CHAPTER 4
Compliance Mechanisms in the EU
Behavior can be changed more easily by the power of persuasion than by the persuasion of power.

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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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.\(^6\) 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.\(^7\) 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...”.\(^8\)


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.\(^9\) 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”.\(^{10}\)

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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.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 scoreboard as it has also been called)12 provides much detailed information and the rankings of Member States on most fronts. As the Commission itself stated:

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.13

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

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since the previous report, while Sweden almost halved its average delay during the same period.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{14} Figure taken from European Commission (2012) Internal Market Scoreboard 25.

\textsuperscript{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>10.3</td>
<td>7.9</td>
<td>8.2</td>
<td>6.9</td>
<td></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>-37%</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.
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. The Commission itself, in any case, is quite positive about the effectiveness of the system. 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.” 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.
21 European Commission, Commission Communication on Effective Problem Solving in the Internal Market (“SOLVIT”), COM(2001)702 final, p. 1. 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).\(^{26}\) 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.\(^{27}\) 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.\(^{28}\) Figure 4.3 shows the increasing importance of the SOLVIT system over the past six years.\(^{29}\)

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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.

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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.\(^{30}\) 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.\(^{31}\) Interestingly, the number of new SOLVIT cases per year has increased from 180 in 2002 to almost 1400 in 2010. Moreover, its annual caseload

\[\text{Figure 4.3: Infringement Cases Compared with SOLVIT Cases}\]

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, Eurojust, 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).
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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

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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.46 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.47 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.48

Some possible implications of the process may need further evaluation.49 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). 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. 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. 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

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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.53

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-

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53 Figure taken from EU Pilot Evaluation Report 2010.
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

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55 Ibid.

56 Respondents #1 and #8, and confirmed by the information in ibid.
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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.

![Figure 4.5: Softness of EU Compliance Mechanisms](image)

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.\textsuperscript{58} 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.\textsuperscript{59} 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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\textsuperscript{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.\textsuperscript{62} 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.\textsuperscript{63}


\textsuperscript{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).
PART II  EU Compliance Mechanisms

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 been 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

Figure 4.8: EU-15 Compliance 1995-2010 (number of infringement procedures)

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-

Figure 4.9: EU Internal Market Compliance 1995-2010 (number of infringement procedures)
fects 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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SOLVIT Evaluation 2011.
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)
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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. 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.
PART II EU Compliance Mechanisms

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.
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, 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%. 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.

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.

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68 SOLVIT Evaluation 2011
69 A satisfactory solution is found in 80% of all cases brought to the SOLVIT Centers (ibid.).
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.