Contemplating compliance: European compliance mechanisms in international perspective
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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.
separate discipline or even part of economic research, where economic tools and models are used to analyze legal questions.\textsuperscript{5}

More recently a turn towards the more explicit use of empirical methods in legal research can be observed.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{6} See for example the article by Shaffer, G. and T. Ginsburg, ‘The empirical turn in international legal scholarship’ (2012) 106 (1) American Journal of International Law.

\textsuperscript{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.\(^8\)

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.\(^9\)

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.\(^10\) 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.\(^11\)

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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\(^8\) For a more detailed explanation of different types of research design, see also Creswell, J.W., Research Design. Qualitative, Quantitative, and Mixed Methods Approaches (Sage Publications Inc., Thousand Oaks, CA 2009).


\(^10\) 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

\textsuperscript{14} Others are for example narrative research, phenomenology, grounded theory or ethnography.


\textsuperscript{16} Ibid., pp. 2-19.
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.

**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. 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.
all complaints brought to the SOLVIT centers.\textsuperscript{19} 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).\textsuperscript{20} The

\textsuperscript{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.

\textsuperscript{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,\textsuperscript{21} 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

\textsuperscript{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.