steps were formulated that help to determine the effectiveness of compliance mechanisms: A: the goal, B: the compliance, C: the effectiveness, and D: the comparison. As was done in previous chapters, A and B and C will be applied here, while D will be addressed for all different mechanisms in the final chapter in this thesis.

5.1. The Goal of the OECD Compliance Procedures

The underlying goal of the OECD peer review systems is to fulfill the tasks laid upon the Member States according to Article 3 of the OECD Convention, where the Member States are to keep each other informed, to consult together and to cooperate closely. The fulfillment of these tasks is necessary in order to reach not only the goals of the Organization as set out in Article 1 OECD, but also the undertakings in Article 2 OECD. In this last article Member States agree to several soft commitments, such as promoting the efficient use of resources or pursuing policies designed to achieve economic growth. The soft character of these obligations makes enforcement impossible, but fits very well with the soft methods of the peer review system.

The purpose of the OECD peer review systems is thus to promote policy dialogue, transparency, capacity building, as well as compliance through assessing and encouraging trends towards compliance, and in some cases preventing non-compliance. The goal is therefore quite diverse and not easily defined in one category. Compliance is part of the goals of the OECD compliance mechanism, but not the only one. However, it can be said that at the heart of every procedure lies the idea of influencing Member States through informing and comparing them with other economies. Through cooperating, Member States can see the added value of the OECD studies and conclusions, and may ultimately conform to the suggestions and advice advanced by the organization. By softly pushing Mem-
ber States in a certain direction through information, cooperation and advice, by changing the ideas and the mindset of the country under review, the OECD can reach its ultimate goal of achieving higher economic growth in the Member States.71

5.2. Compliance

According to the compliance model developed in this thesis, four compliance-related questions now need to be asked regarding the Member State obligations, the character of these obligations, the definition of non-compliance and the causes of non-compliant behavior.

Expected Behavior
The first question regards the obligations the Member States are expected to adhere to. The peer reviews in the OECD are quite diverse, covering many different topics that fall under the general purposes of the organization. However, all peer reviews are an implementation of the general obligation under Article 3 OECD Convention to inform, consult and cooperate. The behavior expected from the Member State is thus to participate actively in the peer review process and to provide information to the organization regarding its (economic) policies. There is no obligation to conform to the conclusions of these reports.

Hard or Soft Obligations
The second question deals with the character of the underlying obligations. Almost all obligations under the OECD Conventions are of a soft character. One example of a hard obligation is Article 3, which forms the basis for the OECD peer reviews, where Member States have agreed to furnish the organization with the information necessary for the accomplishment of its tasks. However, most other obligations are worded in terms such as “promote”, “pursue”, or “contribute”, which are obligations of effort rather than result, and thus should be regarded as soft obligations. Other binding legal obligations of the OECD, with a hard character, are the Council Decisions. However, these decisions are binding only on those Member States that voted for them. They are thus usually applicable to those Member States that intend to adhere to them anyway. Moreover, these decisions usually include references to the route to be taken in case of divergence of views on the interpretation and application of the decision – the usual way is to find

71 Article 1, OECD Convention.
consensus between the parties, with the help of the (Chair of the) Council or the specific Committee that occupies itself with the relevant topic if needs be.\textsuperscript{72}

**Actual Behavior Given the Element of Discretion**

The third question regards the actual behavior of the Member States: When is a Member State non-compliant? The last section concluded that compliance is only part of the ultimate goal of the OECD mechanisms. However, the peer review systems are set up to assess the performance of the Member States, thereby helping the reviewed state improve its policy making and comply with existing standards and principles.\textsuperscript{73} The conclusions of the peer review reports take the form of recommendations and guidelines, offering the reviewed state ways to improve its performance. Compliance in the context of the OECD can thus best be described as the extent to which Member States follow the advice of the organization, or take the road laid before them in the reports.

Surveillance over adherence to these guiding documents is the task of both the Organization as well as the Member States, throughout the peer review process and the adoption and publication of the reports. This surveillance takes place continually, and can be seen for example in the discussions of the reports in the EDRC, or the inclusion of a section on “Follow-up to previous OECD Recommendations” in these reports. The determination of this non-compliance with OECD rules is at the same time the organization’s only compliance mechanism: peer review is a way to establish non-compliance, and through establishing this in a public, transparent, comparative and interactive manner, peer review also induces increased compliance with the organization’s ideas.

The obligation of providing the organization with information to enable it to perform its tasks under the OECD Convention is also evaluated throughout the peer review process itself. Without the relevant information, no determination on the economic progress of the Member State can be made other than on the basis of publicly available information.

**Intentional or Non-Intentional Non-Compliance**

The fourth compliance question refers to the underlying reasons for non-compliant behavior. Peer review systems in general, and especially the OECD peer review system where the organization has no enforcement mechanism available as “back-up”, rely strongly on the lower steps of the compliance pyramid that was discussed in chapter 1.

\textsuperscript{72} The Agriculture Council or Trade Council, for example.

\textsuperscript{73} See Peer review: merits and approaches in a trade and competition context.
**Prevention**, the lowest step, was described by Tallberg as preventive capacity building and rule clarification that reduce the risk of violations due to incapacity or inadvertence. This is the area where peer review thrives – in fact, it was mentioned before that the specific purposes of the OECD mechanism include policy dialogue (the exchange of information and ideas), transparency (the presentation, clarification and explanation of national rules), and capacity building (the exchange of best practices and methodologies between Member States). These elements work together in preventing non-compliance with the ideas and advice of the OECD.

**Monitoring**, step two, is in fact done continuously throughout the peer review process, which itself is a continuous process. OECD delegates investigate the current state of the policies of the Member State under review; they assess the impact of new policies as well as the adherence to previous policy advice from the organization, among other things. They send out questionnaires, go to the Member States in person, discuss with policy makers in the Member State, and draft the reports that are discussed by all Member States, including the reviewed country. In this sense, monitoring is at the core of the peer review process. However, the follow-up steps of a legal system and sanctions do not exist in the OECD. There is no possibility of bringing cases that further clarify existing rules against non-compliant states, nor the possibility of “punishing” or penalizing non-compliance. Given the soft character of the underlying obligations, this is logical.

The focus of the peer review systems on the two lower levels of the compliance pyramid and the absence of the two upper steps show that the causes for non-compliance are mostly assumed to be non-intentional, and thus able to be solved through more transparency, information, dialogue and so forth. The idea is that Member States will adhere to the recommendations and advice of the OECD when they understand the rationale behind these recommendations, and see how such adherence has worked to the advantage of other countries. As mentioned above, the OECD works through the power of ideas. There are no right or wrong ideas – but one can convince the other of the superiority of one idea over another. The Member State may be able to show the organization that their own ideas work better for their own state, while in other cases following the advice of the OECD may be in their interest. There are no strict rules to be followed by the Member States, and through mutual cooperation and information, ideas may
also change through time. Non-adherence to OECD recommendations may very well be intentional, but also may be necessary due to underlying political, historical or societal constructions.

The above analysis shows that the soft character of the underlying obligations goes hand in hand with the idea of unintentional non-compliance. In those cases where non-compliance is intentional, it is usually perceived not as non-compliance, but as an acceptable difference of opinion between the organization and the Member State. Through continued discussions and transparency, the OECD aims to, in the end, change the opinion of the Member State. The OECD thus relies almost completely on the managerial-type efforts as explained in chapter 1.

5.3. Conclusions on Effectiveness

The previous sections have shown that the goal of the OECD peer review system is not compliance as such, but rather to change the mindset of the Member States through managerial efforts. By encouraging the Member States to incorporate OECD recommendations and advice and apply them, the ultimate purposes of the Organization concerning, for example, economic growth or trade may be achieved. In order to ascertain the effectiveness of the OECD compliance mechanism, it needs to be determined in how far the system is in fact capable of achieving its objectives.

It is generally thought that the OECD is quite effective in making its Member States comply with its recommendations and other advice. Nowhere, however, is evidence found for this assumption. For a large part, this can be explained by the fact that the OECD’s purpose is not so much to induce compliance with its rules and recommendations, but – as was just said – to change the mindset of the Member States concerning which economic policy is best for the country. Changing a mindset or ideas and thoughts takes time, occurs gradually, and the change can usually not be pinpointed to a specific time or action. The fact that a Member State does not incorporate the OECD’s advice as laid down in their country reports, for example, does not mean that they do not take the advice into account. It could very well be that over the course of the following years, after repeated discussions with OECD representatives and other Member States, the
country concerned slowly changes its ideas in the area where the advice had been given previously. Moreover, some changes just take time to occur. For example, “the Japanese government has found that some recommendations require more time before it can translate them into effectively implemented policy reform”.74

It is, of course, impossible to measure exactly how the OECD has effectively changed the mindset and ideas of its Member States over the years. One way to gauge its influence, however, is by analyzing how often and in what context OECD reports and Recommendations are referred to by national policymakers or in national publications. Academic studies, for example, make frequent use of OECD reports and statistics. National policymakers often refer to OECD recommendations to support national policy. Other national stakeholders also use OECD publications when promoting their own ideas as examples of supporting qualitative documentation in order to convince policymakers. Through these channels, OECD ideas make their way into national policy as well.

On the other hand, there are inherent limits to how much influence ideas can have on national policy, given the interplay between existing beliefs and values as well as existing power structures.75 It is a fact that the OECD recommendations are not followed in about 50% of all cases, as explained in the earlier sections. Nevertheless, the recommendations, policy advice and ensuing discussions do contribute to the policymaking in the national states.76 The outcome of the national debates may not be in line with the OECD recommendations, but is nevertheless not without effect. It may therefore be better not to speak of the effectiveness of the OECD in actually changing the ideas of the Member States, but rather the effectiveness of introducing new ideas and contributing to the policy debates in the Member States. Academics, national policy makers, economists and others generally acknowledge the high quality and the unequaled availability of data that the OECD studies provide to the Member States.77 The OECD can thus be said to be quite effective in achieving its goals of information dissemination, cooperation, policy dialogue and transparency.

The fact that there is no enforcement mechanism to back up the peer review system may even be beneficial to the purposes of the organization. As will be seen in the next chapter, the existence of a hard mechanism that oversees adherence

76 See the analyses and results in e.g. OECD (2008) or The Power of Ideas: The OECD and Labour Market Policy in Canada, Denmark and Sweden, which show the impact of OECD recommendations in certain areas in specific countries.
77 Ibid.
to the same rules as a soft mechanism might have the opposite effect of reducing information dissemination out of fear for sanctions. Since OECD obligations are of a soft character, they are best served by a managerial mechanism. The hard obligation of Article 3 OECD (the obligation to cooperate, consult and inform), which could theoretically be subjected to a hard enforcement mechanism since it is legally binding, is supposed to keep a certain degree of voluntariness. The purpose for which this obligation exists is to be able to perform the soft peer reviews – it would not be logical to force Member States to cooperate in order to use this cooperation to formulate non-binding recommendations.

6. CONCLUSIONS

The OECD peer review mechanism is generally regarded as an effective system. The reason for this perceived effectiveness probably lies in the fact that the system is not meant as an enforcement or even compliance mechanism, but rather as a way to introduce new thoughts and ideas into national policy-making. Changing one’s ideas, or mindset, takes effort and time. The many meetings and discussions between the OECD and the Member States help in making the countries more receptive to the organization’s policy advice. Moreover, the involvement of the Member States in the peer review process gives them a sense of ownership of the recommendation, which increases the possibility of winning national support for policy decisions.\(^ {78} \)

What the OECD studies and recommendations aim to achieve is increased information sharing, transparency and policy analysis of and between the Member States. This is exactly what lies at the heart of the peer review process, and what makes the studies successful: not so much the recommendations themselves, but rather the process leading up to the formulation of the advice is what matters. In this regard a managerial system, which according to Chayes and Chayes relies on reciprocity, transparency and accountability, is the logical choice to achieve the goals of the OECD as laid out in Article 1 to 3 of the Convention.\(^ {79} \)

The expected behavior of the Member States, the soft character of the underlying obligations, the involvement of the Member States in the surveillance process as well as the underlying mostly non-intentional causes for non-compliant behavior all support the rationale for a managerial system in the OECD. An

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\(^ {78} \) The fact that the policy recommendations are not legally binding adds to the feeling of government ownership (Hirono (2008), p. 248).

\(^ {79} \) See chapter 1 in this dissertation for more on Management and Enforcement.
enforcement element would not be possible for inducing compliance with the mostly soft obligations of the OECD. On the contrary: It would probably not help achieve the OECD goals of consultation and cooperation, and could even have a detrimental effect on compliance. The study of the WTO mechanisms in the next chapter shows how a lack of interaction between a hard mechanism and a soft mechanism, both overseeing compliance with the same obligations, can have adverse effects on adherence to the rules of an organization.
CHAPTER 6

WTO
The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.


The TPRM? Useless. [...] I mean, who cares about the TPRM?

Respondent #3.
Chapter 6  WTO

1. INTRODUCTION

The OECD peer review method has served as a blueprint for peer review and mutual surveillance mechanisms in a number of other international organizations. One example is the WTO, with its Trade Policy Review Mechanism (TPRM), which functions in parallel with the official Dispute Settlement System. This chapter will first say something about the history and function of the WTO, its legal instruments and institutional set-up. The Dispute Settlement System and the TPRM will be discussed next, while finally the effectiveness of the WTO’s compliance mechanisms is analyzed.

2. ABOUT THE WTO: HISTORY AND FUNCTIONING

The World Trade Organization was established on January 1, 1995. However, its origins go back to the General Agreement on Tariffs and Trade of 1947 (GATT), which for almost 50 years was the de facto organization for international trade. Originally it had been the intention to establish an International Trade Organization (ITO) as a counterpart to the Bretton Woods institutions: the World Bank and the International Monetary Fund. The Economic and Social Council (ECOSOC) of the UN, which was created in 1945, convened a conference in 1946 on the notion that peace is not only achieved through the abolishing of crime, but also (or maybe even more so) through cooperation in the field of trade and economics. Thus 23 countries (including the US, Canada and the UK) started negotiations with the goal to create an agreement to ensure postwar stability and prevent excessive protectionism such as existed in the interbellum.

In 1947, the United Nations Conference on Trade and Employment adopted the Havana Charter establishing the ITO. The proposed organization was meant to be a “proper” international organization, including an institutional chapter

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2 The 23 countries were: Australia, Belgium, Brazil, Burma (Myanmar), Canada, Ceylon (Sri Lanka), Chile, China, Cuba, Czechoslovakia (Czech Republic and Slovakia), France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia (Zimbabwe), Syria, the United Kingdom and the United States (preamble to GATT 1947).

governing membership, organs, functions, decision-making and the like. During the ITO negotiations the parties had already agreed on several important tariff reductions. It was thought that these concessions should be applied as soon as possible, even before the ITO negotiations were concluded, and they were meant to be incorporated into the Havana Charter later on.\(^4\) This *General Agreement on Tariffs and Trade*, therefore, would be applied on a provisional basis only until the ITO entered into force.

It soon became apparent that, most importantly, the US Congress (which after the 1948 elections was primarily Republican, with a Democrat President) would no longer approve the ITO Charter. However, since the GATT contained a grandfathering clause,\(^5\) thereby leaving national law unaltered, there was no need for ratification of that Agreement by the US Congress and it could therefore be adopted without any problems.\(^6\)

Since the GATT was an agreement to be provisionally applied until the ITO came into being, it incorporated virtually no institutional provisions.\(^7\) The GATT did provide for a small secretariat that was to come into action once the ITO had been established, which was overseen by the Interim Commission for the International Trade Organization (ICITO). Given the dependence of the Secretariat on the ICITO, however, the powers of this institution were quite weak. Other weaknesses of the GATT can be pointed out, such as: 1. its provisional character; 2. the conclusion of several related but separate agreements, the relation of which to the GATT was never clarified; and 3. its weak decision-making structure – this includes the existence of a non-plenary body and the need for all decisions to be taken on the basis of Article XXV *GATT 1947*.\(^8\) This article provided for decision-making by the

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\(^4\) About 45,000 tariff concessions were negotiated, affecting roughly $10 billion worth of trade (for more on the negotiations process concerning the GATT see Irwin, D.A. *et al.*, *The Genesis of the GATT* (Cambridge University Press, New York 2008))

\(^5\) The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, in Annex I to GATT 1947, states in its first provision: “The Governments of [the signatories] undertake [...] to apply provisionally on and after 1948 (a) Parts I and III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.” Some also call Part II of the GATT the heart of the Agreement, since it covers topics such as covering national treatment, antidumping, subsidies, safeguards, balance of payments, prohibition of quantitative restrictions, general exceptions to the obligations assumed, and dispute settlement.


\(^8\) Ibid.
Contracting Parties through majority voting; however, nothing was said about the bindingness of the decisions taken.\footnote{Although decision-making was officially by majority voting, in practice decisions were adopted by consensus.} Throughout the years that GATT was applied on a provisional basis, it functioned increasingly as a \textit{de facto} international organization.\footnote{(On this topic, see also Footer (2006), pp. 12-18; see also Jackson, J.H., \textit{The World Trading System, Law and Policy of International Economic Relations} (MIT Press, Cambridge, MA 1997), pp. 31-43, or also Stoll, P.T. and F. Schorkopf, \textit{WTO - World Economic Order, World Trade Law} (Koninklijke Brill NV, Leiden 2006), pp. 11-30.)} In six additional negotiating rounds, more and more far-reaching tariff concessions were agreed upon, as well as separate agreements and additional instruments such as those on subsidies and countervailing duties, technical barriers to trade, import license procedures, public procurement and anti-dumping.\footnote{Stoll and Schorkopf (2006), pp. 11-30. The 6 rounds were the following: 1949 Annecy, 1950–51 Torquay, 1956 Geneva, 1960–62 Dillon, 1964–67 “Kennedy-Round”, 1973–79 “Tokyo-Round”.} However, the Member States became increasingly frustrated with the functioning of the system, especially the toothless consensus-based dispute settlement system, which had led to an increase of agreements between individual Member States and unilateral trade sanctions.\footnote{Ibid., pp. 11-30. Agreements were made such as the Multi-Fibre Agreement, in effect from 1974, where developed and developing countries entered into bilateral agreements requiring the exporting countries to limit their exports of certain textiles and clothing. Other examples are the increased use of voluntary export restraints (VERs), government procurement, technical specifications and administrative procedures.}

In 1986 the eighth GATT round started with a Ministerial Conference in Punta del Este, Uruguay. This eight-year-long Uruguay Round ended up establishing not only a new system for the world trade order, but also introduced a so-called “single-undertaking” approach, which meant that States could only accept or reject the results of the negotiations as a whole, instead of rejecting the structure in separate agreements.\footnote{The structure was still along the lines of separate agreements. However, Member States could only accept all agreements simultaneously since they were annexed to the one WTO Agreement.} The final act of the Uruguay Round thus included 46 agreements and 25 resolutions, including the Agreement Establishing the World Trade Organization. The Act was signed in 1994, and was subsequently ratified by 76 Member States before entering into force in January 1995.\footnote{Stoll and Schorkopf (2006).}

The WTO was meant to act as “the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments”.\footnote{Article II(1) WTO Agreement.} The main purposes of the WTO,
according to Article III WTO Agreement are to 1) facilitate the implementation, administration and operation, and further the objectives of the covered agreements; 2) provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements; 3) administer the Dispute Settlement Understanding as well as the TPRM; and 4) cooperate with the IMF and the World Bank. It is thus clear that not only is the WTO meant to maintain and facilitate, but also to further develop the world trade order.\footnote{Stoll and Schorkopf (2006), pp. 15.} It ended the provisional application of the GATT 1947, and terminated any grandfather clauses that existed under that Agreement. This has made it possible for the Organization to be much more effective in developing the world trade order than was previously the case.

2.1. Institutional Structure

Similarly to the OECD, the WTO has an extensively subdivided structure, with several committees, working groups, councils and the like for specialized subjects. These all derive from the three main organs: the Ministerial Conference (MC – representative body), the General Council (GC – executive body) and the Secretariat (administrative body).

The MC is the principal organ of the WTO, composed of representatives of all Members and meeting at least once every two years. It carries out the functions of the WTO, and has the authority to take (binding) decisions.\footnote{Article IV(1), WTO Agreement.} Examples of the functions the MC carries out are appointing the Director General of the WTO, adopting staff regulations, setting up committees, authentically interpreting and amending the Multilateral Trade Agreements, waiving obligations imposed on a Member, and deciding on the negotiation and regulation of new subjects as well as the acceptance of new Members.\footnote{Stoll and Schorkopf (2006).}

The GC is also composed of representatives of all Members at the Ambassador’s level, and shall “meet as is appropriate”, which is normally every two months.\footnote{Article IV(2), WTO Agreement. See also the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WT/L/161, 25 July 1996.} It takes over the functions of the MC in the intervals between the meetings of the MC, as well as carrying out its own functions as assigned to it by the Agreement. The GC is responsible for the continuing, day-to-day management of the WTO and its activities. One of its most important functions is to discharge
the responsibilities of the Dispute Settlement Body (DSB) as established in the DSU, as well as of the Trade Policy Review Body (TPRB) as established under the TPRM. However, under the WTO Agreement these two bodies are functional emanations of the GC – which can, if necessary, appoint a chairman and rules of procedure for these bodies.\textsuperscript{20}

Another function specific to the GC is that it can create subsidiary organs, which in turn can create their own committees.\textsuperscript{21} Article IV(5) of the WTO Agreement provides for a Council for Trade in Goods, a Council for Trade in Services, and a Council for Trade Related Aspects of Intellectual Property Rights, which oversee the application and functioning of the Multilateral Trade Agreements, the GATS (General Agreement on Trade in Services) and the TRIPS Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights), respectively.\textsuperscript{22} These Councils are all composed of representatives of all Member States, and according to Article IV(5) receive “guidance” from the GC, while the GC can also “assign functions” to them. In practice, the latter rarely ever happens.\textsuperscript{23}

The Secretariat of the WTO is headed by a Director-General (DG, appointed by the MC), who in turn appoints the members of staff. The WTO Agreement gives the DG very little power, not much beyond running the Secretariat (Article IV) and proposing the budget (Article VII). The Ministerial Conference determines the DG’s powers and duties. In practice, the DG takes on greater responsibility than is officially accorded to him or her, such as conducting the negotiations for the Doha Development Agenda or other trade negotiations.\textsuperscript{24} Nevertheless, since the official functions of the role are quite limited, every DG needs to assert himself or herself in practice.\textsuperscript{25}

The Secretariat itself functions independently of national governments,\textsuperscript{26} and has no official decision-making powers. Its functions are thus limited to the

\textsuperscript{20} Article IV(3) and IV(4), WTO Agreement.
\textsuperscript{21} Article IV(5) and IV(6), ibid.
\textsuperscript{22} These three areas cover the multilateral trade agreements as they are in the Annex to the WTO Agreement, where part A covers all agreements on trade in goods (based on and including the GATT 1947), part B contains the GATS and part C the TRIPS.
\textsuperscript{23} Kuijper (2009), pp. 86-87.
\textsuperscript{24} Ibid., p. 117. The Doha Declaration has appointed the DG chairman of the Trade Negotiations Committee, which supervises the overall conduct of the negotiations.
\textsuperscript{25} The DG of the WTO has a very weak position related to e.g. the DGs of other international organizations – the DG for UNESCO has the right of initiative, in the WHO the DG is \textit{ex officio} secretary of the Health Assembly and of the Board, in the FAO the DG has full power and authority to direct the work of the organization (for more examples, see ibid.).
\textsuperscript{26} Article VI of the WTO Agreement dictates that the responsibilities of the DG and the staff of the Secretariat shall be “exclusively international in character”, where on the one hand the secretariat shall not “seek or accept instructions from any government or any other authority external to
logistic, technical and professional support of the councils and committees, dissemination of information and the organization of the Ministerial Conferences. It gives advice to candidate Members, and offers legal expertise in the context of dispute settlement.\(^{27}\)

2.2. WTO Instruments

The WTO has three main categories of legal instruments. First and most important, there are the agreements. The Annexes to the WTO Agreement contain 46 agreements: Annex 1 contains the trade-related provisions, Annex 2 the DSU, Annex 3 the TPRM and Annex 4 the Plurilateral Trade Agreements.\(^ {28}\) There is no real hierarchical structure between the different agreements; corresponding to general international public law all agreements are of equal rank in relation to each other. The WTO Agreement does provide that in the event of a conflict between the WTO Agreement and any of the Multilateral Trade Agreements, the WTO Agreement prevails.\(^ {29}\) However, the difficulty of solving conflicts between the several Agreements has often come to the fore in dispute settlement procedures, regarding for example the relationship between the GATT and GATS, or between the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT). The rules laid down in the Agreements are binding on all Members of the WTO (and for the plurilateral Agreements for the relevant signatories).

Second, interpretations play a significant role. The MC and GC have exclusive authority to adopt, by three-fourths majority, interpretations of the agreements.\(^ {30}\) These interpretations are binding on the WTO, the bodies and the Member States, and need to be taken into account in case of dispute settlement.\(^ {31}\)

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\(^{28}\) Plurilateral Agreements have optional membership, with a special role regarding their rules on institutions and decision-making. Examples are the Agreement on Government Procurement or on trade in Civil Aircraft.

\(^{29}\) Article XVI:3 WTO Agreement.

\(^{30}\) Article IX(2), WTO Agreement. In case of interpretation of one of the Agreements in Annex 1 to the WTO Agreement, they shall take their decision based on a recommendation of the Council overseeing the functioning of that Agreement.

Third, the MC and the GC have the possibility to take decisions. The term “decision” in the context of the WTO does not have the same meaning of a “legally binding decision” which it had in the EU and the OECD, as was seen above. In the WTO, a decision is not necessarily legally binding. In general, it can be said that WTO decisions are binding when they concern internal organizational questions, or the topics to be addressed by the individual bodies. When addressed to the Members, they are often in non-binding form since there is no corresponding explicit authorization. The WTO “internal law” also belongs in this category, such as rules of procedure for the several bodies, rules on the budget and so on. Examples of binding decisions are the adoption of the Final Act of a Ministerial Conference, Ministerial Decisions and Decisions of the General Council, where some may give rise to new treaty rights or obligations.

In order to ensure compliance with those rules that are legally binding on the Member States (and thus have external effect), there are two mechanisms that have the task of surveillance and obtaining implementation with the substantive international trade law covered by the Agreements. The first is the well-known DSU, which governs the settlement of disputes between Member States. The second is the TPRM, an institutionalized form of peer review, which is meant to enhance transparency and improve coherence in the application of WTO law. It is thus meant to improve compliance with the rules and to prevent disputes from arising by clarifying how to apply existing rules. The next section will discuss the DSU, while the TPRM and the issue of compliance will be dealt with in the following sections.

3. THE DISPUTE SETTLEMENT UNDERSTANDING

This section will describe the workings of the dispute settlement system under the original GATT 1947 and under the current WTO DSU, as well as analyze some of the distinguishing features and characteristics of the dispute settlement mechanism as it is today.

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32 Ibid., p. 29.
33 On the bindingness of WTO decisions, see e.g. Footer (2006), pp. 176-178.
3.1. Dispute Settlement under GATT 1947

The failed Havana Charter contained a quite specific system of dispute settlement for the ITO. While excluding any unilateral measures, it provided for voluntary arbitral jurisdiction, arbitral awards, recommendations and “appropriate and compensatory” measures, as well as the possibility for an advisory opinion by the International Court of Justice. However, since the ITO was never to be, the GATT was applied on a provisional basis without the provisions envisioned for the actual organization.

The GATT 1947 Agreement contained two elements relevant for dispute settlement: Article XXII provided for the possibility of consultations between any of the Member States with respect to “any matter affecting the operation of this Agreement [GATT]”. If such consultations were unsuccessful, “The Contracting Parties” could intervene and consult with the “accused” Member State. Article XXIII then (entitled ‘Nullification or Impairment’) provided for the possibility of referring a complaint concerning the nullification or impairment of benefits accruing to a Member State to the Contracting Parties, who would investigate the matter and make appropriate recommendations. As a final possibility, Article XXIII:2 offered the option to suspend the application of concessions or other obligations under the Agreement if the circumstances were serious enough to justify such action.

In the beginning, these provisions meant that where consultations failed to resolve a dispute, the dispute would be handled by working parties, consisting of representatives of interested Contracting Parties, including the parties to the dispute, and deciding on the basis of consensus. Due among other things to the increase in Membership of the WTO and the need for more authoritative rulings, proceedings were in the end “legalized” more with the establishment of a legal office within the GATT Secretariat and the codification of dispute settlement procedures.

In 1952, the working parties were replaced by a system of panels of three to five independent experts (often diplomats with little or no legal training) from contracting parties not involved in the dispute. The GATT Council (all Contracting Parties) would have to adopt the recommendations and rulings of the panel by consensus before they became legally binding on the parties to the dispute.

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This meant that also the parties to the dispute would have to agree to the establishment of a panel and the adoption of the panel report, which offered them (and other Members, for that matter) the possibility to block the adoption. In 1981 an Office of Legal Affairs was established within the GATT Secretariat to help the panels with the drafting of panel reports. The improvement in the legal quality of the reports and the use of previous panel reports as precedents, as well as the application of customary rules of interpretation, helped to evolve the GATT dispute settlement system from a diplomatic to a rules-based judicialized system, “based primarily on the authority of legal obligations”. However, problematic issues still remained under GATT, such as the adoption of Council decisions regarding panels by consensus, the lack of an opportunity for appeal or of legal options to act against a non-compliant Member State after the adoption of a panel report.

3.2. Dispute Settlement under the WTO

With the establishment of the WTO in 1995 and the accompanying DSU, an elaborate (quasi-) judicial dispute settlement system was provided for based on the GATT provisions, very much like the practical application of those provisions in the last years prior to the WTO. New elements of the mechanism, however, were the introduction of a quasi-automatic adoption of requests for panel establishment, panel reports and the authorization to suspend concessions; a strict timeframe for the various stages of the dispute settlement process; automatic bindingness of rulings upon the parties; and the possibility of appellate review...
of panel reports. The Dispute Settlement Body (DSB) now officially handles the administration of the disputes, a body composed of representatives of all WTO members. It has the authority to “establish panels, adopt panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the covered agreements”.41

Adjudication in the WTO system can be divided into two phases: the administrative and judicial phase.42 The administrative phase consists of consultations between the complainant and the defendant, the procedure of which has been outlined in Article 4 DSU.43 This phase is obligatory, since the WTO prefers the settlement of disputes through mutual agreement, whereby the Members are urged to attempt to obtain satisfactory adjustment of the matter before taking recourse to further action. The phase is meant to serve as a way to reach a solution without recourse to actual litigation, as well as to define the subject-matter and scope of the litigation if no solution is found. Although many cases lead to an officially announced Mutually Agreed Solution pursuant to these consultations, or remain inactive definitely, a large number of the cases also proceed to the second phase.44

In the second, judicial phase a panel is established according to Article 4.7 DSU upon request of the complaining party if consultations fail to settle the dispute within 60 days of requesting the consultations. The second phase itself consists of three parts: first the panel procedure, which is the first and sometimes final instance of procedures, before an ad hoc panel established following the procedure laid out in Article 6 and further DSU45. Second comes the procedure

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41 Article 2:1 DSU.
42 Horn and Mavroidis call this the bilateral and the multilateral phases (Horn, H. and P.C. Mavroidis, ‘A Survey of the Literature on the WTO Dispute Settlement System’ (2007) 6020 CEPR Discussion Paper). In this dissertation the terms administrative and judicial phase are chosen, as they are somewhat reminiscent of the phases of the infringement procedures and make comparative analysis easier later on in this book.
43 According to Article 4.6 DSU consultations are to be confidential, however others may be present during consultations when they have a substantial trade interest in the consultations, after notification to the parties to the dispute and DSB and the acceptance by the party to which the request was addressed (Article 4.11 DSU).
44 Here, a reference is made only to the official cases: those announced to and published by the Dispute Settlement Body. As Horn and Mavroidis describe: These cases represent only “the tip of the tip of the iceberg”, and it is unclear what conclusions can be drawn from any empirical research on the official data (Horn and Mavroidis (2007), p. 30).
45 The members of the panel are chosen according to the will of the parties to the dispute. Only in case of disagreement between them, the panelists will be appointed by the Director General of the
before the Appellate Body (AB), which is similar to a court of last instance and hands final judgment over a dispute. The AB is a standing body, to which seven judges are appointed on four-year terms. The AB can no longer go into the factual matters of the case, which are taken to have been examined in depth by the panel in the earlier instance. Appeals, therefore, have to be based on points of law. Third and final, when a ruling by the AB has been made and a party does not comply with the ruling within a certain timeframe, resort can be taken to a so-called ‘compliance panel’ under Article 21.5 DSU. This panel can examine the WTO consistency of implementing measures. If it finds the Member concerned has indeed not implemented the rulings within the set timeframe, it can authorize the other party to the dispute to take retaliatory measures or suspension/termination of concessions until the original report is complied with. Figure 7.1 shows the four steps of the dispute settlement procedure.

![Figure 7.1 The Phases of the WTO Dispute Settlement System](image)

It is important to realize that during the entire process, the parties to the dispute can still negotiate. Moreover, the panel and AB reports do not tell the

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WTO (Article 8 DSU).

46 These judges are persons of recognized authority unaffiliated with any government (Article 17 DSU).

47 According to Article 21.3 of the DSU, the Member concerned must inform the DSB within 30 days of its intentions in implementing the recommendations and rulings of the AB. This implementation must be within a "reasonable period of time for".
losing party how to bring its behavior into conformity with the rules and obligations of the WTO. Article 19 of the DSU states quite clearly that the panel or AB “shall recommend the Member concerned bring the measure into conformity with the Agreement”, but that it “may suggest ways in which the Member concerned could implement the recommendations”. Article 19.2 adds, “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements”. This means that the way the losing party to the dispute changes its behavior after the adoption of the report can also be a subject of consultation and negotiation between the parties to the dispute. All that is required is for the Member State to bring its measure into conformity with the Agreement.

3.3. Features and Character of the Procedure

The new dispute settlement system has helped to resolve many of the problems that existed under the GATT mechanism and that had rendered that system less effective than it could have been. In particular, the formalization of a complainant’s right to a panel, providing for the automatic adoption of panel reports through “reverse consensus”, the availability of appellate review and the establishment of a mechanism with jurisdiction over all disputes arising under the covered agreements have increased the system’s effectiveness. This section discusses some important features as well as the character of the WTO dispute settlement procedure.

3.3.1. Some Features of the Dispute Settlement System

Some interesting features of the WTO dispute settlement procedures pertain to its intergovernmental character, the absence of a requirement of legal interest, the purpose of the system, the preference for friendly settlement when possible, and the possibility for sanctions as an ultimate remedy.

**Intergovernmental**

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48 Similar to the declaratory rulings by the Court of Justice of the European Union during the infringement procedures.

49 Reverse consensus means that a panel report will only not be adopted when all members (including the winning party in a dispute) agree it should not be.
An important element of the WTO dispute settlement procedure is that a dispute can only be brought before a panel by a Member of the WTO against another Member. There is thus no central or supra-national WTO body that can bring a Member State before a panel in order to achieve compliance with WTO rules. This fact is seen by some as one of the reasons for the relatively low number of WTO cases since the organization’s inception.\textsuperscript{50} When this is compared to the EU system for instance, it is clear from statistics that Member States prefer taking recourse to the Article 258 TFEU procedures by notifying the European Commission of another Member State’s non-compliance, rather than invoking Article 259 and taking the matter to the Court themselves.\textsuperscript{51} In the WTO, most disputes end before a panel ruling, and most of these even before a panel is requested. As one scholar put it: “the success of the WTO system hangs on its ability to encourage bargaining in the shadow of weak law”.\textsuperscript{52}

\textbf{No requirement of legal interest}

There is no provision in the DSU requiring a Member to have a certain legal interest in the case at hand in order for them to have recourse to the dispute settlement system. In \textit{EC-Bananas III} it was held by the Appellate Body that “a Member has broad discretion in deciding whether to bring a case against another Member under the DSU” and furthermore that “Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly”.\textsuperscript{53} In \textit{Mexico-Corn Syrup (Article 21.5 – US)}, the Appellate Body stated it must presume that a Member submits a request for a panel in good faith, and that Article 3.7 DSU “neither requires nor authorizes a panel to look behind that Member’s decision and to question its exercise of judgment”.\textsuperscript{54} In general it can thus be stated that a Member is presumed to act in good faith and to have an interest (direct or indirect, according to the wording of Article 3.7 DSU) in bringing the case before a panel. This is easy to fulfill, given the fact that WTO cases are supposed to be about “trade opportunities”, and not actual trade flows.

\textsuperscript{50} Tallberg (2002), p. 637.

\textsuperscript{51} See chapter 3 on the EU infringement procedures.


\textsuperscript{53} \textit{EC – Bananas III}, paras. 132 – 136.

A Member State can also be heard as a third party to a dispute when it has a substantial interest in the case at hand, meaning when “any benefit accruing to it directly or indirectly […] is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded.”\textsuperscript{55} However, any legal findings apply only to this case and to the parties concerned.

**Purpose of the system**

The dispute settlement system is there to preserve the rights and obligations of the members under the covered agreements and to clarify the existing provisions of those agreements.\textsuperscript{56} It is therefore not there to protect common or union interests or the rights of third parties, in contrast to the EU Article 258 procedure, for example.\textsuperscript{57} The aim of the dispute settlement system is thus more political in that the goal is to settle disputes.\textsuperscript{58} The system does not have as its primary goal to induce compliance with the rules of the organization as such. Article 3.7 of the DSU states quite clearly: “the aim … is to secure a positive solution to a dispute”, while Article 3.3 DSU emphasizes, “prompt settlement […] is essential to the effective functioning of the WTO.”

Nevertheless, despite the fact that the system is meant to resolve disputes between Member States and is not meant as a compliance mechanism per se, in practice it does to a large extent function as such, at least during the judicial phase. The panels and the AB review whether the measures taken by the defendant state are indeed in non-conformity with the rules and obligations under the WTO Agreement. If they are, the non-compliant State is obliged to remove the offending measure, thereby bringing itself into conformity with WTO rules. The dispute is thus solved through inducing compliance by the Member States.

**Friendly settlement**

As a logical consequence of the dispute-solving character of the system, the DSU prefers Members to settle their differences through consultations if possible. This is the obligatory first step in the dispute settlement procedure. It is still possible to end a dispute through negotiations while it is already before a panel, in contrast to for example the EU system. In the EU system, the infringement procedures also encourage the peaceful settlement of disputes between the Commission and the Member State, but once a procedure has started it is not auto-

\begin{flushleft}
\textsuperscript{55} Article XXIII:1 GATT.
\textsuperscript{56} Article 3:2 DSU.
\textsuperscript{58} Busch and Reinhardt (2000), p. 158.
\end{flushleft}
matically stopped when the Member State adheres to the EU rules. The possibility of ending a dispute when it is already before a panel is, among other things, due to the fact that dispute settlement under WTO rules is not meant to protect common or higher WTO interests. Thus, when the parties no longer want to continue the procedure, it is not up to a panel or the DSB to proceed anyway.\(^{59}\)

So far, 462 disputes have been brought to the WTO since 1995.\(^{60}\) For 223 cases, panels were established and are actively working or have reported. For the other 239 disputes, in as far as they are not currently pending after consultations have been requested, either the WTO has been notified of a mutually agreed solution (94 cases), or the dispute has been dropped or settled in some other way before the establishment of a panel. This means that in roughly half of all cases, a solution was found without recourse to the WTO dispute settlement system’s judicial phase. It could be that the mere fact of requesting consultations on a certain matter signals the complainant’s seriousness. The respondent, wanting to prevent the establishment of a panel and having to comply with a binding panel report, will then be more likely to look for a friendly solution to the dispute than without this signal. This could explain the fact that a mutually agreed solution or another manner of settling the dispute was found in so many cases.\(^{61}\) Early settlement (that is, before or during consultations) is beneficial for both parties, both in an economic and social sense. Reaching a settlement in later stages of the procedure may also be preferred to awaiting the outcome of litigation. In that way the defending party can choose to undertake measures which are beneficial to the Member’s stakeholders (industry, consumers), thereby avoiding the possibly costly legislative changes the outcome of panel proceedings could involve.\(^{62}\)

### Sanctions

A last element of interest, and one which again distinguishes the WTO dispute settlement procedure from the EU infringement procedures for example, is the fact that whereas the EU Court of Justice can impose penalties on a non-compli-
ant Member State, in the WTO such penalties cannot be awarded. When a party
does not promptly comply with the recommendations or rulings of the DSB (pur-
suant to Article 21 DSU), however, the other party can request authorization from
the DSB to suspend the application to the member concerned of concessions or
other obligations under the covered agreements (suspension of concessions as
allowed by Article 22 DSU). However, these provisions on trade sanctions do not
allow for the imposition of penalties. This is of course in line with general inter-
national law, where the focus is on restoring the balance between the parties. No
"international crime" has been committed, and thus no punishment is neces-
sary. This absence of penalties is seen by some as a reason for the existence of
persistent non-compliance with the rulings of the AB – since there is no ultimate
penalty for non-compliance. It has been argued that "a regime that is concerned with redress for those
who claim that their rights have been infringed, is different in focus from a
system whose main concern is to provide consequences for those who do not
comply with its rules". For the WTO, the aim is to settle disputes and to offer
redress, not damages. Nor does it want to sanction or punish those who are non-
compliant. Compensation in the WTO is a temporary measure until implement-
tion is achieved, and is meant as an incentive for the offending state to bring
its laws into compliance. This means a return to conformity through *restitution
in integrum.* It has often been argued that the lack of compensatory remedies
should be addressed under WTO rules, but as of yet the option has not been
provided for. Other suggestions regarding changes to the compensatory system
of the WTO include the introduction of a choice between monetary payments to
or suspension of concessions by the prevailing party; a retrospective assessment
of remedies, calculations thus starting before the date set for implementation

63 E.g. Bronckers, M. and N. van den Broek, ‘Financial Compensation in the WTO: Improving the
Remedies of WTO Dispute Settlement’ (2005) 8 (1) *Journal of International Economic Law. Others believe
that rather than turning to hard sanctions to address non-compliance, softer mechanisms should be
used more intensively, such as publicity, education, capacity building etc. (see e.g. Charnovitz (2001)).
64 Persistent non-compliance refers to cases such as EC – *Bananas III*, or EC - Measures Concerning
Meat and Meat Products (Hormones), Report of the Appellate Body WT/DS26/AB/R & WT/DS48/AB/R,
adopted 16 January 1998 (cases which were originally started in 1996 and only found a solution in
2009 and 2012, respectively).
65 McRae, D., 'Measuring the Effectiveness of the WTO Dispute Settlement System' (2008) 3 (1) *Asian
66 Kuijper, P.J., 'Attribution – Responsibility – Remedy. Some comments on the EU in different
international regimes' (forthcoming) *Belgisch Tijdschrift voor Internationaal Recht / Revue belge de droit
ternational.*
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– thereby preventing unnecessary delays in implementation,68 and the increase of sanctions over time.69 In any case, it has been shown that the introduction of penalty payments is capable of increasing compliance with rulings.70

3.3.2. Character of the Dispute Settlement System

The character of the dispute settlement system under the WTO has, despite the changes made to it, retained some of the diplomatic character it had under the GATT 1947. Early settlement is encouraged under the WTO as much as under GATT 1947 and remains the prevalent way to solve disputes. Panels are requested in less than half of all cases.71 The negotiations and consultations that take place during early settlement are not made publicly known. Members other than the parties to the dispute are not present during consultations.72 It thus remains unclear on what grounds the early settlement has taken place, and what political and diplomatic issues may have played a role in this stage.

Moreover, smaller or developing countries have a weaker position under the habit of early settlement. They have fewer resources, both financial, human as well as knowledge resources, to spend on dispute settlement than the larger and developed members. Since their aggregate trade value is less than that of the developed members, and remedies under WTO law are limited, they have less to gain from a successful claim. A simple cost-benefit analysis reveals that the balance usually tips over toward the developed countries in early settlement, since developing countries have more to lose when a case continues to the judicial

68 However, this suggestion is not very efficient: It just heightens the cost of being the target of compensatory actions, without inducing earlier compliance. Any Member that was able to comply with a ruling within the reasonable period for compliance will not have to pay or suffer retaliatory damages at all, so why start the calculation of the height of these remedies on a date still within the reasonable period of time?
71 Between 1995 and 2011 panels were established in 234 cases out of 423 requests for consultations. Panel reports were adopted in 154 cases, while arbitration awards were made in 12 cases only (19 awards).
72 Most consultations are between the complaining and responding members only. However, it is possible in some cases (under Article XXII GATT only, not under Article XXIII GATT), when agreed to by both consulting parties, for third parties with a substantial interest to participate. It is also possible to request good offices, conciliation and mediation, involving an impartial third party, under Article 5 of the DSU. This may continue during the panel process if so agreed by the parties to the dispute.
phase and less to gain. Statistics seem to bear out this phenomenon.\footnote{See e.g. Bown (2009).} Access to dispute settlement has indeed proved to be problematic, especially for developing and least developed countries.\footnote{McRae (2008).} Some efforts have been made to improve access for these Member States, but much remains to be done in that area if the system wants to reach all Member States effectively.\footnote{For more on the access of developing countries to WTO dispute settlement, see Bown (2009).}

Another area where developing countries have a disadvantage relative to the richer Member States is when non-compliance has indeed been established by a panel or AB report. Some have called the WTO’s dispute settlement system a system of “breach and pay”, where continued non-compliance is possible as long as a Member is willing and able to compensate or endure retaliation.\footnote{Zimmerman, C.D., ‘Toleration of Temporary Non-Compliance: The Systematic Safety Valve of WTO Dispute Settlement Revisited’ (2011) 3 (2) Trade, Law and Development, p. 387.} It is clear that the more developed or larger Member States will be able to sustain such a situation of breach and pay much longer than less developed or smaller Member States.

It has been argued that the reason for the continued preference for early settlement has to do with uncertainty. The complainant has the choice between a unilateral trade measure on the one hand and filing for dispute settlement on the other. In considering the option of retaliation, it also needs to consider the costs for the retaliating country itself, in terms of the restriction of imports that in a way punishes the Member’s own importers and retailers of imported goods as well as consumers.

The defendant must weigh the cost of potential retaliation, the cost of reputation loss by breaking WTO rules, setting a precedent for non-compliance by others, and even consider national political elements, such as being able to point towards a WTO ruling when tying the hands of domestic (protectionist) lobby groups. Neither of the parties knows what weight the other accords to the costs of retaliation and of continued non-compliance.\footnote{Busch, M.L. and E. Reinhardt, ‘The Evolution of GATT/WTO Dispute Settlement’ in J.M. Curtis and D. Ciuriak (eds), Trade Policy Research (2003).} According to Busch and Reinhardt, the anticipation of a ruling and the desire to avoid it is the system’s most effective means of extracting market-liberalizing concessions.\footnote{Ibid., p. 147.} The strength of the procedure thus follows from the normative force of the rulings combined with community pressure (or peer pressure) to observe them,\footnote{Hudec, R.E., ‘Transcending the Ostensible’: Some Reflections on the Nature of Litigation Between Governments’ (1987) 72 (December) Minnesota Law Review.} as well as a weigh-
ing of the costs and benefits of non-compliance. A Member may choose to comply because of reciprocity, reputational issues, fear of retaliation and jeopardizing international cooperation on other issues.\textsuperscript{80} It has been shown that the most important element in making governments comply is the potential cost of retaliation, whereas the other factors play a more limited role.\textsuperscript{81}

To improve transparency in and understanding of the WTO rules, and thereby improve adherence to these rules (and thus lessen the need for dispute settlement, either in the administrative or the judicial phase), the WTO has also introduced an institutionalized form of peer review: the TPRM.

4. THE TRADE POLICY REVIEW MECHANISM

The transparency principle is essential to the workings of the WTO. States, individuals as well as companies involved in international trade need to know about the conditions of trade in order to ensure a balanced and effective functioning of the world trade system. Transparency makes these conditions clearer, as it 1. enables the contracting parties to appreciate trade policies and their impact on the functioning of the multilateral trading system; 2. provides better understanding of trade policies; and 3. demonstrates issues of non-compliance or non-conformity with trade rules.\textsuperscript{82} The TPRM sets out to increase transparency in and understanding of the trade policies of the WTO Member States, thereby increasing adherence to the rules of the WTO.

A first attempt at transparency of trade policies was made by Article X of the original GATT, which called for the prompt publication of laws, regulations and rulings pertaining to international trade. However, the Member States never really acted on this obligation.\textsuperscript{83} After the adoption of the 1979 “Understanding on Notification, Consultation, Dispute Settlement, and Surveillance”, the Secretariat submitted two reports per year on the state of the world trading system.\textsuperscript{84} The

\textsuperscript{80} Hippler Bello (1996), p. 417.
\textsuperscript{84} See Article 24, GATT (1979) Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 265/210).
Trade Policy Review Mechanism as such was finally introduced as a provisional feature during the Uruguay Round Negotiations, and subsequently became a permanent part of the WTO system under Article III(4) of the WTO Agreement: “The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the “TPRM”) provided for in Annex 3 to this Agreement”.

The TPRM is set out in Annex 3 to the Marrakesh Agreement. The purpose of the mechanism is to

- contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of members.\(^85\)

According to the text of the WTO Agreement, the TPRM enables regular collective appreciation and evaluation of individual Members’ trade policies and practices and their impact on the world trading system. The mechanism is meant as a forum where policies can be explained and concerns can be expressed on a non-confrontational and non-legalistic basis.\(^86\) In fact, the WTO Agreement expressly sets out that the mechanism “is not intended to serve as a basis for enforcement of specific obligations under the [WTO] Agreements” (emphasis added).\(^87\) Since the TPRM is not part of the agreements covered by the DSU, it is also procedurally impossible to base a claim on breach of the rules under the TPRM.\(^88\)

Peer review in a trade context can provide a forum for examination of the enforcement policies in individual countries – a forum for national implementation to be monitored and for Members to voice dissatisfaction with another’s enforcement policies. This in turn may result in increased compliance with policy

\(^85\) WTO Agreement, Annex 3.
\(^87\) WTO Agreement, section A(i).
\(^88\) See supra fn 22.
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obligations.\textsuperscript{89} The TPRM thus, through increasing transparency and disseminating information, can indirectly increase compliance with WTO rules.

The Trade Policy Review Body (TPRB) publishes two kinds of reports: the Individual Country Review, and an annual overview of developments in international trade, which may have an impact on the international trading system. The latter is a general report on the workings of the TPRM and developments in international trade and is assisted by an annual report from the Director-General of the WTO highlighting significant policy issues affecting the trading system. The former – the individual country reviews – essentially examine every national policy to check its compatibility with the WTO agreements.

The TPRB is the designated body to carry out periodic trade policy reviews: the Individual Country Reviews.\textsuperscript{90} Each member is obligated to report regularly to the TPRB, describing the Member’s trade policies and practices. The members also provide reports when there are significant changes to their trade practices, as well as annual statistical updates. The review by the TPRB itself is based on a policy statement by the Member under review as well as a report prepared by economists in the Trade Policy Review Division. The most critical source of information however are the responses to questionnaires sent by the Secretariat and the results of fact-finding missions. A preliminary report is sent to the government under review for comments, after which the final report is circulated to Member States\textsuperscript{91}. This report is then discussed in a meeting of the TPRB, the results of which are published together with the final report. These reviews of individual countries are carried out in periods representative of the Member’s share of world trade. The EU, for example, is reviewed every two years, while smaller or less-developed country Members are reviewed every six years or even less frequently.

The TPRM process is thus quite similar to the OECD peer review process: 1. Information is collected about and from the country under review; 2. Members of the TPRB Secretariat travel to the reviewed country to interview country officials and discuss outstanding questions; 3. The Secretariat drafts a report, on which the country under review can comment; 4. The final report, together with a policy statement from the country, is circulated to the Member States, who are invited to submit written questions; 5. The TPRB organizes a review meeting,

\textsuperscript{89} Peer review: merits and approaches in a trade and competition context.

\textsuperscript{90} The frequency of the reviews is dependent upon the impact of individual members on the functioning of the multilateral trading system.

\textsuperscript{91} The Secretariat remains solely responsible for the content of the report, despite the influence of the Member’s government. The final report is an objective evaluation of the situation.
open to all Member States. The Report is discussed, and at the end of two half-day meetings, disseminated and made public.

The Reports are all structured similarly, with a part on the economic situation of the Member State, a second part on the trade policy regime (institutional framework) including investment policies, a third on the Member’s trade policies and practices that examines the existing trade measures, and a final part on trade policy by sector.92

One crucial element of these trade reviews, which stands in contrast to the OECD peer reviews, is that at no point in time are any recommendations made for actions to be taken by the Member under review. The reports are overviews of the individual countries’ policies, with an aim to enhance transparency and to have Members learn from each other. Especially for developing country Members, these reviews are very useful in terms of capacity building and technical assistance. The findings in the report often do point towards areas where change might be needed, and the concerned member’s policy statement at the publication of the report also often contain remarks on how the country’s trade policy will take the findings into account. If the Member State then subsequently does not adhere to its statements in the report, its reputation will surely suffer, internally as well as externally.

However, neither the statements made both in the Government Report provided before the review meeting nor the statement made by the government at the time of the meeting usually contain very strong commitments. Conversely, in the concluding remarks of the chairman of the TPR meeting at the end of the process, it does become clear where some of the most important issues lie. Since this is the most accessible information regarding the review process, it is liable to have the most impact. Phrases such as: “members are concerned”, “the member is encouraged to review policies”, “policies are seen as a hindrance to trade”, “the member is requested to inform or clarify further” and so on are not uncommon.

The TPRB itself has been quite positive about the functioning of the TPRM in its own annual reports. It finds the body is functioning effectively, while expressing satisfaction with the structure, quality and content of the reviews. Appraisal in academic literature is much less positive, where critical comments have described Trade Policy Reviews (TPRs) as

Cumbersome to read and clogged with compendium-style information.
They are analytically superficial and relentlessly uncritical. They differ in their coverage and approach one from another. Furthermore, the

92 The sectoral part often concentrates on agriculture and services, areas where restrictive measures are frequent.
procedures for preparing and discussing TPRs lack efficiency and public participation. It is therefore unsurprising that TPRs are deemed to have no discernible effect on trade policies. Other trade policy assessment, for example by the World Bank, are more rigorous and outspoken.\footnote{Zahrnt (2009), p. 2.}

One official even went as far as to comment: “The TPRM? Totally useless!”\footnote{Respondent #3.}

Although these critiques contain very relevant truths, they are somewhat harsh. The TPRM reports can lead to peer pressure as well as pressure on a national public level. The mechanism is not meant as an enforcement mechanism, but is a compulsory review where a country’s practices are measured against the WTO standards. When, for example, the report states that a certain member has significantly increased its anti-dumping practices since the last review, this might be an incentive for other members to exert pressure on their peer to reduce this amount. In this manner the objective reports of the TPRB do have certain enforcement characteristics. In practice, the reviews have indeed led, albeit modestly, to revision of national legislation by several members in order to conform to WTO rules.\footnote{For an analysis of the effect of trade policy reviews on the outcome of WTO rulings, see for example Chaisse, J. and D. Chakraborty, ‘Implementing WTO Rules Through Negotiations and Sancions: The Role of Trade Policy Review Mechanism and Dispute Settlement System’ (2007) 28 (1) \textit{Journal of International Economic Law}.}

In order to improve the impact of the TPRs, the WTO could learn from the peer review practices of the OECD – a system to which the TPRM bears strong resemblance. The idea of naming-and-shaming, active dissemination through the press, making critical analyses and providing policy recommendations which are checked against actual policy changes in following reviews – these are all elements the TPRM could introduce or apply more rigorously than has been done to date. However, in how far the TPRM will be able to reach the same level of effectiveness as the OECD peer reviews remains to be seen. Although the results of the TPRM cannot be used for dispute settlement, the existence of this compliance mechanism remains at the back of the Member States’ minds. While the existence of a strong compliance mechanism in the EU serves as an extra incentive for the Member States to try and solve their problems through softer mechanisms, the availability of a strong mechanism in the WTO may have entirely the opposite effect due to the legal separation between the TPRM and the DSU. More on the influence this separation has on the effectiveness of these two compliance mechanisms will follow in the final sections of this chapter. A general analysis
of the effect of a strong mechanism in the background in different international organizations is made in the final chapter to this thesis.

5. WTO COMPLIANCE

The WTO dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements”, with the aim of promptly settling situations “in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member”.\footnote{Article 3.2 DSU.} In the WTO system, therefore, the focus of the mechanism is on the rights and obligations of the Member States as they themselves perceive it.

This stands in contrast to the situation under the EU infringement procedures, for example, where the aim is to ensure the fulfillment of obligations under EU rules – compliance\footnote{Article 3.7 DSU.} or as determined by the European Commission. Under the infringement procedures it is the Commission that decides whether in its opinion compliance is achieved or not and whether to take the alleged non-compliant Member State to Court – not the Members themselves. One could say therefore that the WTO dispute settlement system is somewhat more similar to the EU system under Article 259 TFEU, where a Member State can start procedures against another Member State if the Commission decides not to act.

One notable difference between the EU and the WTO dispute settlement systems are the respective goals of the systems. Whereas the aim of the EU infringement procedures is to bring a Member State into compliance with its obligations under EU law, the goal of the WTO dispute settlement system is rather “to secure a positive solution to a dispute”.\footnote{WTO (2011) Understanding the WTO, p. 55.} As the WTO puts it: “The priority is to settle disputes, not to pass judgement”,\footnote{Ibid.} and the first objective is therefore to obtain a “solution mutually acceptable to the parties to a dispute”.\footnote{Article 3.5 DSU: “All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.” (emphasis added).} Such solutions must be WTO-conform.\footnote{Ibid.} Only when this solution cannot be found, an investigation will be launched into whether the measures concerned are found to be inconsis-
tent with the provisions of any of the covered agreements, and whether further actions can be taken. The main objective of the WTO DSU is thus not adjudication but rather dispute settlement, and therefore falls under what was classified earlier as a dispute settlement mechanism where the underlying obligations are of a bilateral nature, as opposed to an enforcement mechanism where obligations are of a more collective nature.101

Nevertheless, Article 22.1 indirectly defines compliance as being “full implementation of a recommendation to bring a measure into conformity with the covered agreements”. This is used in the context of post-panel/AB adjudication, where investigations have been made to see whether the measures at stake are inconsistent with the provisions of any of the covered agreements and no mutually satisfactory solution has been found. To bring the measure into compliance with the covered agreements is then the next option, before the imposition of compensation payment or suspension of concessions.

Before this stage, however, it is possible to find a mutually satisfactory solution where in fact the measure is not brought into consistency with the covered agreements but is rather modified in such a manner, or compensation offered, so the complaining member will not bring the case before a panel. Actual compliance with WTO rules may thus not necessarily have been reached, although officially the solution must be WTO compatible according to the DSU. Rather, a level of non-compliance acceptable to the parties to the dispute may continue to exist. A comparison can here be made to the pre-judicial phase of the EU infringement procedures, where the Commission decides whether a solution offered by the Member State concerned is satisfactory to no longer pursue the case until before the courts. It is thus possible under the WTO dispute settlement system, as with the prejudicial stage of the European infringement procedures, that actual compliance has not been reached after that stage.

There is an important difference between the EU system and the WTO system, which relates to what was said earlier about whether or not a common interest is pursued through the supervision of a more or less supranational institution. The ultimate goal of the WTO dispute settlement system is to solve disputes between Member States in such a way that the solution is in conformity with the obligations under WTO rules. The ultimate goal of the EU infringement procedure is to obtain compliance with EU rules sec. Whether or not this has solved a dispute between Member States is not important as such. There is thus potentially more room under WTO consultations to reach agreement between the parties than there is under the preliminary stages of the infringement proce-

101 See supra: Introduction to Part III.
dures. Moreover, the WTO is a system in which every Member can take on the role of Attorney General, where it is left up to the Member States themselves to decide whether or not a mutually satisfactory solution has been found. Under EU law on the other hand, this decision is left to the Commission. There is thus potentially less room for diplomatic or political influence on the discussions / consultations in the pre-judicial stages of the EU procedures, given the independent status of the Commission, as compared with the two opposing Member States under WTO consultations.

When the WTO system is examined from a compliance perspective, there are a few comments that can be made. First of all, as noted above the discretion left to the Member States is quite large. Not only can they decide whether they want to start procedures, but they are also the masters of the dispute in the sense that, if a solution can be reached between the parties without involvement of the panel or Appellate Body, this is the preferred route to be taken.

Second, and in combination with the discretion left to the Member States, the aim of the system is not necessarily to reach full compliance, but rather to reach a level of compliance acceptable to the parties to the dispute.

Third, compliance with the rules of the organization is potentially improved by the existence of the softer mechanism of the TPRM. The system works parallel to the DSU, and while it is not meant to serve as a basis for litigation, it increases transparency regarding Member State trade policy practices. It thus works as a complementary system alongside the DSU in achieving compliance with the rules of organization. In fact, it is much more focused on achieving compliance than the DSU, which has as its aim the settlement of disputes. Since this is explicitly not the goal of the TPRM, the interaction between the two systems potentially provides an interesting dynamic. In practice, however, the interaction is quite limited, due to the fact that the TPRs do not provide actual policy analyses or recommendations. Dissemination through media and other channels is also quite limited, so the impact in the sense of peer pressure though those means is not as strong as it could be. One of the recommendations for improvement of the TPRM that has been heard repeatedly over the years, both on the side of the TPRB as well as in academic literature, specifically concerns the process of dissemination.\footnote{Zahrnt (2009).}

\footnote{Zahrnt (2009).}
6. THE EFFECTIVENESS OF WTO COMPLIANCE MECHANISMS

Now that the set-up and functioning of the two compliance mechanisms of the WTO has been examined, an analysis of their effectiveness can be undertaken. This chapter will here examine the three elements formulated in chapter 2.1: A: the goal, B: the compliance, and C: the effectiveness. The final chapter will explore D: the comparison.

6.1. The Goal of the WTO Compliance Procedures

The DSU and the TPRM do not set out to attain the same objective: the DSU is aimed at settling disputes, while the TPRM addresses compliance issues.

The purpose of the DSU’s dispute settlement system is not only, as the name itself might seem to imply, the settlement of disputes. It also serves to preserve the rights and obligations of the members as well as to clarify the existing provisions of the WTO agreements. The DSU provides as well that prompt compliance with the rulings under the DSU is essential in ensuring effective resolution of disputes. It can thus be said to reach its goals when i) disputes are definitely settled, ii) they are settled in such a way as to preserve the rights and obligations of all members, iii) the provisions of the agreements are interpreted and clarified so as to provide the members with a predictable multilateral trading system, and iv) when rulings under the DSU are complied with in a prompt manner. The aim of the mechanism is to secure a positive solution to a dispute – compliance is not the primary goal. However, the final solutions, whether proposed by the parties themselves in the administrative phase or by the Panels and AB in the judicial phase, do need to be in compliance with the rules of the organizations.

The purpose of the TPRM is the opposite of the DSU. Its goal is to contribute to the compliance of the Member States with the rules of the organization, and is explicitly not meant to serve as the basis for enforcement or dispute settlement. So even though both systems have the ultimate intended effect of achieving compliance with the rules of the organization, their actual direct aims are different.

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103 As provided by Article 3 DSU.
104 Article 21.1 DSU.
105 Article 3 DSU also provides: the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.
106 Article 3.7 DSU.
6.2. Compliance

Before the effectiveness of the WTO compliance mechanisms is examined, four compliance-related questions need to be asked regarding the Member State obligations, the character of these obligations, the definition of non-compliance and the causes of non-compliant behavior. This way the extent to which compliance can be reached under the mechanisms used in the WTO can be determined.

Expected behavior
The first question regards the obligations the Member States are expected to adhere to. The DSU applies to what are called the “covered agreements”, meaning the WTO Agreement and the Multilateral Trade Agreements, as well as the Plurilateral Trade Agreements for as far as the parties to those agreements have set out the terms for the application of the DSU to that Agreement.

The TPRM applies to the Multilateral Trade Agreements and to the Plurilateral Trade Agreements where applicable, and thereby not to the WTO Agreement itself. This is logical, since the focus of the TPRM is on trade policies as such, and not adherence to institutional rules as under the WTO Agreement.

Hard or soft obligations
The second question deals with the character of the underlying obligations. Both the DSU and the TPRM apply to legally binding, hard norms, as laid down in the Agreements. This means that a soft compliance mechanism, which involves instruments such as increased transparency, information dissemination, peer review and peer pressure in the shape of the TPRM, also in fact covers hard obligations. However, according to the TPRM, para TPRM, para. A(i), the results of the TPRM cannot be used for the enforcement of specific obligations, while the reports contain legally non-binding recommendations and advice only.

Actual behavior given the element of discretion
The third question goes to the core of the compliance problem: When is a WTO Member State non-compliant? For both mechanisms it is theoretically the case that a Member State is non-compliant when it does not adhere to the obligations under the agreement targeted by the specific mechanism. But who determines when non-compliance exists?
Under the DSU, the determination of a violation is left up to the Member States themselves – the only parties that can initiate proceedings. Moreover, most cases are solved during the phase of (informal) consultations, where it is only the parties to the procedure that discuss and negotiate among themselves.\textsuperscript{107} The Member States are thus up to a certain point Masters of the Dispute – which is logical in the Member-driven organization that is the WTO. Of course, any mutually agreed solutions reached during the time of consultation need to be brought to the attention of the DSB and any relevant Councils and Committees, where any Member may raise any point.\textsuperscript{108} Nevertheless, there is no objective independent body during this phase that decides whether or not compliance has been reached – it is left in the hands of the contracting parties. In practice, solutions to a dispute are often not communicated to the organization, and thus official scrutiny of what exactly has been concluded between the parties to the dispute is difficult. Discretion therefore does play a role in the administrative part of the dispute settlement procedures.

However, in the event that the parties are not able to come to an agreement under the prejudicial phase, the dispute is left in the hands of a panel, and when needed eventually in the hands of the Appellate Body. These bodies, then, determine whether or not the disputed trade measure indeed breaks a WTO agreement or an obligation under it. In theory, these reports need to be adopted by the DSB, but as this is done by reverse consensus, the adoption is quasi-automatic.

Determinations of non-compliance under the TPRM are made by the TPRB. In contrast to the OECD’s country reports, the Member State under review cannot influence the contents of the reports. Instead, the observations of that country are published separately from the TPRB Report. The Member States themselves thus do not determine non-compliance with the rules of the WTO; they can only provide the necessary information to the TPRB and explain or provide their view of alleged instances of non-compliance. On the other hand, the TPRB is composed of Member State representatives, and in that light the Member States – through the TPRB – determine the extent to which a Member State is in compliance with WTO law.

\textbf{Intentional or non-intentional non-compliance}

This last element refers to the underlying reasons for non-compliance. Whereas the first, administrative part of the dispute settlement procedure provides for the opportunity to explain oneself to the complaining party, and therefore allows for

\textsuperscript{107} Although third parties can also participate under certain conditions. See \textit{supra}, fn. 72.

\textsuperscript{108} Article 3.6 DSU.
the rectification of non-intentional non-compliance to some extent, the judicial part does not. Nevertheless, in the case that a breach is determined, a reasonable period is given to the non-compliant Member State to rectify the situation. Moreover, in the case of compensation or retaliation, this period is extended due to the need for negotiations on compensation between the parties, or the necessity of requesting the DSB’s permission to suspend concessions of obligations. Furthermore, this compensation or retaliation does not have retroactive effect. This thus gives the non-compliant Member State the opportunity to rectify the situation. If non-compliance was non-intentional and rather due to differing interpretations of WTO rules for example, the Member State is thus not “punished” for its non-compliant behavior.

The TPRM, then, is targeted at cases of non-intentional non-compliance. Its aim is to increase transparency in and understanding of the trade policies of the WTO Member States, and thereby increase adherence to the rules of the WTO. When the compliance pyramid is applied to the WTO, an interesting divide between the TPRM and the DSU can be discerned. Whereas the TPRM incorporates the two first steps of prevention and compliance, the DSU embodies the next two steps of a legal system and sanctioning. What this divide means for the effectiveness of the two systems will be examined in the next section, after an exploration of the four compliance steps.

Prevention in terms of capacity building and rule clarification is the hallmark of the TPRM. The purpose of the mechanism is to increase adherence to the rules through increased transparency in and understanding of the trade policies and practices of the Members, as well as their impact on the multilateral trading system. The TPRs are in fact a type of Monitoring report, where a check is kept on developments concerning individual trade policies, their compatibility with the rules of the organization and other practices that have an effect on the world trade system. In order to write the reports, surveys are sent out, data are gathered with the help of country officials, and visits to the reviewed country are made to discuss certain issues. By monitoring policy developments in the countries under review and increasing mutual understanding, adherence to the rules of the organization can be increased.

There is, however, no link between the WTO’s TPRM and its legal system. What is more, it is not possible to use the findings of the TPRM for enforcement purposes. This divide between the two systems was made since it was thought that countries would be more open and transparent if they knew that what they said during the TPRs could not be used against them later. A legal system does exist, of

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109 TPRM, para. A(i).
course, in the shape of the dispute settlement system. The DSU also has a managerial side in the shape of the consultations phase, which is meant to arrive at a mutually agreed solution, and offers the possibility to clarify the parties’ positions and to talk to each other in a meaningful way. Moreover, the system itself, and especially the possibility of sanctions, or rather compensation and retaliation, does have a preventive influence. The community costs, meaning the concerns relating to reputation and emulation by other countries, in particular create an incentive to comply or attempt to avoid the judicial proceedings.

However, the most important element of the DSU is its legal system with the panel and appellate procedures, as well as in the possibility for compensation or retaliation. Although the term ‘sanction’ as such is not employed in the DSU, the purpose of the compensation or retaliation is to induce compliance. Article 22.8 DSU states that suspension actions “shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed ...” while Article 23.2(c) adds that suspension actions are “in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.” They thus effectively function as sanctions, as instruments of enforcement.110

The divide between the soft TPRM with its focus on the first two steps of the pyramid and the hard DSU with its focus on the top two steps stands in sharp contrast to the previous systems discussed in this dissertation. Both mechanisms are applied to the same hard obligations under WTO rules, and though their direct aims differ, they have the same ultimate goal of achieving compliance with the rules of the organization.

However, the TPRM mainly targets non-intentional compliance through managerial efforts, while the DSU is more geared towards remedying intentional compliance through enforcement. The managerial phase of the DSU, the consultations, plays an important role as half of all disputes are solved during this stage. This phase is probably so effective at ending disputes due to the shadow of the legal side of the dispute settlement system hanging over the consultations. Parties know that a panel, costly in financial as well as community costs, will be established if a solution is not found. However, this phase is not meant as a means to induce compliance with WTO, but aims to reach a mutually agreeable solution between the parties concerned. Given the power of the parties and the lack of scrutiny in this phase, it is debatable in how far actual compliance is reached during this phase. Moreover, the phase is not so much meant for clarification, capacity building or information dissemination, but rather as a last,

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obligatory way to avoid the judicial part of the procedures. It can thus be seen more as the political part of the procedures, as compared to the legal panel and AB proceedings, than as a means to solve non-intentional non-compliance.

The fact that the DSU does not incorporate managerial elements such as those that exist under the TPRM to a greater extent, while instances of non-compliance cannot be referred from the TPRM to the dispute settlement system, undermines the effectiveness of both systems – as will be discussed in the next section. As one official remarked:

> It is long lists of questions and reports. I never have seen anybody modifying its legislation, because of the TPRM. I mean I had fun, and sometimes you put questions to the US and to China and say this is not compatible and the like. But then there is this sentence in the TPRM agreement saying that the information collected in TPRM cannot be used for litigation. I mean, who cares about the TPRM, are only the people who have to collect the replies. [...] I mean you can bash every country you want and say what they do is outrageous. But there is no pressure, no naming-and-shaming from the TPRM. No. No way. \[111\]

### 6.3. Conclusions on Effectiveness

The TPRM is often criticized for its lack of actual scrutiny and recommendations to the Member States at the end of the reviews. Many do not see it as an effective or even useful system.\[112\] This is surprising, especially given the similarities of the system to the OECD peer review mechanism, which is heralded as a system that has quite some influence on Member State policies, or at least one with results that are often taken into account in national policy debates.\[113\] Explanations are usually found in the lack of recommendations, no active dissemination through the press, no critical analyses and no follow-up on the implementation of national laws, only an analysis of new and existing laws without looking at how these laws are actually carried out in practice.

One very important difference between the OECD and the WTO, however, is the complete lack of an enforcement system in the OECD. The WTO, on the other hand, has the elaborate dispute settlement system alongside the TPRM. This difference may also explain to some extent the perceived difference in effectiveness between the two peer review mechanisms.

\[111\] Respondent #3.

\[112\] See section 4 in this chapter.

\[113\] See the previous chapter.
First, the results of the TPRM may not be used for enforcement purposes. Nevertheless, any information divulged under the TPRM is readily publicly available after the reports are published. Member States may hesitate to be completely frank and transparent, given the information’s potential to be used indirectly in dispute settlement. Even if not allowed directly, certain information can still draw attention to certain practices of a Member State that may otherwise have gone unnoticed. This may also explain the lack of firm commitments of Member States at the end of the peer review process.

Second, the DSU system also to a certain extent incorporates managerial elements during the consultation phase. In the European infringement procedures, the preliminary managerial stage of that system in combination with the existence of alternative procedures provides the Member States with ample opportunity to weed out non-intentional non-compliance, as well as the possibility to solve instances of non-compliance at a relatively early stage. Creating a divide between the TPRM and the DSU may not allow the preliminary phase of the DSU to come to full potential, while the TPRM is not put to effective practical use. The idea behind the divide is probably the thought that Member States will speak out more, and be more transparent when they do not have to fear the use of their information in contentious proceedings. However, reality shows that given the existence of the DSU, this fear of using the TPRM information for the DSU exists nevertheless. It could thus render both the DSU as well as the TPRM more effective if an institutional and operational link between the two mechanisms were made.

Criticisms that are heard regarding the effectiveness of the DSU concern its weak enforcement capabilities, other than compensation or retaliation, and the bias of the system toward the richer and more developed economies. By integrating the TPRM and the DSU, developing countries will potentially benefit, while the introduction of harder sanctioning possibilities may become less controversial. When the managerial base of the pyramid is strengthened, and possibilities for friendly settlement are thus increased, informational asymmetries between richer and poorer countries will diminish through application of the TPRM. This is beneficial to developing countries, which often draw the short straw during consultations as they have less capacity and a lower budget to make investigations. Moreover, a stronger pyramid base will be more capable of carrying a heavier top, in the sense of increased sanctioning possibilities. Given the stronger base, with more information and transparency, fewer cases will continue through all four steps of the pyramid. And of those cases that do enter the last step of sanctions, a larger proportion will be caused by intentional non-compliance, as the
increased transparency in the bottom steps will have weeded out more non-intentional non-compliance.

Integrating the two systems, however, is probably a step too far. Moreover, it would not do justice to the TPRM as it functions today. It not only reviews a country’s trade practices, but it also highlights interconnections between trade and internal economic developments, sectoral effects of trade policies or the influence of other policies such as competition or investment. Nevertheless, strengthening the managerial basis of the DSU by increasing transparency and reducing information asymmetries may help to increase the effectiveness of that system. On the other hand, stronger critiques, recommendations and other improvements that may lead to more peer pressure will improve the functioning and effectiveness of the TPRM.

7. CONCLUSIONS

The interaction, or rather the lack thereof, between the soft TPRM and the hard dispute settlement system can be seen as a very important explanation for the lack of effectiveness of the TPRM and the weak enforcement capabilities of the DSU. The option of integrating the systems, or at least making the results of the TPRM available for use within the dispute settlement system, may remedy both problems. Given the likelihood that this will remain an impossibility, lessons should be learned from the disadvantages of the divide. Building a stronger managerial foundation for the DSU, while increasing the enforcement possibilities in the TPRM through adding to the two upper steps by improving its peer pressure capabilities, will improve the effectiveness of both systems.
CHAPTER 7

IMF
The IMF is as relevant and effective as its member governments (especially the largest) want it to be.

1. INTRODUCTION

The previous two chapters have analyzed the functioning and effectiveness of compliance mechanisms in the OECD and the WTO. Chapter 5 showed how a soft mechanism based on mutual surveillance and peer review can work effectively when compliance with the underlying soft obligations is not expected in the short-term, but rather seen as a process that takes time and effort before results are obtained. Chapter 6 then showed how a soft (the TPRM) and a hard compliance mechanism (the Dispute Settlement Mechanism) can function alongside one another within one international organization, and how the existence of one type influences the functioning of the other. Once again, the importance of the character of the underlying obligations was seen, and it became clear that a soft mechanism potentially functions less effectively for hard obligations than it theoretically could when a costly and bilateral adversarial mechanism looms in the background. It was argued that a further integration of the two systems could enhance the effectiveness of both the TPRM as well as the Dispute Settlement Mechanism.

This current chapter will analyze how a soft mechanism functions in the International Monetary Fund (IMF), where the underlying obligations are partly of a soft and partly of a hard character. The IMF does have the possibility of imposing enforcement measures, but these are considered inefficient and almost never applied. The ultimate sanction of involuntary expulsion from the organization has been applied only once in its history. First, an overview is given of the history and functioning of the IMF, followed by a discussion of one of the most important mechanisms of the IMF: the Article IV consultations. Second, an analysis is made of the functioning and effectiveness of this mechanism in inducing compliance with the underlying obligations.

2. ABOUT THE IMF: HISTORY AND FUNCTIONING

Before the First World War, there was no legal regime that covered international monetary affairs. All currencies of the major Western economies were tied to gold, meaning that *de facto* exchange rates were essentially fixed – the so-called gold standard – while other states tied their currencies to one of the key currencies and held reserves in either gold or those key currencies.\(^1\) This gold stan-

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\(^1\) This in contrast with international trade or customs agreements. See also Lowenfeld, A.F., *International Economic Law* (Oxford University Press, Oxford 2008).
standard system collapsed at the outbreak of the First World War. The interbellum that followed was a period with mixtures of floating and fixed exchange rates, while the Great Depression of the thirties led to states increasing subsidies, trade restrictions, competitive devaluations of currencies and restrictions on foreign exchange. These beggar-thy-neighbor attempts to counter the effects of the depression only had adverse effects, which in the end led to a sharp decline in world trade, employment and living standards in many countries, and eventually contributed to the outbreak of World War II.

As early as 1942, negotiations for what later became the Bretton Woods Agreement began. The Agreement itself was signed in 1944, before the Second World War was even officially over, and came into force in December 1945 after ratification by 29 countries. The Bretton Woods Conference created two institutions: the International Monetary Fund and the International Bank for Reconstruction and Development (The World Bank). The World Bank would be devoted to long-term economic development, while the IMF was to enable states to achieve financial stability by making its resources available to them in accordance with the Articles of Agreement (AoA). In practice, this meant that the IMF Member States agreed to surrender some of their monetary sovereignty to the IMF in exchange for a rules-based monetary system. One of the main decisions taken by the Bretton Woods negotiators was to commit to fixed exchange rates, with the idea that this would produce the stability that had been lacking in the inter-war period.

2 Article I of the Articles of Agreement reads as follows:
The purposes of the International Monetary Fund are:
(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.
(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.
(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.
(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.
(v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.
(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.
The Fund shall be guided in all its policies and decisions by the purposes set forth in this Article.
3 Bradlow, D., ‘Stuffing New Wine into Old Bottles: The Troubling Case of the IMF’ (2001) 3 (1) *Journal of International Banking Regulation*, p. 3.
Under Article IV of the AoA, each Member State was required to adopt a par value for its currency in terms of either gold or the US dollar (which itself had been fixed to gold since 1934 at $35 per ounce). Although this par value system was only partially adhered to, the system functioned well due to the fact that the United States kept to the duties agreed upon in the AoA, regarding the conversion of dollars to gold – and vice versa – at the rate set by the AoA.

Everything changed on August 15, 1971, when the United States unilaterally decided to no longer convert foreign-held dollars into gold, except when in the interest of monetary stability and “in the best interests of the United States”. Nor would it continue to intervene in exchange markets to maintain the par value of the dollar to other currencies. It was becoming clear that the rules as they existed could no longer be upheld, while the effects of the oil crisis had shown that fixed exchange rates were also no longer opportune. It was thus necessary to change the rules of the organization, rather than uphold the existing ones.

Subsequently, the AoA were amended to reflect the actual behavior of floating exchange rates. The new AoA entered into force on April 1, 1978. The most important amendment concerned Article IV, where the par value system contained in that article was now replaced by obligations regarding exchange arrangements. Article IV(2)(b) now allows practically every type of exchange arrangement, as well as changes in Member State policies at any time – provided the Fund is notified promptly. Two restrictions contained in Article VIII remain for the Member States, prohibiting restrictions on the making of payments and transfers for international transactions, as well as multiple currency practices without the approval of the IMF.

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4 Currencies of the Member States were pegged to within 1% of the value of the US Dollar, which itself was fixed to the value of gold. Article IV(1)(a) of the original AoA read: “The par value of the currency of each member shall be expressed in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on July 1, 1944”.

5 France made a change in its par value in the 1948. Canada had a floating currency in the 1950s, while many of the developing countries never established a par value at all (see Lowenfeld (2008), p. 624).

6 Ibid., p. 625.

7 In fact the only type of exchange arrangement that is specifically prohibited is one that uses gold as the denominator: “exchange arrangements may include (i) the maintenance by a member of a value for its currency in terms of the special drawing right or another denominator, other than gold, selected by the member, or (ii) cooperative arrangements by which members maintain the value of their currencies in relation to the value of the currency or currencies of other members, or (iii) other exchange arrangements of a member’s choice.” (emphasis added)

The role of the IMF today is largely to oversee economic stability, foster growth, provide policy advice and financing for Member States in economic difficulties and achieve macroeconomic stability for developing countries.\(^9\) The tasks of the Fund can be classified in three categories. First, \textit{surveillance}: the monitoring of economic and financial developments, and the provision of policy advice aimed especially at crisis prevention. Second, \textit{financial assistance}: The IMF lends to countries with balance of payments difficulties to provide temporary financing and to support policies aimed at correcting the underlying problems. Third, \textit{technical assistance}: The IMF helps member countries to manage their economic policy and financial affairs effectively. These three main functions of the Fund are all related to the overall goal of promoting financial stability in and among its member countries.\(^10\)

The two systems that are key to performing these roles of the IMF are the Article IV consultations (Article IV AoA), and the Balance of Payments Support Programs (Article I AoA). These systems will be discussed in sections 3 and 4, after an overview of the IMF institutional structure and its instruments.

2.1. IMF Institutional Structure

Article XII AoA established the three organs of the IMF: a Board of Governors, an Executive Board and a Managing Director, who also functions as chairman of the Executive Board.\(^11\)

The \textit{Board of Governors} consists of one governor and one alternate appointed by each Member State, usually the Minister of Finance or the President of the Member’s Central Bank. The board meets at least once a year, or when called into special session. All powers of the Fund are vested in the Board of Governors, but it has delegated most of its powers to the Executive Board.\(^12\) The most important rights it has retained include the right to approve quota increases, SDR\(^13\) allocations, admittance and withdrawal of Members, as well as amendments to the AoA.

\(^9\) See the AoA, e.g. Article I for general purposes of the IMF, as well as the IMF website www.imf.org.
\(^11\) Article XII(1) AoA.
\(^12\) Article XII(2).
\(^13\) SDRs are Special Drawing Rights, which represent a claim by the IMF Member States on Member States’ foreign exchange reserve assets. The value of an SDR is defined by a weighted currency basket of the US Dollar, the Euro, the British Pound and the Japanese Yen. In practice, SDRs function mostly as the IMF’s unit of account.
and by-laws. The Board also elects or appoints the executive directors that make up the Executive Board discussed below, and makes final interpretations of the IMF’s AoA.

Two committees advise the Board: the International Monetary and Financial Committee (IMFC) and the Development Committee (DC). The IMFC meets every six months to discuss matters regarding the global economy. The communiqué it produces at the end of the meeting serves as a guiding document for the IMF’s work program until the next meeting. The DC is a joint committee of the IMF and the World Bank, and serves as a forum to build intergovernmental consensus on development issues.\(^4\)

The Executive Board consists of at least 20 directors – five appointed by the five members with the largest quotas,\(^5\) and at least 15 as elected by the other members.\(^6\) The Board takes care of the IMF’s day-to-day business, and is in continuous session at the offices of the IMF.\(^7\) Voting in the Board is weighted according to the Member State’s economic importance as reflected in the quotas in the Fund with a minimum voting power for each member.\(^8\) Voting is officially by a majority of the weighted votes,\(^9\) however, decisions are in practice usually made by consen-

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\(^{15}\) The US (16.75% of the total), Japan (6.23%), Germany (5.81%), France (4.29%) and the UK (4.29%).

\(^{16}\) At the moment there are 19 Directors other than the largest five. Each usually represents a group of Members according to their regional situation, linguistic background or other reasons. Mr. Jose Rojas from Venezuela, for example, is currently (2013) the Director of a group which consists of Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Spain, and Venezuela. On the other hand, three Directors represent just one Member each (aside from the largest five): China, Russia and Saudi Arabia.

Proposals to reform the quota and governance system have been accepted by the Board of Governors in 2010, which after ratification will lead to significant changes in the IMF governance structure. This involves, among other things, a doubling of quotas, a shift of quota shares to developing countries and under-represented countries, as well as a more representative, all-elected Executive Board. The package is awaiting ratification by Member States representing at least 85% of the votes in order to come into effect (at the time of writing this thesis it had been ratified by around 70%). See Press Release no 10/477, IMF Board of Governors Approves Major Quota and Governance Reforms, December 16, 2010 (found on IMF website: http://www.imf.org/external/np/sec/pr/2010/pr10477.htm).

\(^{17}\) Article XII(3).

\(^{18}\) The rather complicated method of vote distribution is detailed in Article XII(5) AoA.

\(^{19}\) This can be either by (simple) majority of the total voting power, 70% concerning more important decisions (24 possible occasions in total can be found in the AoA, including votes on the rate of interest on SDRs or the determination of a remuneration rate under Article V(9)(a), or 85% for very important decisions (23 possible occasions in the AoA, such as voting on compulsory withdrawal of a Member, or amendments to the AoA).
sus before it comes to an official vote.\textsuperscript{20} The Executive Board, like the Board of Governors, is made up of representatives of (groups of) Member States. The Executive Directors are supposed to represent their appointing or electing states and take instructions from them. The fact that they work at the Fund, live in Washington, D.C. where the Fund is seated, and are paid their salaries by the Fund, leads to their being seen as less political than the members of the Board of Governors. However, they remain representatives of the countries and groups that elected them and are not independent experts or international civil servants.

The \textit{Managing Director} and the Staff form the third pillar of the Fund’s three-tier structure. The Managing Director is selected by the Executive Board and is neither a Governor nor an Executive Director. He is chairman of the Executive Board, but without the right to vote. The Director is chief of the operating staff and conducts the ordinary business of the Fund, as well as the organization, appointment and dismissal of the Staff. According to Article XII(4)(c) AoA, both the Managing Director as well as the staff of the IMF owe their duty to the IMF and no other authority, and thus function independently from the influence of the Member States.

\section*{2.2. IMF Instruments}

To perform its three tasks of performing surveillance, providing lending facilities and technical assistance, the IMF has several legal instruments. Apart from the Articles of Agreement themselves, the legal instruments include the by-laws, rules and regulations of the IMF, decisions, interpretations and recommendations by the Executive Board and the Board of Governors.

The by-laws of the IMF are adopted by the Board of Governors, meant as complementary to the AoA and binding upon the Member States under Article V AoA. The rules and regulations are supplements to the AoA and the by-laws and are not intended to replace them in any manner. They provide operating rules, procedures, regulations and interpretations as necessary and desirable to carry out the purposes and powers as contained in the AoA and by-laws.

\textsuperscript{20} See IMF Rules and Regulations, Rule C-10: “The Chairman shall ordinarily ascertain the sense of the meeting in lieu of a formal vote. Any Executive Director may require a formal vote to be taken with votes cast as prescribed in Article XII, Section 3(i), or Article XXII(a)(ii).” One reason for the preference for decision-making by consensus is in order to ensure the possibility for all Members to effectively participate in the decision-making process. This goes in particular for developing countries, which hold about 30\% of the voting power in the IMF (40\% when including emerging market economies), as compared with developed countries having around 60\% of the votes.
Decisions are taken either by the Board of Governors, by the Executive Board according to the voting rules as laid down in the AoA, or by consensus as is preferred according to the by-laws of the IMF. They are binding upon the Member States. One example of a decision is found in Article XXIX AoA, decision of interpretation. This article gives the Executive Board exclusive power to interpret the AoA, and if a Member does not agree with the interpretation it can ask for a final decision by a Committee of Interpretation of the Board of Governors. Interpretative decisions are also binding decisions.

Recommendations are not binding on the Member States. An example of a recommendation can be found in the principles for the guidance of members’ exchange rate policies under Article IV. By complying with these recommended guidelines a member is in compliance with its obligation to cooperate with the Fund under this Article, but non-compliance with the guidelines does not necessarily imply non-compliance with the obligation of cooperation. Cooperation can take other forms than those recommended by the Fund.

For those obligations that are binding on the IMF Member States, no hard enforcement mechanism exists. In fact, there are only a few options under the Articles for dealing with non-compliant Member States, options that do not include the existence of a dispute settlement system. The options are mentioned in the AoA in several different places, but amount to roughly the same idea: The Fund may declare the Member ineligible to use the general resources of the Fund, its voting rights may be suspended, and it may ultimately be required to withdraw from membership in the Fund. These options have rarely been used throughout the Fund’s history, as they are often considered too heavy a tool to address the non-compliance at issue. Another oft-heard argument for the lack of application

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21 See previous footnote.
22 In December 2011, the total number of decisions taken by the IMF was 303, complemented by 15 resolutions by the Board of Governors and four interpretations under Article XXIX(a) AoA.
23 Article XXVI AoA. The Member State deemed to be in non-compliance is also given the opportunity to state its case, both orally and in writing. Although suspension of voting rights and the use of the fund’s resources are applied from time to time (e.g. in the case of Sudan, Somalia and Zimbabwe over the past years), there is only one example where a Member State was expelled: the expulsion of Czechoslovakia in 1954, when it refused to provide certain information to the Fund. It was re-admitted in September 1990, and ceased to be a member in 1993 when it was succeeded by the Czech Republic and the Slovak Republic (see IMF website www.imf.org). A procedure for compulsory withdrawal following continued arrear in payments by Zimbabwe was started in 2003, but in the end did not lead to withdrawal.
24 See e.g. IMF (2003) Strengthening the Effectiveness of Article VIII, Section 5, p. 9. For failure to pay obligations to the IMF (the most prevalent type of non-compliance), the preferred solution is the so-called rights approach, as explained in e.g. IMF (2004) Review of the Fund’s Strategy on Overdue Financial Obligations.
of enforcement measures is the fact that Member States are afraid to apply harsh measures to non-compliant peers, as they fear similar treatment in the future.\textsuperscript{25}

As stated earlier, the IMF’s purposes can be classified in three categories: surveillance, financial assistance and financial advice. In fulfilling its third function of providing technical assistance, no binding obligations are produced for the Member States, since these usually take the form of recommendations. From Article V(2)(b) AoA it follows that when requesting technical assistance from the Fund, “Services under this subsection shall not impose any obligation on a member without its consent”.

In order to fulfill the other two functions, however, two mechanisms exist within the IMF that involve hard obligations for the Member States to comply with: a soft surveillance mechanism overseeing adherence to Article IV of the AoA, which falls under the IMF’s surveillance function\textsuperscript{26}; and the hard compliance mechanisms that exist for the Balance of Payments Support Programs, which fall under its financial support function. The following sections discuss the functioning and effectiveness of these two basic mechanisms of the IMF.

3. \textbf{ARTICLE IV SURVEILLANCE}

Article IV(1) AoA articulates one general and four specific obligations for the Members of the IMF:

Each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. In particular, each member shall:

(i) endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;

(ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;


\textsuperscript{26} There are more specific obligations for the IMF Member States under the AoA. Most importantly, these include the general obligations under Article VIII regarding restrictions on current payments, discriminatory currency practices, the convertibility of foreign-held balances, and the furnishing of information to the Fund. Adherence to these (voluntarily accepted) obligations is also reviewed during the Article IV consultation process.
(iii) avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members; and

(iv) follow exchange policies compatible with the undertakings under this Section.

This article thus contains two soft and two hard obligations. Soft as in: Members shall endeavor to direct their policies towards economic growth with price stability, and they shall seek to promote stability. Hard as in: Members shall avoid manipulation and they shall follow compatible exchange policies. In order to ensure compliance with these obligations, Article IV(3) provides for the possibility for the Fund to “exercise firm surveillance” over Member States’ exchange rate policies, and to adopt principles for the guidance of the Member States with respect to those exchange rate policies. The Member States in turn are obligated to provide the Fund with the information necessary for such surveillance. IMF surveillance has two components: Article IV(3) gives the Fund the responsibility to “oversee the international monetary system in order to ensure its effective operation” (multilateral surveillance), as well as to “oversee the compliance of each member with its obligations under Section 1 of this Article” (bilateral surveillance over members’ exchange arrangements). A description is given here of the functioning of the IMF’s Article IV consultations: the bilateral surveillance, followed by a brief overview of the Fund’s multilateral surveillance and an assessment of the changes introduced by the 2013 decision on integrating the two types of surveillance.

3.1. Bilateral Surveillance

Article IV of the IMF Articles of Agreement, “Obligations Regarding Exchange Arrangements”, states the following: “each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates”. This obligation is then further elaborated upon in the subsections of this Article, where three obligations for the Member States can be found:

1) The obligation to refrain from exchange rate manipulation,
2) The necessity to intervene on the exchange market to counter disorderly conditions, and
3) The necessity, when intervening, to take into account the interests of other members.

Bilateral surveillance refers to the Fund’s periodic consultations with the Member States to assess economic and financial developments in each Member’s economy: the Article IV consultations. Originally, the core of the IMF surveillance was macroeconomic, where analysis was focused on the choice of exchange rate and the consistency between the fiscal and monetary policy regimes. From the 1990s onward, however, IMF surveillance has slowly evolved to include financial sector issues. The 1990s financial crises taught the IMF the importance of the two-way relationship between the financial sector and macroeconomic stability.27 The Fund had not been able to identify the risks coming from the domestic financial sector in the Mexican and Asian crises, making it clear that it needed to develop its knowledge on financial sector issues – involving changes to its staff, whose knowledge had been mostly macroeconomic in nature – as well as its instruments to conduct surveillance in order to include financial sector issues. Most importantly, in 2007 the Executive Board adopted a decision on bilateral surveillance, which introduced the standard of external stability to assess Members’ domestic policies, thus taking into account the external effects of domestic exchange rate policies and introducing the idea of systemic stability.28

The Article IV consultations take place roughly once every year. During a consultation, a group of IMF economists visits a country to assess its economic and financial developments as well as discuss the Member’s economic and financial policies with government and central bank officials.29 The aim of the mission is fact-finding as well as holding bilateral discussions with high-level officials. At the end of the mission, the team presents its concluding statement, on which the local officials can comment. Any difference in opinion needs to be reported on by the team to the IMF.30

The findings are then presented to IMF management, followed by a staff country report, containing information on the economic situation of the reviewed country, policy recommendations, an account of the policy discussions as well as the final appraisal by the staff. One month later, the Executive Board discusses the report and multilateral discussion takes place. There are no pre-appointed reviewers, nor specific country delegation participants; all members

28 Ibid., pp. 131-134.
can participate in the discussion. A summary of the views of the Executive Board is then sent to the government of the Member State under review. Three months after the consultations, the Fund issues a confidential report, containing non-binding conclusions on the Member’s exchange rate policy. Although the report itself is confidential, the Members have agreed to the publication of Public Information Notices (PINs), which summarize the views of the IMF staff and the Executive Board.\footnote{PINs are issued after consent of the relevant Member State only. As of July 2013, PINs have been integrated into the IMF’s Press Release Series: see http://www.imf.org/external/news/default.aspx?pn (last accessed July 2013).} Often, the report itself is also published on the IMF website.\footnote{For the country reports, see IMF website: http://www.imf.org/external/ns/cs.aspx?id=51 (last accessed July 2013).}

In contrast with the peer review process in the OECD, there is no need to come to a consensus view on the report. Instead, the staff report is published unchanged, while a PIN is issued containing a summary account by the chair of the day the report was discussed, including the different views of the Executive Directors as aired during the board meeting. Since consensus is not required and the views of the Staff and the Executive Board are published separately, also detailing the views of the country under review, the IMF allows for more transparency in the process than the OECD, for instance.\footnote{Moschella (2011).}

The determinations and recommendations made in the IMF reports are of a soft nature and therefore cannot be followed up by ‘hard’ enforcement. As with the OECD and the TPRM, it is through the weight of the arguments, the quality of the assessment, the involvement to a certain extent of the national policy makers in the peer review process, as well as the peer pressure that ensues from the discussion and usually publication of the reports that a country might be persuaded to change its economic policy to bring it in line with IMF conclusions. There are some indications that especially the larger (more powerful) industrialized countries do not adhere to IMF conclusions when they do not agree with those opinions, in contrast to the smaller countries.\footnote{The richer, developed countries are less likely to need the Fund’s financial assistance, and their incentive to comply may thus be smaller than for those countries that are smaller, less rich and are more likely to need the IMF’s funds. For an analysis of the influence of bargaining power, see e.g. Lombardi, D. and N. Woods, ‘The politics of influence: An analysis of IMF surveillance’ (2008) 15 (5) Review of International Political Economy.} This is one of the reasons why over the past years, strong critiques have been heard regarding the role of the IMF with respect to global financial stability. If the IMF cannot force Member States to comply with its conclusions, then how can it guarantee its function as a forum for a stable global economy?
One example where criticism of the IMF has been especially harsh was in the light of China’s currency peg. For years China maintained a currency peg to the US dollar, leading the Renminbi to be (significantly) undervalued. Many believe the IMF should have condemned China’s exchange rate policy at that time, as it was argued that the currency peg and the ensuing undervaluation of the currency against the dollar could be seen as a form of currency manipulation, specifically prohibited by Article IV. The 2007 bilateral surveillance decision provided guidance on what defines currency manipulation; however, it remains extremely difficult to prove the existence of a manipulation situation. In fact the IMF never went further than stating the Chinese Renminbi was significantly undervalued.

As said before, the IMF has no hard enforcement mechanism – the options available to the Fund under Article XXVI are rarely applied, as they are considered inadequate in addressing the issue of non-compliance at hand, or too strong a measure to remedy the non-compliance. Rather, the IMF resorts to soft mechanisms of peer pressure and persuasion. Country officials in general regard the IMF’s recommendations and policy advice as useful, where especially “discussions with mission teams were usually candid, constructive, and of high quality, bringing useful and independent third-party views to the policy debate”. However, it was often deemed difficult to implement policy recommendations, as they were presented in a “laundry list of warnings, with no prioritization”, with the usual economist approach of “on the one hand (list of economic positives), followed by on the other hand (list of downside risks)”, where it was unclear how to respond to which risks with what prioritization.

Moreover, policy recommendations were often obvious, but contained no advice on how to implement them, while the Executive Board’s contribution in its Summings Up was usually seen as belated and superficial. In short, the con-

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35 From 1995 to 2005, China pegged its currency at slightly over eight yuan to the dollar. In 2005 China allowed its currency to appreciate relative to the dollar until July 2008, when it was again pegged at 6.8 yuan to the dollar (or more accurately, a managed float with a bandwidth of 0.5%). Since 2010, gradual appreciation through a managed float has been allowed again.


37 In the last Article IV Consultation available, from 2013, the Renminbi is seen as moderately undervalued by 5 to 10% (IMF (2013) IMF Country Report no. 13/211, People’s Republic of China, 2013 Article IV Consultation, p. 28).


39 Ibid.

40 Ibid., p. 35.
consultations and recommendations are seen to be of high quality, but the operationalization of the advice and recommendations is seen as difficult and unclear. Furthermore, Article IV Staff Reports do not show in how far previous policy advice has been followed up by the Member State under review, in contrast with for example the OECD Reports. This makes it difficult to evaluate to which extent the Article IV consultations have indeed had an effect on Member State policies.41

Another oft-heard comment on the Article IV consultations was its lack of systemic analysis, including spillover risks and externalities. Multilateral surveillance – the second responsibility of the IMF under Article IV discussed in the next section – has always been conducted separately from the actual Article IV consultations. Due to the financial crisis after 2007, a proposal has been adopted integrating the two types of surveillance into the Integrated Surveillance Decision (ISD) of June 2012.42

3.2. Multilateral and Integrated Surveillance

Besides the bilateral version of surveillance, the IMF also reviews global and regional economic trends under its multilateral surveillance mechanism. The result are the semi-annual publications the World Economic Outlook (WEO) and the Global Financial Stability Report (GFSR).43 The WEO is prepared twice a year to report on global economic developments, prospects and risks, as well as an analysis of selected policy issues. The report is published as a staff document, together with a Summing Up of the Executive Board after it discusses the report in their meeting. The GFSR is meant to identify vulnerabilities in the global financial system. It is also published as a staff document together with the Executive Board’s Summing Up. The WEO is seen as the intellectual foundation for much of the IMF’s other multilateral surveillance work.44

Due to the onset of the global financial crisis, the Fund realized that a more systemic approach to surveillance was warranted. In the years that preceded the

41 More on this below in section 5: IMF Compliance.
43 The WEO and GFSR are the most important outputs of the multilateral surveillance process. Other processes and outputs of the multilateral surveillance processes include the vulnerability exercise, the Coordinating Group on Exchange Rate Issues, World Economic and Market Developments, and regional outlooks. The Fund has also introduced multilateral consultations (the first took place in 2006), where global economic imbalances are addressed and Member States voice their opinion on how this can be done as well as their own individual intentions to deal with the situation. For an evaluation of these processes, see IEO (2006) Evaluation Summary Multilateral Surveillance.
44 Ibid., p. 15.
crisis, the IMF had failed to recognize the risks to global financial stability and to demand action from policy makers. The IMF is not expected to predict a crisis, as crises are inherently unpredictable. However, it is expected to be able to identify risks and vulnerabilities in order to warn the Member States in order to prevent a possible crisis in the future. The IMF had not been able to “anticipate the crisis, its timing, or its magnitude, and, therefore could not have warned the membership”.45 In order to be better able to do so in the future, two important changes have been made to the surveillance system. On the one hand, IMF surveillance has been expanded to bring financial sector surveillance up to the same level as macroeconomic surveillance. On the other hand, bilateral surveillance has been reformed in order to include systemic analysis and spillover effects. It was felt that, although the two types of surveillance (bilateral and multilateral) are legally distinct, the two needed to be operationally integrated to enhance the effective functioning of the surveillance system. The ISD updates the 2007 surveillance decision by laying out a conceptual link between bilateral and multilateral surveillance, while including both types of surveillance in the Article IV consultations in order to provide the Fund with the opportunity to discuss the spillovers from Member State policies that affect global stability.46

An important distinction between bi- and multilateral surveillance is that under multilateral surveillance Member States are under no obligation to modify their economic policies in light of the views expressed by the Fund, whereas bilateral surveillance involves an assessment of substantive obligations. The inclusion of multilateral surveillance in the Article IV consultations therefore offers the opportunity to discuss the implications of a Member State’s policies, but the Fund may go no further than offer suggestions for alternatives to enhance the effective functioning of the international monetary system.47 Hence, the ISD speaks of “principles” in the case of bilateral surveillance, and “guidance” for multilateral surveillance. The Article IV consultations now include a discussion with members of the “impact of their policies on the operation of the international monetary system”,48 and the option for multilateral consultations between the Fund and Member States when an issue has arisen that requires collaboration among members.49

48 §26, ISD.
49 §31-33 ISD.
Given the short period that has lapsed since the introduction of the ISD, it remains to be seen what the effects of the enhancements made to the surveillance system will be. However, the Article IV reports will remain the product of a peer review process, and thus part of a soft compliance mechanism – perhaps to an even greater extent since the integration of the even softer multilateral surveillance element in the review process. One possible influence on the adherence of the Member States to the recommendations made under the Article IV consultations can be identified in the existence of the Balance of Payments Support system. The next section briefly explains the workings of that particular system.

4. BALANCE OF PAYMENTS SUPPORT

One essential element in attaining the IMF’s goal of financial global stability is the Fund’s financial support function. One of the core responsibilities of the IMF is to provide loans to countries with balance of payments problems, since a country in severe financial trouble poses not only problems for itself, but for the international financial system as well. The possibility for providing such loans is provided in Article I of the Articles of Agreement, the *Purposes of the IMF*, sub (v): “To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, ...”.

A Member State can request financial assistance when it has a balance of payments need, meaning when it cannot find sufficient financing to meet its international payments. IMF resources are usually made available under the so-called lending arrangements, where certain conditions may be stipulated to resolve the Member State’s balance of payments problems. These conditions relate to macro-economic variables and structural measures within the Fund’s core areas of responsibility,50 as well as variables and measures that are outside the Fund’s core areas of responsibility that require more detailed explanation of their critical importance in the program designed specifically for a certain Member.51


51 Such as privatization and public enterprise policies; labor market policies; transparency and disclosure policies; poverty-reduction and social safety-net policies; pension policies; corporate governance policies (including anti-corruption measures); and environmental policies (ibid, pp. 2-3; and Goldstein, M., ‘IMF Structural Programs’ NBER Conference on Economic and Financial Crises in Emerging Market Economies <http://www.iie.com/publications/papers/goldstein1000.pdf>, p. 4).
country must agree to implement these conditions in order to qualify for the loans.

The Member State then formulates the specific economic policy program contained in the arrangement in consultation with the IMF, which is subsequently presented to the Executive Board in the so-called “Letter of Intent”. Once the Executive Board approves the arrangement, the Fund’s resources are released in installments throughout the implementation of the program.\textsuperscript{52} The Balance of Payments programs can be classified as hard compliance mechanisms, since non-compliance with the undertakings in the Letters of Intent entails non-disbursement of the Fund’s resources. However, the IMF itself has always been careful not to label the commitments in the Letters of Intent and related documents as legally binding obligations. The suspension of the right to draw funds under the arrangements is never characterized as sanctioning or punishment by the Fund.\textsuperscript{53} The failure to repay the loans to the Fund, however, after completion of the program and passing of the repayment deadline, does constitute a breach of a legal obligation. In that case sanctions may be imposed, with the compulsory withdrawal of the Member State as the ultimate sanction.\textsuperscript{54}

Several different types of loan arrangements exist, such as concessional, zero percent interest loan facilities,\textsuperscript{55} as well as non-concessional, market interest rate loans.\textsuperscript{56} The intensity of use of the programs has fluctuated throughout the years, influenced by the onset of several different crises. Lending by the IMF has increased sharply again since the start of the 2008 global financial crisis. Currently, there are programs involving 50 Member States amounting to commitments of more than $325 billion since the start of the crisis.\textsuperscript{57}

The effectiveness of the Balance of Payments programs and the accompanying conditionality has been strongly criticized over the years, including concerns regarding political influence over conditionality,\textsuperscript{58} the ineffectiveness or

\textsuperscript{52} See IMF website: http://www.imf.org/external/about/lending.htm (last accessed July 2013).
\textsuperscript{53} Lowenfeld (2008), pp. 663-664.
\textsuperscript{54} Ibid.
\textsuperscript{55} Such as the Extended Credit Facility, the Standby Credit Facility or the Rapid Credit Facility, meant for low-income countries.
\textsuperscript{56} Such as the Stand-By Arrangements, the Flexible Credit Line, the Precautionary and Liquidity Line, or the Extended Fund Facility.
\textsuperscript{57} See IMF website: http://www.imf.org/external/about/lending.htm (last accessed July 2013).
\textsuperscript{58} It has for example been argued that politically strong countries face weaker conditionality (see e.g. Dreher, A. et al., ‘Politics and IMF Conditionality’ (2013) 338 KOF Working Papers). However, for a counterargument see e.g. Stone, R.W., ‘The Scope of IMF Conditionality’ (2008) 62 International Organization.
even adverse effects of the program conditions,\textsuperscript{59} or the connection between the Balance of Payments loans and the Article IV consultations. The Article IV consultations are often used as a precursor for the conditions laid on the Member States under the Balance of Payments Programs. The IMF guidelines for Conditionality state quite clearly: “The member’s past performance in implementing economic and financial policies will be taken into account as one factor affecting conditionality”.\textsuperscript{60} The fact that the soft Article IV consultations and their conclusions are linked to the hard balance of payments loans indicates that it may not be peer pressure alone that induces Members’ adherence to the IMF’s conclusions. Since the richer Member States are less likely to one day need to avail themselves of the Fund’s lending facilities, the effect of this linkage is most likely strongest for the less-developed, low-income countries. In how far this has an effect in general on compliance with the IMF’s Article IV consultations will be analyzed in the next section.

5. IMF COMPLIANCE

Compliance with IMF rules can be examined in two contexts. The first is the context of compliance with IMF rules as such, meaning the IMF Articles of Agreement, while the second refers to compliance with conditions as laid out in the IMF Balance of Payments lending programs. Since compliance with this conditionality is firstly program- and Member-specific and secondly governed by the Fund’s Articles of Agreement, it is more useful to investigate what is meant by compliance in general with the Articles of Agreement by the IMF Members.

The IMF defines compliance in a manner similar to the EU or the WTO: It means fulfillment of a Member’s obligations under the IMF Articles of Agreement.\textsuperscript{61} The AoA contain a limited amount of legal obligations, of which many are of a soft nature and not enforceable in court. It was seen that enforcement options under the AoA are indeed very limited and have been seldom applied. Moreover, it is debatable in how far these existing sanctions may influence the larger and richer members of the Fund in particular, who are least likely to ben-


\textsuperscript{61} As seen in Article XXVI section 2(a) on compulsory withdrawal: “If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the general resources of the Fund”.

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benefit from eligibility to use the resources of the Fund. In fact, they are more likely to be the greater contributors to the resources of the Fund. On the other hand, as enforcement by the Fund has rarely been called for over the course of its existence, it could also be that non-compliance is not actually a problem.

In the case of the WTO it was shown that the litigating parties are the Masters of the Dispute and the ones deciding whether there is cause to start and continue legal proceedings or not. In later stages the panels and the AB ultimately decide whether a Member State’s measures are in compliance with the obligations under WTO rules. In the case of the IMF, however, there is no dispute settlement system, and thus no direct possibility for redress by an IMF member. An explanation for this difference between the systems is that when a Member does not comply with its obligations under WTO rules, the rights of other Member States are somehow directly or indirectly hurt. Under the IMF rules, on the other hand, obligations are created that are owed to the institution as such, rather than to its Member States. The rules on financial issues such as exchange restrictions in the IMF Articles are meant to protect the integrity of the entire financial system, as well as the possibility for Member States to call upon financial support by the Fund, rather than protecting the rights of individual Member States.\textsuperscript{62} The Fund’s articles do require that a Member State remove all restrictions that affect other members,\textsuperscript{63} but regardless of whether other members have issued a complaint regarding these restrictions. Any Executive Director is required to bring instances of breach of obligation to the Executive Board. Ultimately, the Board of Governors would decide on issues such as compulsory withdrawal if non-compliance indeed led to that stage.

The case is different for compliance with the Balance of Payments programs. In those cases not only the organization as a whole, but – through non-adherence to the conditions underlying the programs and the possibility for borrowing funds – other Member States are also indirectly affected. Stronger enforcement measures are therefore called for and applied in those programs.

Three elements are important when assessing the effectiveness of the IMF peer review process. First: Member State involvement in the process is limited to providing information to the Fund during the peer review and participating in the meetings and discussions regarding the peer review reports. Member State views, however, are published separately from the reports themselves. This cre-


\textsuperscript{63} E.g. Article IV, section 1(iii): each member shall “avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members”. 
ates less of a feeling of “ownership”, and could therefore to some extent influence the level of acceptance of IMF recommendations in the Member States. On the other hand, this could also possibly make the conclusions in the reports more objective, giving them more force of quality, for example.

Second: Although formulated as recommendations or guidelines, the reviews include an assessment of substantive obligations. In that light, even though the recommendations themselves are not legally enforceable, the analysis and conclusions of the report can be used as a basis for applying enforcement measures at one point in time. For example, if during one of the Article IV consultations in the past the conclusion had been drawn that China’s exchange rate policy could at that time have been seen as currency manipulation, this determination could have been the basis of the application of enforcement measures. In contrast with the TPRM therefore, there is a connection between the peer review process and enforcement measures. However, given the very weak enforcement possibilities under the IMF, the connection is rarely made.

Third: As with the OECD country reviews as well as under the TPRM, Member States are obligated to provide the organization with information that is relevant for the peer review process. For the IMF, there has been at least one instance where enforcement measures were taken against a Member State that refused to provide the information requested by the organization. This would be impossible under OECD or TPRM rules.

6. THE EFFECTIVENESS OF IMF COMPLIANCE MECHANISMS

Now that the workings and character of the two compliance mechanisms of the IMF have been outlined, an analysis of their effectiveness may be attempted by following the steps formulated in chapter 2.1: A: the goal, B: the compliance, C: the effectiveness. The final chapter will address the last step D: the comparison. The analysis in the current chapter focuses on the Article IV consultations only, but takes into account the possible effect of the existence of the Balance of Payments programs.

64 In case of Czechoslovakia, see supra fn 23.

65 Since the OECD does not provide for hard enforcement possibilities at all, while the TPRM does not fall under the agreements covered by the DSU, and enforcement is thus not possible.
6.1. The Goal of the IMF Compliance Procedures

The purpose of the Article IV consultations is to “oversee the compliance of each member with its obligations” under Article IV. Today this includes both bilateral as well as multilateral surveillance, keeping in mind that under multilateral surveillance the Member States are under no obligation to modify their policies in light of IMF suggestions.

6.2. Compliance

According to the compliance model developed in this study, four compliance-related questions now need to be asked regarding the Member State obligations, the character of these obligations, the definition of non-compliance and the causes of non-compliant behavior.

Expected behavior
The first question regards the obligations the Member States are expected to adhere to. The Article IV consultations seek adherence to the obligations as stated in that particular article: 1. to collaborate with the Fund with regard to orderly exchange arrangements and a stable system of exchange rates; 2. to direct policies toward fostering orderly economic growth; 3. to promote stability; 4. to avoid manipulating exchange rates or the international monetary system; and 5. to follow exchange policies compatible with the undertakings under this Section.

Hard or soft obligations
The second question deals with the character of the underlying obligations. Apart from the general obligation of collaboration with the Fund, Article IV contains two softer obligations (Members shall endeavor to direct its policies towards economic growth with price stability, and they shall seek to promote stability), and two hard ones (Members shall avoid manipulation and they shall follow compatible exchange policies). Moreover, Member States are obligated to provide the necessary information to the Fund for it to be able to exercise the firm surveillance as mentioned in Article IV.

Actual behavior given the element of discretion
The third question goes to the core of the compliance problem: When is an IMF Member State non-compliant, and who makes this determination? Ultimately, the Executive Board determines whether a Member State complies with IMF obligations....
gations or not, since it is that body which adopts the Article IV reports. The Member State under review is able to present its views on the report, but in contrast to the OECD and similarly to the TPRM peer review processes, these views are not taken into account in the final draft of the report, but rather published separately. The reports thus reflect the views of the Fund only (of its staff as adopted by the Executive Board), although they are based upon information provided by the Member State.

**Intentional or non-intentional non-compliance**

When the compliance pyramid is applied to IMF compliance mechanisms, three of the four steps can be recognized, with a strong focus on the bottom steps and weak enforcement possibilities at the top. As with the OECD and the TPRM, prevention and monitoring form the core of the peer review system. Working through clarification of the rules, information dissemination, transparency and ongoing discussion, the aim of the system is to prevent non-compliance and monitor ongoing trends. A legal system is absent in the IMF. When there is a dispute between Member States, or between Member States and the organization, recourse can be taken to the Board of Governors when the dispute regards to the interpretation of the AoA. When the Fund is of the opinion that a Member State “is using the general resources of the Fund contrary to the purposes of the Fund”, a report is sent to the Member State. At that time the Fund may already limit the availability of the resources to the Member State, and if no or an unsatisfactory reply is received, a continuation of limitation or even a declaration of ineligibility may be declared. The same protocol is followed regarding other types of infringements. Some options exist, therefore, in case of disputes, but do not amount to a legal or dispute settlement system of the kind encountered in other international organizations such as the EU or the WTO.

Sanctions as such also do not exist in the IMF. Enforcement measures, intended to induce compliance with the obligations under the AoA, do exist in the shape of restricting or ending eligibility to use the Fund’s resources, or eventually even compulsory withdrawal of membership. However, as was pointed out, these are rarely applied, as they are considered either inadequate for some types of infringements, or too strong for others. Furthermore, some Member States will feel the consequences less strongly than others. The richer, more developed Member States will not have the same need of the Fund’s resources as poorer, less developed economies. Summing up, then, it is evident that the enforcement

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66 See Article V(5), or VI(1)a AoA for example.
side of the IMF surveillance mechanism as represented by the top two steps of the pyramid is virtually non-existent or very weak to say the least.

The Article IV consultations target both intentional as well as non-intentional non-compliance, while taking into account the reasons for non-compliant behavior. Article IV states: “These principles [for the guidance of all members with respect to their exchange rate policies] shall respect the domestic social and political policies of members, and in applying these principles the Fund shall pay due regard to the circumstances of members”. As with the OECD, the IMF thus aims to change the ideas and the mindset of the countries under review, in order for them to follow the advice put to them by the organization. A strict enforcement system does not fit in with this aim. However, when persistent non-compliance occurs, and when it is obviously intentional non-compliance and persists after due warning from the Fund, the available enforcement measures can be applied. And so both intentional and non-intentional compliance are targeted by the Article IV consultations.

6.3. Conclusions on Effectiveness

The effectiveness of the Article IV consultations is debatable. On the one hand, the quality and usefulness of the reports are praised. On the other hand, it was shown that the Member States often find it difficult to implement the recommendations made by the Fund. The effectiveness of the system is influenced by several different elements. First, there is less Member State involvement throughout the process than was seen in the OECD peer review process, for example. This creates less of a feeling of “ownership” of the proposed recommendations than possibly would be the case if Member State views were taken into account in the final report. It now potentially feels more judgmental, and therefore less likely to be accepted by the Member States. On the other hand, the quality of the reports is deemed very high, while a certain degree of objectiveness is introduced by not including Member State opinions, but rather publishing them separately.

Second, the Fund recommendations under Article IV are potentially discriminatory towards the poorer, developing countries. As compliance with the recommendations is seen as a precursor to the Balance of Payments programs, those countries that expect to need the programs are more inclined to follow Article IV recommendations than those that do not expect to need them. Since countries in financial difficulty are usually the poorer, less developed economies, the peer review programs probably will work more effectively for those Member States due to the existence of the Balance of Payments Programs.
Third, there is no legal system which can “back up”, so to speak, the recommendations made by the Fund. Additionally, the reports do not check the extent to which previous recommendations have been followed up. Combined with a lack of hard enforcement measures, this can be a genuine drawback of the system. Member States may well feel less inclined to follow the recommendations when they know there will be no real consequences to non-compliance. On the other hand, the willingness to share information and transparency may be greater under the IMF consultations than it could be if a legal system were in place – as was observed with the WTO TPRM, for example. However, given the fact that the IMF peer reviews can already be backed up to a certain extent by (albeit weak) enforcement measures, the influence of a hard legal system may have the effect of either decreasing transparency and thereby the effectiveness of the soft mechanism (as with the TPRM), or increased compliance through the soft mechanism precisely due to its existence, knowing the consequences will be felt when the legal system is applied at a later stage (as with the EU). Then again, Article IV contains both hard and soft obligations. In that respect, the interplay between a hard legal system and a soft peer review mechanism may have more beneficial effects than it has in an organization where only hard obligations are concerned, such as the WTO.

7. CONCLUSIONS

The IMF has a compliance system that oversees adherence to the obligations under one specific legal article: Article IV of the Articles of Agreement. This article contains both hard and soft obligations, but surveillance is performed through a soft peer review mechanism only. This system has several elements that can potentially hinder its effective functioning. These elements concern Member State involvement throughout the process, a bias towards more developed economies as well as the lack of a legal system reinforcing the functioning of the soft mechanism. The peer review mechanism of the IMF targets both soft and hard obligations under Article IV. The recommendations that follow the peer reviews are not legally binding. The imperfect working of the system may be explained precisely by this mismatch between hard underlying obligations and a soft compliance mechanism without the existence of an interacting legal back-up system. In the next section, a comparison is made of the findings for the mechanisms discussed in this chapter on the IMF and the previous chapters on the WTO and OECD. This comparative analysis shows how the character of the underlying obligations influences the need for a particular type of compliance mechanism.
Comparative Conclusions Part III
The previous chapters have discussed several compliance mechanisms in three selected international organizations in order to draw more robust conclusions about the effectiveness of compliance mechanisms in the EU. Although the three organizations differ to a great extent in their set-up and functioning, as well as in the character of the underlying obligations, some comparative conclusions can be drawn as to their effective functioning due to the application of the compliance pyramid and the model of effectiveness as developed in part I. This section briefly presents some of the differences and similarities of the compliance mechanisms, with a view to evaluating these differences in light of the effectiveness model and to drawing final conclusions on their effective functioning.

The most important difference between the three organizations under analysis in the previous chapters is the character of the underlying obligations. The OECD is almost entirely based on soft law, where changing the mindset of the Member States and introducing new ideas through information sharing, transparency, peer review and discussions can be seen as the objective of the peer review mechanism, rather than inducing compliance with hard obligations. Member State involvement is thus of the utmost importance in the OECD. The OECD has no enforcement system, and the top two steps of the compliance pyramid, so to speak, are entirely absent.

The WTO compliance mechanisms, on the other hand, seek to adhere entirely to hard obligations under WTO law. The DSU is characterized by intergovernmentalism, the importance of the element of discretion, and the dispute settlement character; it has no primary objective of safeguarding common interests, and subsequently there is a preference for settling disputes in the early stages of the process. The bottom two steps of the pyramid are thus represented in the DSU and play an important role. On the other hand, the upper two steps are also available in the shape of a legal (quasi-judicial) system and the possibility for sanctions in the shape of compensation or retaliation. Given the fact that the DSU is not meant to protect common interests, but rather to settle disputes, the bilateral character of the sanction is a logical consequence.

The TPRM, then, is set apart completely from the dispute settlement side, and dispute settlement cannot be used to back up the findings of the peer review system. Although it is set up similarly to the OECD peer review systems, its functioning is not equally effective. This is partly due to the fact that the system aims at adherence to hard obligations, but is not backed by an enforcement system. Conversely, the absence of a functional link between the TPRM and the DSU has a negative effect on the effectiveness of the peer review mechanism. Moreover, several critiques regarding the level of naming-and-shaming, active dissemination and a lack of follow-up on previous recommendations make the TPRM less
effective in inducing compliance compared to the OECD, where these elements are much more rigorously applied. The broadening of the pyramid base through the introduction of the TPRM is not functional to the extent that a cross-over from the soft to the hard side is impossible.

The IMF, finally, has compliance mechanisms in place to oversee adherence to both hard and soft obligations. The Article IV consultations provide a managerial system intended to induce compliance with partly hard obligations, without a real possibility of enforcement back-up. The possibility for sanctions exists, but is not considered practicable and hardly applied. Moreover, the existence of the Balance of Payments Programs provides for an incentive to comply with the recommendations made under the peer review mechanisms, but this leads to unbalanced application biased towards developing Member States. In the IMF, therefore, there is a broad managerial base to the pyramid as represented by the bottom two steps of prevention and monitoring. The top of the pyramid, on the other hand, is very small as compared to the bottom. Given the existence of both hard and soft mechanisms in the IMF, an interplay between a managerial system and an enforcement mechanism is logical. The balance, however, is missing in the organization.

A soft mechanism such as exists in the OECD does not function as effectively in organizations where the underlying obligations are not, or not only, of a soft character. The absence of a procedural link between the WTO’s DSU and TPRM renders the TPRM ineffective, while the results of the TPRM cannot be used to increase the effectiveness of the bottom steps of the pyramid in the DSU. In the IMF such a link between the hard and the soft system does exist, but given the limited capacity of the enforcement side of the pyramid the effects of this element are quite limited.

It is now obvious that two elements play an important role in the effective functioning of compliance mechanisms in international organizations: 1. a correct match between the character of the underlying obligations and the compliance mechanisms; and 2. the possibilities for interaction between the different mechanisms within one organization. The next section will now evaluate what these findings can say about the effectiveness of the compliance mechanisms in the EU, and to what extent these comparative conclusions can have a more general application.
Conclusions
Do not be too hard, lest you be broken; do not be too soft, lest you be squeezed.

Ali ibn Abi Talib (Imam, 600 – 661 AD).
This book has discussed the issue of compliance mechanisms in international organizations. First, the book presented an analytical framework in order to evaluate the comparative effectiveness of compliance mechanisms. Subsequently, this framework was applied to the cases of the EU Internal Market, the OECD, WTO and IMF. In this concluding section the results of this analysis for the four different organizations are brought together, with a view to draw general conclusions on what makes compliance mechanisms function effectively. In light of the findings in this book, some implications for the existing compliance mechanisms are pointed out, and recommendations are made to improve their effectiveness.

Comparing compliance mechanisms
Membership of an international organization enhances cooperation, which can alleviate the externality problems that can arise when states act unilaterally. Given the perceived advantages of such cooperative efforts, it can generally be stated that Member States have a natural propensity to comply with the rules of an international organization. Nevertheless, in most organizations non-compliance is a frequent occurrence. Non-compliance may weaken the foundations of the organization and thus diminish the positive effects of institutionalized cooperation. International organizations therefore need compliance mechanisms in order to ensure adherence to their rules. Compliance mechanisms, however, come in many shapes and sizes. They can vary from a soft managerial type mechanism to a hard enforcement mechanism to anything in between, or a combination of different types. Deciding which mechanism would be most suited to a particular situation is not an easy matter. This study has demonstrated that the choice between enforcement mechanisms is constrained by such elements as the organization’s institutional set-up, its legal framework and functioning as well as the character and content of the underlying obligations.

The importance of choosing an effective compliance mechanism was illustrated in the introduction to this book by the recently felt need for an overhaul of economic governance structures in the EU in the wake of the 2008 financial crisis. The manner in which national fiscal policies were being reviewed in the framework of the Stability and Growth Pact had not been able to effectively induce compliance with the underlying obligations. The relatively soft compliance mechanism was not appropriately matched to the hard obligations it was meant to oversee. It was found in later chapters that this apparent mismatch between the compliance mechanism and its underlying obligations is encountered not only in the EU, but even more spectacularly in other international organizations such as the IMF and the WTO.
Conclusions

In this study an analytical framework was developed to enable a structured comparative analysis of the functioning of existing compliance mechanisms in international organizations. The application of this analytical framework exposed several characteristics that can explain why a certain type of mechanism functions effectively in one organization, but fails in another. The EU was chosen as the basis for this comparative analysis. This international organization is particularly interesting as both soft and hard compliance mechanisms target non-compliance with identical obligations, such as for example Internal Market rules. The comparative effectiveness of different compliance mechanisms overseeing adherence with the same underlying obligations could thus be analyzed. Moreover, the results of this analysis could also be compared to the functioning of similar mechanisms in other international organizations such as the OECD, WTO and IMF by applying the analytical framework.

Before the analytical framework and outcome of these analyses are discussed, though, one possible critique of the comparative study performed in this thesis needs to be addressed. It may be questioned whether a comparison of the chosen international organizations is possible at all, given their crucial differences in set-up, legal framework and functioning. An often-heard remark is that the European Union is a “unique” organization, and cannot be compared to “normal” international organizations. This assertion draws its strength from arguments based on the supranational character of the EU, its legal framework, its scope, membership and any number of other characteristics. Such argumentation could go as follows.

First, the supranational character of the EU sets it apart from all other international organizations. Only the EU has given an objective institution the task to oversee compliance with the rules of the organization, and has endowed this supranational organ with the power to take a non-compliant Member State before a Court. Second, the *sui generis* nature of the EU, its legal framework and notions like direct effect and supremacy make it “less than a State, more than an international organization”.¹ Third, the difference in subject matter between the organizations prohibits any fruitful comparison. The EU has a very broad scope, including areas such as economic and monetary union, competition, trade, environmental issues, public health and so on. The other organizations, contrarily, have a much narrower scope. The OECD focuses on economic growth and development, the WTO deals with issues of international trade, while the IMF oversees the international monetary system. Fourth, the membership of the organizations

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has to be taken into account, whereby the EU currently has 29 Member States, the OECD 34, the WTO 159 and the IMF 188. It is arguably much easier to oversee compliance by 29 Member States than it is to control 188 Members.

The list of differences between the organizations is long. One could say that comparing EU compliance mechanisms with those in other international organizations is like “comparing apples and pears”.\(^2\) Nevertheless, apples and pears also have characteristics that do enable comparative analysis. They are both fruit, taste sweet, have similar colors, grow on trees, and are harvested at the end of summer. The goal of eating such fruit is to provide nutrition. By comparing the two types of fruit, an analysis can be made of which of the two is more effective in reaching this goal of providing nutrition: Which contains more vitamins, which is better taken up by the human body, which can be preserved the longest and so forth. Thus, just like compliance mechanisms in different international organizations, they are quite dissimilar in some respects, but they are used and applied for the same purpose. The ultimate goal of the compliance mechanisms is to induce compliance with the rules of the organization. It may be that the aim is formulated as increasing cooperation, or the settlement of disputes, or compliance sec, but any and all solutions offered under the compliance mechanisms need to be in conformity with the rules of the organization. Choosing and comparing certain specific aspects of compliance mechanisms that are crucial for their effectiveness can overcome the differences in the set-up and functioning of the organizations for the purpose of the analysis in this thesis.

**Part I: A framework for comparison**

The aim of this dissertation was to evaluate the effectiveness of compliance mechanisms in international organizations. Existing compliance mechanisms in four international organizations were chosen for comparison: the EU infringement procedures, Internal Market Scoreboard, SOLVIT and EU Pilot, the OECD peer review process, the WTO Dispute Settlement System and Trade Policy Review Mechanism (TPRM), and finally the IMF surveillance mechanism. As was just explained, all of these organizations differ in their set-up and functioning. In order to nevertheless be able to compare the mechanisms based on their effectiveness, a framework for analysis was developed in Part I of this study.

Effectiveness is defined as the degree to which objectives are achieved. The objective of a compliance mechanism is to achieve a certain level of compliance with the rules of the organization. Compliance with international law is how-

\(^2\) As was pointed out by respondent #4. The correct idiom in English would be comparing apples and oranges. However, this does not detract from the argumentation made here.
Conclusions

ever a complex and much debated subject, where scholars theorize on why and when states do or do not comply. Two perspectives in this compliance debate are offered by i) the management approach and ii) the enforcement approach. The management model is one of cooperation, where justification, discourse and persuasion are used to make states comply. The premise is that non-compliance by states is not necessarily due to deliberate defiance. The enforcement model on the other hand, is based on cooperation, enforcement, and “the endogenous quality of rules”. In contrast to the management theory, states, as rational actors that weigh the benefits and costs of their actions against each other, might willfully choose not to comply when this suits them. In this model therefore, compliance is structured around state incentives in order to induce compliance, with the use of sanctions in the case of non-compliance.

In combining management and enforcement theories two elements were distilled that are essential in finding the optimal fit between the compliance mechanism and the underlying obligations. First the character of the underlying obligations needs to be determined, which can be either hard and legally binding or soft and non-binding. Second the sources of the non-compliant behavior have to be analyzed, where non-compliance can be either intentional or unintentional. A compliance mechanism needs to account for and match the outcome of these two elements in order to function effectively. It was found that hard obligations and intentional non-compliance are best matched by an enforcement type mechanism, involving a legal framework and the possibility of sanctions. Management type efforts on the other hand, such as prevention and monitoring, are most effective in inducing compliance with soft obligations and when non-compliance is unintentional. When non-compliance with hard underlying obligations is unintentional, it is unclear whether management or enforcement will be most effective. It was theorized that a combination of the two approaches would probably be most effective: start with soft managerial type efforts, and when compliance is not reached gradually harden the method until the ultimate enforcement possibility of sanctions is reached if necessary.

Based on the above theoretical assumptions, four questions were formulated which were answered in this dissertation: what behavior is expected from Member States, what is the character of the underlying obligations, when is a Member State non-compliant and what caused this non-compliant behavior? In answering these questions for all compliance mechanisms in the four international organizations, a comparative analysis was made possible of the mechanisms and the degree to which they are able to achieve their compliance goals.
Part II & III: Findings

Part II showed how the interaction between the infringement procedures and three newer mechanisms, the Internal Market Scoreboard, SOLVIT and EU Pilot, has a mutually reinforcing effect on the functioning of the respective systems. It was found that the infringement procedures are quite effective in inducing compliance with EU law. Interestingly, most infringement cases are closed in the early phases of the procedure. A mere five percent of all cases are brought before the Court. However, over the years the procedures have gradually increased in hardness with the introduction of sanctions, more transparency and less room for Commission discretion. This hardening has gone hand in hand with an increased focus of both the Commission and the Member States on the managerial phases of the procedures. The hardened enforcement side of the procedures apparently has a deterrent effect on Member State non-compliant behavior and provides an incentive to remedy non-compliance in an early phase.

The newer mechanisms have provided an alternative route for inducing compliance. This route has been useful especially for complainants given their low costs, the very short deadlines to come to a solution, the low threshold to the procedures and the direct involvement of the complainants. Furthermore, the introduction of these procedures has increased the detection rate of non-compliant behavior. This increase can be attributed to inter alia the low threshold and easy access to the alternative systems, and the fact that they also appeal to users different from those who would have filed a complaint under the infringement procedures. This makes it possible for the Commission to devote more resources to the prioritized areas of EU law or to cases of persistent non-compliance. Conversely, the existence of the hard infringement procedures provides an enforcement element crucial for inducing compliance with hard underlying obligations of the EU. This mutually reinforcing interaction between the soft and hard mechanisms was found to be an important explanation for the effective functioning of all four mechanisms.

Part III strengthened the findings of the previous part. It was uncovered that not only in the EU, but even more so in other international organizations two elements play a crucial role in the effective functioning of compliance mechanisms: 1. a correct match between the character of the underlying obligations and the compliance mechanisms; and 2. the possibilities for interaction between the different mechanisms within one organization. This became clear after the application of the analytical framework to three organizations: the OECD, the WTO and the IMF.

A soft mechanism works well in an organization like the OECD where the underlying obligations are mostly of a soft character and where the goal of the
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mechanism is to change the mindset of the Member States, persuading or pushing them in a certain direction, rather than to induce compliance with hard obligations. The OECD peer review mechanism is a process intended to increase information sharing, transparency and policy analysis of and between Member States. Not the recommendations themselves, but the process leading up to their formulation is what matters. Moreover, the output the OECD produces in shape of reports, statistics, and analyses are used extensively by national governments. Through this channel, the OECD is also able to change the way Member States think and act. The OECD is a prime example of a good match between the character of the compliance mechanism and that of the underlying obligations.

In the WTO, the underlying obligations are mainly of a hard character. It was found that the dispute settlement system is set up as a relatively hard enforcement mechanism with a broad managerial base. Consultations and negotiations play an important role in this intergovernmental organization, where the Member States remain the masters of the dispute. *Vice versa*, the enforcement elements of the mechanism ensure the effectiveness of the managerial efforts. Consequently it was found that the dispute settlement mechanism is quite effective in achieving its goal of solving disputes between the Member States.

In addition to this relatively hard dispute settlement system, however, there is also a soft peer review system in shape of the TPRM. This system is set up in a way very similar to the OECD peer review mechanism, but lacks actual scrutiny measures and does not involve making recommendations to the Member States. In contrast to the OECD system the TPRM is generally not considered an effective mechanism. The institutional and operational divide between the dispute settlement system and the TPRM, the fact that findings from the TPRM cannot be used for enforcement purposes and the mismatch between the soft mechanism and the hard underlying obligations were revealed as the reasons for its ineffectiveness.

In the IMF, then, where the rules are of both a soft and hard character, the potentially effective combination of a managerial and an enforcement mechanism is undermined by several drawbacks in the set-up of the system. Most importantly, the Article IV consultations are a soft surveillance mechanism meant to oversee compliance with hard and soft obligations, but without any real enforcement capabilities. A certain balance between managerial and enforcement elements was found missing, while there is no successful interaction with the one enforcement type system the IMF does have in shape of the Balance of Payments Programs.
Conclusions
The aspects that were found to be fundamental for the effective functioning of compliance mechanisms pertain to the match between the character of the underlying obligations and the mechanisms, and the possibility for interaction between and mutual reinforcement of compliance mechanisms within one organization. Where there is a perfect match, such as in the OECD, the mechanism functions quite effectively. Where there is a mismatch such as occurs in the IMF, the system is rendered incapable of targeting actual compliance. And when there is no interaction between the mechanisms within one organization as is legally prohibited in the WTO, the effective functioning of each mechanism is much less than it potentially could be. The analysis of the functioning, advantages and drawbacks of the compliance mechanisms in these three international organizations offers an explanation of the positive effects the introduction of soft mechanisms in the EU have had on the classic infringement procedures.

First, it is clear that soft managerial type elements play an important role in the effective functioning of compliance mechanisms, also when the underlying obligations are mostly of a hard character. Applying only hard enforcement type measures is not only potentially quite costly given the involvement of a legal framework and judicial procedures, but are also relatively ineffective. Using a hard mechanism to address managerial type problems such as miscommunication or information asymmetries will not solve these types of problems. We can compare this to disciplining an allegedly disobedient child: when you ask a child to put on its shoes, but it is not yet capable of tying his shoelaces, yelling at the child or even physical abuse will not make him tie them any faster.

Second, a mismatch between the type of compliance mechanism and the character of the underlying obligations will render the mechanism’s functioning less effective. Applying soft measures to induce compliance with hard obligations will work to some extent, depending on the sources for the non-compliant behavior. However, if there is no enforcement mechanism available as back-up, there is less incentive for the non-compliant Member State to conform to the rules. Especially when the Member State is intentionally non-compliant, a lack of hard measures will make the mechanism function below its optimal level.

Third, when different types of compliance mechanisms exist alongside each other in one international organization it should be made possible for them to interact with each other. It was for example found in the WTO that when there is no possibility for interaction, the hard as well as the soft mechanism are ren-
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Considered less effective, and one of them may even become “totally useless”, as one respondent phrased it.³

These three elements are all to a large extent existent in the mechanisms studied for the EU, which explains why it was found that the EU compliance system functions quite effectively. Of course, this does not mean that the EU system is perfect. All four organizations that were studied in this thesis can and should learn something from their counterparts that can increase the effectiveness of their compliance mechanisms, as the next section will summarize. In addition, some general recommendations will be made based on the findings in the dissertation and on some of the problems that were encountered along the way of the analysis.

Implications and Recommendations

1. The analysis in this dissertation has shown that it is possible to construct a compliance mechanism based on certain (predefined) objective principles, given the specific set-up and character of an international organization. Given the experience with an array of compliance mechanisms in the EU over the course of its existence, and taking into account best practices as seen in other organizations, the time has come to develop a more evidence-based policy for designing and introducing new mechanisms, instead of doing this on an _ad hoc_ basis.

2. In introducing new compliance mechanisms, heed needs to be taken of the possibility of fragmentation of the supply of options for redress for individuals and businesses in the EU. It is essential that complainants know where they can go, and how their problems can be addressed effectively. Fragmentation will not only confuse these users of the systems, but will also render the interaction between the mechanisms less than optimal – _in der Beschränkung zeigt sich erst der Meister_.⁴

3. The analysis for the EU was limited to certain mechanisms targeting non-compliance with the rules of the Internal Market. As a follow-up to this study, it should be examined what the findings in this dissertation mean for

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³ Respondent #3.
⁴ J.W. von Goethe, ‘Natur und Kunst’, 1802. However, as Frasier said: “Ah, but if less is more, just think of how much more “more” will be!” (Frasier Television Series (David Angell et al), Season 7 Episode 13: ‘They’re playing our Song’).
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compliance mechanisms in other areas of EU law. Especially those areas that are excluded from the application of the classic infringement procedures could benefit from this analysis.

4. In order to perform a robust analysis of the effectiveness of compliance mechanisms, it is essential to have access to decent statistical information. The statistics for the EU mechanisms found in publicly available documents, especially those for the infringement procedures, SOLVIT and EU Pilot, are not reported in a consistent manner. Given the frequent changes in the way the data is presented throughout the years, it is a challenging task to perform a thorough and fruitful comparative analysis. In the interest of transparency, it is recommendable to publish more consistent reports offering comparable data.

5. The OECD peer review system seems to work quite effectively since its soft mechanism matches the soft character of the underlying obligations. However, some instruments are adopted or drafted by the OECD that do include legally binding obligations for the signatories to these instruments. Examples are the Anti-bribery Convention or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. It would be interesting to examine how compliance mechanisms laid down in such Conventions would hold up in light of the findings in this dissertation.

6. The WTO dispute settlement system is quite effective as well in solving disputes between the Member States. The TPRM on the other hand is a good example of how a mismatch between the character of a compliance mechanism and its underlying obligations renders its functioning ineffective. Both the (managerial part of the) DSU as well as the TPRM would benefit in terms of effectiveness if the divide between the two systems were removed, providing an institutional and legal link and options for interaction between them.

7. The IMF surveillance mechanism also suffers from a mismatch between the soft character of the mechanism and the partly hard character of the underlying obligations. First, harder, enforcement type elements should be added to the mechanism in shape of an actual procedure, with a greater probability of repercussions or sanctions being applied. Member States should be more involved in the peer review process, and the recommendations following Article IV consultations should be followed up more stringently. Second, the interaction with the Balance of Payments programs is less than optimal.
Conclusions

Especially the lack of balance between smaller and larger, or developed and developing economies created by the link between the Article IV consultations and the Balance of Payments programs should be addressed.
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European Commission respondent, #1
European Commission respondent, #2
European Commission respondent, #3
European Commission respondent, #4
European Commission respondent, #5
European Commission respondent, #6
European Commission respondent, #7
European Commission respondent, #8
NGO representative, #9
National government official, #10
Samenvatting
De economische crisis die begon in 2008 heeft niet alleen de financiële sector en de reële economie beïnvloed, maar heeft ook tot forse aanpassingen geleid op het gebied van financieel en economisch toezicht. Binnen de Europese Unie (EU) bijvoorbeeld was het duidelijk geworden dat de bestaande toezicht- en naleving-mechanismen op dit gebied niet effectief genoeg hadden gefunctioneerd. Het Stabiliteits- en Groeipact, het mechanisme dat dient om buitensporige tekorten van EU-lidstaten te voorkomen en zo nodig te corrigeren, had zijn doel niet weten te bereiken. Maar ook de samenwerking van financieel toezichthouders schoot tekort bij het overzien van multinationale financiële instellingen. De tekortkomingen die werden blootgelegd als gevolg van de crisis hebben dan ook geleid tot belangrijke hervormingen, zoals een grotere rol voor de Europese Commissie, strengere toezicht mechanismen en zwaardere sancties in geval van niet-naleving van de regels.

Deze aanpassingen zijn opmerkelijk in het licht van de trend in de afgelopen decennia binnen het toezichtbeleid van de Europese Commissie op het gebied van de Interne Markt. Hier bestaat sinds jaar en dag een zeer sterk nalevingmechanisme in de vorm van de inbreukprocedures (artikel 258 – 260 WVEU), waar de Commissie “ongehoorzame lidstaten” voor het hof kan dagen en kan vragen om het opleggen van sancties. Echter, de laatste jaren zijn juist diverse nieuwe, alternatieve procedures geïntroduceerd die eveneens tot doel hebben de naleving van Interne Markt-regels te vergroten. Deze nieuwere procedures zijn van een zachter karakter dan de inbreukprocedures, en maken gebruik van methoden zoals toegangen transparantie en dialoog, peer review, het zwartmaken of juist ophemelen van bepaalde lidstaten, enzovoort. Hierbij wordt dus niet gegrepen naar hardere methoden zoals juridische procedures of het opleggen van boetes.

Niet alleen binnen de EU, maar ook in internationale organisaties in het algemeen zijn er grote verschillen tussen de manieren waarop wordt getracht naleving van de regels van de organisatie te bewerkstelligen of in ieder geval te bevorderen. Het is dan ook interessant om te onderzoeken in hoeverre deze verschillende soorten harde en zachte mechanismen in staat zijn om op effectieve wijze naleving van de regels te bewerkstelligen. In dit proefschrift wordt daarom de vraag gesteld: *Hoe effectief zijn de Europese inbreukprocedures in vergelijking met andere nalevingmechanismen in zowel de EU als in andere internationale organisaties?*

Vier verschillende internationale organisaties worden onder de loep genomen om een antwoord te kunnen geven op deze vraag: de EU, de Organisatie

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1 For an English summary, see the Conclusions to this thesis, starting on page 315.
Samenvatting

voor Economische Samenwerking en Ontwikkeling (OESO), de Wereldhandelsorganisatie (WTO) en het Internationaal Monetair Fonds (IMF). Deze organisaties zijn in zekere zin vergelijkbaar omdat zij soortgelijke procedures hanteren om toe te zien op de naleving van de vanuit de organisatie geldende regels op het gebied van economisch en financieel recht. Op institutioneel en inhoudelijk vlak bestaan uiteraard ook grote verschillen tussen de vier organisaties. Om tot een zinvolle vergelijking te komen wordt in dit proefschrift een analytisch raamwerk ontwikkeld waarmee de effectiviteit van de diverse mechanismen kan worden geëvalueerd. Dit raamwerk is gebaseerd op een piramidevormig model dat de diverse stadia van een nalevingmechanisme weergeeft. De piramide toont hoe een mechanisme vanuit een zachte basis geleidelijk aan gebruik kan maken van in toenemende mate hardere nalevingmethoden, met uiteindelijk de toepassing van sancties als ultieme mogelijkheid in het hardste stadium.

Effectiviteit wordt gedefinieerd als de mate waarin een bepaald vooraf gesteld doel wordt behaald; het doel van een nalevingmechanisme is immers ervoor te zorgen dat de lidstaten zich houden aan de regels van de organisatie. Voortbouwend op de politicologische management en enforcement theorieën komen twee elementen naar voren die van belang zijn bij het bepalen van de keuze voor een bepaald type nalevingmechanisme: 1. het karakter van de onderliggende verplichtingen die nageleefd dienen te worden (deze kunnen ofwel zacht en juridisch niet verbindend, ofwel hard en juridisch verbindend zijn), en 2. de oorzaak voor de niet-naleving van de regels (is het een expliciete en doelbewuste ongehoorzaamheid, of is dit onbedoeld?). Een nalevingmechanisme dat toeziet op naleving van bepaalde regels moet passen bij deze twee elementen. Om nu de effectiviteit van een dergelijk mechanisme te evalueren, moet volgens het ontwikkelde analytisch raamwerk een aantal vragen worden beantwoord: welk gedrag wordt verwacht van een lidstaat, wat is het karakter van de onderliggende verplichtingen, wanneer wordt een lidstaat als ongehoorzaam gezien en wat is de oorzaak van dit ongehoorzame gedrag?

In eerste instantie worden deze vragen beschouwd voor een aantal mechanismen in de EU. Allereerst de inbreukprocedures zelf - het basismechanisme waarmee de overige procedures binnen en buiten de EU vergeleken worden. Dit mechanisme zelf kent verschillende stadia, die naarmate de procedure verder vordert toenemen in hardheid en uiteindelijk tot het opleggen van boetes kan leiden. Vervolgens drie meer recent geïntroduceerde, alternatieve procedures: het Scorebord voor de Interne Markt (IMS), een peer review mechanisme; SOLVIT, een alternatief conflictbeslechtingsmechanisme; en EU Pilot, een zacht systeem dat functioneert als voorportaal van de inbreukprocedures en werkt op basis van dialoog en een zekere mate van openheid tussen de verschillende partijen.
Het blijkt, na analyse van de procedures en beantwoording van de vier voornoemde vragen, dat de inbreukprocedures behoorlijk effectief functioneren. De inbreukprocedures zijn door de jaren heen harder geworden van karakter, onder andere zichtbaar in bijvoorbeeld de introductie van boetes. Dit leidde ertoe dat een steeds groter aantal zaken snel wordt opgelost in de vroege, zachte stadia van de procedure. Hier ziet men de invloed van de wetenschap dat een harde procedure bestaat, en ook daadwerkelijk wordt toegepast. Het idee is dat als een lidstaat niet zijn gedrag aanpast in de vroege stadia, deze de harde kant niet zal ontlopen. Het is dus beter om het gedrag aan te passen dan juridische procedures of boetes te risicieren.

De drie nieuwere alternatieve procedures versterken dit beeld. Deze mechanismen bieden een alternatieve route om op een relatief goedkope, snelle manier te komen tot een oplossing voor een nalevingprobleem. De effectiviteit van de systemen blijkt onder meer uit de succesratio’s van deze mechanismen, alsook de gelijktijdige zichtbare afname van het aantal inbreukprocedures. Een verklaring voor de effectieve werking van zowel de oorspronkelijke inbreukprocedures als de alternatieve mechanismen kan worden gevonden in de wisselwerking tussen de harde en de zachtere mechanismen.

Als nu de werking van de Europese procedures vergeleken wordt met die in andere internationale organisaties, wint deze verklaring aan kracht. Uit de analyse blijkt dat twee elementen een cruciale rol spelen als men een lidstaat wil dwingen zich te houden aan de regels van de internationale organisatie: 1. Het karakter van de onderliggende verplichtingen moet aansluiten bij het type nalevingmechanisme, en 2. De mogelijkheid tot een wisselwerking tussen de verschillende type mechanismen binnen een organisatie.

De OESO kent voornamelijk zachte verplichtingen. Het doel van het peer review type nalevingmechanisme in deze organisatie is dan ook niet zozeer het dwingen tot naleving. Het werk van de OESO concentreert zich veeleer op het beïnvloeden van het gedrag van de lidstaten en door middel van het uitwisselen van informatie, transparantie en het uitvoeren van kwalitatief hoogstaande analyses deze lidstaten in de gewenste richting te duwen. Hier is een duidelijke gelijkenis te zien met de zachte karakters van de procedures en de onderliggende verplichtingen.

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ingen waar het op toeziet. Bij de WTO is het vooral het zachte TPRM mechanisme dat onder deze twee tekortkomingen lijdt, en daardoor ineffectief is.

Het IMF, als laatste, kent problemen van een andere orde. Hier zijn alle ingrediënten aanwezig voor een goede wisselwerking tussen bestaande harde en zachte mechanismen, waar echter meer gebruik van zou kunnen worden gemaakt. Vooral de artikel IV consultaties ontberen een harde toezichtkant die de preventieve werking kan verbeteren. Er is daarbij weinig tot geen wisselwerking met het harde mechanisme dat wel bestaat in de vorm van de *Balance of Payment* programma’s.

Uit de analyse in dit proefschrift blijkt dat de Europese inbreukprocedures samen met de alternatieve mechanismen een effectieve manier vormen om ervoor te zorgen dat lidstaten zich houden aan hun verplichtingen. Het is duidelijk geworden dat, ten eerste, zachte procedures een essentiële rol spelen, ook als de onderliggende verplichtingen van een harder karakter zijn. Het is relatief ineffectief om enkel een hard mechanisme in te zetten om naleving te bewerkstelligen, zeker indien er geen sprake is van doelbewuste ongehoorzaamheid. Ten tweede, een hard *back-up* mechanisme versterkt de rol van de zachte procedures. Lidstaten zijn eerder geneigd om hun gedrag aan te passen als ze weten dat er uiteindelijk een hard en potentieel kostbaar instrument ingezet gaat worden in de vorm van juridische procedures en eventuele boetes. Ten derde, en volgend uit de vorige twee punten, is het belangrijk dat een wisselwerking wordt mogelijk gemaakt tussen de verschillende procedures binnen een organisatie om het volle potentieel van zachte en harde nalevingmechanismes te bereiken.
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Contemplating Compliance

European compliance mechanisms in international perspective

How can international organizations make their Member States comply with the rules of the organization? Which is the more effective method: to coax and entice, to argue and persuade, or to threaten and punish? On the basis of which criteria should a compliance mechanism be construed and applied, given the character of the underlying obligations and the nature and set-up of the organization?

Contemplating Compliance provides the reader with an understanding of what determines the effective functioning of compliance mechanisms. A three-dimensional compliance model is developed and applied to mechanisms in four international organizations: the European Union (EU), the Organization for Economic Cooperation and Development (OECD), the World Trade Organization (WTO) and the International Monetary Fund (IMF). This systematic comparative analysis offers new insights into the way compliance mechanisms function, highlighting the importance of the existence of different types of mechanisms. Especially the possibility for interaction between hard and softer mechanisms plays an important role in inducing Member State compliance with the rules of an international organization.

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