Contemplating compliance: European compliance mechanisms in international perspective

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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 \textit{inter alia} minimum requirements for national budgetary frameworks and a Macro-economic 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.\footnote{European Commission (2012) \textit{Commission Communication: A Blueprint for a deep and genuine economic and monetary union. Launching a European Debate COM(2012) 777 final.}}

In the area of EU Internal Market law, the role of the European Commission as enforcer of the Treaties has since long been established.\footnote{Article 17(1) TEU.} 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.\footnote{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.} 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.\footnote{Examples of these softer mechanisms are the Internal Market Scoreboard, SOLVIT and EU Pilot. These will be discussed in more detail in chapter 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,\footnote{The Organization for Economic Cooperation and Development is one example of such an organization. See also chapter 5.} to systems with elaborate dispute settlement mechanisms, including judicial procedures and the possibility for com-
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Pension 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.


while an in-depth investigation of soft compliance procedures within the EU is virtually non-existent.\textsuperscript{10} 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.\textsuperscript{11} 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

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12 Tallberg (2002).
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.