Contemplating compliance: European compliance mechanisms in international perspective
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Conclusions
Do not be too hard, lest you be broken; do not be too soft, lest you be squeezed.

Ali ibn Abi Talib (Imam, 600 – 661 AD).
This book has discussed the issue of compliance mechanisms in international organizations. First, the book presented an analytical framework in order to evaluate the comparative effectiveness of compliance mechanisms. Subsequently, this framework was applied to the cases of the EU Internal Market, the OECD, WTO and IMF. In this concluding section the results of this analysis for the four different organizations are brought together, with a view to draw general conclusions on what makes compliance mechanisms function effectively. In light of the findings in this book, some implications for the existing compliance mechanisms are pointed out, and recommendations are made to improve their effectiveness.

Comparing compliance mechanisms
Membership of an international organization enhances cooperation, which can alleviate the externality problems that can arise when states act unilaterally. Given the perceived advantages of such cooperative efforts, it can generally be stated that Member States have a natural propensity to comply with the rules of an international organization. Nevertheless, in most organizations non-compliance is a frequent occurrence. Non-compliance may weaken the foundations of the organization and thus diminish the positive effects of institutionalized cooperation. International organizations therefore need compliance mechanisms in order to ensure adherence to their rules. Compliance mechanisms, however, come in many shapes and sizes. They can vary from a soft managerial type mechanism to a hard enforcement mechanism to anything in between, or a combination of different types. Deciding which mechanism would be most suited to a particular situation is not an easy matter. This study has demonstrated that the choice between enforcement mechanisms is constrained by such elements as the organization’s institutional set-up, its legal framework and functioning as well as the character and content of the underlying obligations.

The importance of choosing an effective compliance mechanism was illustrated in the introduction to this book by the recently felt need for an overhaul of economic governance structures in the EU in the wake of the 2008 financial crisis. The manner in which national fiscal policies were being reviewed in the framework of the Stability and Growth Pact had not been able to effectively induce compliance with the underlying obligations. The relatively soft compliance mechanism was not appropriately matched to the hard obligations it was meant to oversee. It was found in later chapters that this apparent mismatch between the compliance mechanism and its underlying obligations is encountered not only in the EU, but even more spectacularly in other international organizations such as the IMF and the WTO.
In this study an analytical framework was developed to enable a structured comparative analysis of the functioning of existing compliance mechanisms in international organizations. The application of this analytical framework exposed several characteristics that can explain why a certain type of mechanism functions effectively in one organization, but fails in another. The EU was chosen as the basis for this comparative analysis. This international organization is particularly interesting as both soft and hard compliance mechanisms target non-compliance with identical obligations, such as for example Internal Market rules. The comparative effectiveness of different compliance mechanisms overseeing adherence with the same underlying obligations could thus be analyzed. Moreover, the results of this analysis could also be compared to the functioning of similar mechanisms in other international organizations such as the OECD, WTO and IMF by applying the analytical framework.

Before the analytical framework and outcome of these analyses are discussed, though, one possible critique of the comparative study performed in this thesis needs to be addressed. It may be questioned whether a comparison of the chosen international organizations is possible at all, given their crucial differences in set-up, legal framework and functioning. An often-heard remark is that the European Union is a “unique” organization, and cannot be compared to “normal” international organizations. This assertion draws its strength from arguments based on the supranational character of the EU, its legal framework, its scope, membership and any number of other characteristics. Such argumentation could go as follows.

First, the supranational character of the EU sets it apart from all other international organizations. Only the EU has given an objective institution the task to oversee compliance with the rules of the organization, and has endowed this supranational organ with the power to take a non-compliant Member State before a Court. Second, the *sui generis* nature of the EU, its legal framework and notions like direct effect and supremacy make it “less than a State, more than an international organization”.¹ Third, the difference in subject matter between the organizations prohibits any fruitful comparison. The EU has a very broad scope, including areas such as economic and monetary union, competition, trade, environmental issues, public health and so on. The other organizations, contrarily, have a much narrower scope. The OECD focuses on economic growth and development, the WTO deals with issues of international trade, while the IMF oversees the international monetary system. Fourth, the membership of the organizations

has to be taken into account, whereby the EU currently has 29 Member States, the OECD 34, the WTO 159 and the IMF 188. It is arguably much easier to oversee compliance by 29 Member States than it is to control 188 Members.

The list of differences between the organizations is long. One could say that comparing EU compliance mechanisms with those in other international organizations is like “comparing apples and pears”. Nevertheless, apples and pears also have characteristics that do enable comparative analysis. They are both fruit, taste sweet, have similar colors, grow on trees, and are harvested at the end of summer. The goal of eating such fruit is to provide nutrition. By comparing the two types of fruit, an analysis can be made of which of the two is more effective in reaching this goal of providing nutrition: Which contains more vitamins, which is better taken up by the human body, which can be preserved the longest and so forth. Thus, just like compliance mechanisms in different international organizations, they are quite dissimilar in some respects, but they are used and applied for the same purpose. The ultimate goal of the compliance mechanisms is to induce compliance with the rules of the organization. It may be that the aim is formulated as increasing cooperation, or the settlement of disputes, or compliance, but any and all solutions offered under the compliance mechanisms need to be in conformity with the rules of the organization. Choosing and comparing certain specific aspects of compliance mechanisms that are crucial for their effectiveness can overcome the differences in the set-up and functioning of the organizations for the purpose of the analysis in this thesis.

**Part I: A framework for comparison**

The aim of this dissertation was to evaluate the effectiveness of compliance mechanisms in international organizations. Existing compliance mechanisms in four international organizations were chosen for comparison: the EU infringement procedures, Internal Market Scoreboard, SOLVIT and EU Pilot, the OECD peer review process, the WTO Dispute Settlement System and Trade Policy Review Mechanism (TPRM), and finally the IMF surveillance mechanism. As was just explained, all of these organizations differ in their set-up and functioning. In order to nevertheless be able to compare the mechanisms based on their effectiveness, a framework for analysis was developed in Part I of this study.

Effectiveness is defined as the degree to which objectives are achieved. The objective of a compliance mechanism is to achieve a certain level of compliance with the rules of the organization. Compliance with international law is how-
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Ever a complex and much debated subject, where scholars theorize on why and when states do or do not comply. Two perspectives in this compliance debate are offered by i) the management approach and ii) the enforcement approach. The management model is one of cooperation, where justification, discourse and persuasion are used to make states comply. The premise is that non-compliance by states is not necessarily due to deliberate defiance. The enforcement model on the other hand, is based on cooperation, enforcement, and “the endogenous quality of rules”. In contrast to the management theory, states, as rational actors that weigh the benefits and costs of their actions against each other, might willfully choose not to comply when this suits them. In this model therefore, compliance is structured around state incentives in order to induce compliance, with the use of sanctions in the case of non-compliance.

In combining management and enforcement theories two elements were distilled that are essential in finding the optimal fit between the compliance mechanism and the underlying obligations. First the character of the underlying obligations needs to be determined, which can be either hard and legally binding or soft and non-binding. Second the sources of the non-compliant behavior have to be analyzed, where non-compliance can be either intentional or unintentional. A compliance mechanism needs to account for and match the outcome of these two elements in order to function effectively. It was found that hard obligations and intentional non-compliance are best matched by an enforcement type mechanism, involving a legal framework and the possibility of sanctions. Management type efforts on the other hand, such as prevention and monitoring, are most effective in inducing compliance with soft obligations and when non-compliance is unintentional. When non-compliance with hard underlying obligations is unintentional, it is unclear whether management or enforcement will be most effective. It was theorized that a combination of the two approaches would probably be most effective: start with soft managerial type efforts, and when compliance is not reached gradually harden the method until the ultimate enforcement possibility of sanctions is reached if necessary.

Based on the above theoretical assumptions, four questions were formulated which were answered in this dissertation: what behavior is expected from Member States, what is the character of the underlying obligations, when is a Member State non-compliant and what caused this non-compliant behavior? In answering these questions for all compliance mechanisms in the four international organizations, a comparative analysis was made possible of the mechanisms and the degree to which they are able to achieve their compliance goals.
Part II & III: Findings

Part II showed how the interaction between the infringement procedures and three newer mechanisms, the Internal Market Scoreboard, SOLVIT and EU Pilot, has a mutually reinforcing effect on the functioning of the respective systems. It was found that the infringement procedures are quite effective in inducing compliance with EU law. Interestingly, most infringement cases are closed in the early phases of the procedure. A mere five percent of all cases are brought before the Court. However, over the years the procedures have gradually increased in hardness with the introduction of sanctions, more transparency and less room for Commission discretion. This hardening has gone hand in hand with an increased focus of both the Commission and the Member States on the managerial phases of the procedures. The hardened enforcement side of the procedures apparently has a deterrent effect on Member State non-compliant behavior and provides an incentive to remedy non-compliance in an early phase.

The newer mechanisms have provided an alternative route for inducing compliance. This route has been useful especially for complainants given their low costs, the very short deadlines to come to a solution, the low threshold to the procedures and the direct involvement of the complainants. Furthermore, the introduction of these procedures has increased the detection rate of non-compliant behavior. This increase can be attributed to \textit{inter alia} the low threshold and easy access to the alternative systems, and the fact that they also appeal to users different from those who would have filed a complaint under the infringement procedures. This makes it possible for the Commission to devote more resources to the prioritized areas of EU law or to cases of persistent non-compliance. Conversely, the existence of the hard infringement procedures provides an enforcement element crucial for inducing compliance with hard underlying obligations of the EU. This mutually reinforcing interaction between the soft and hard mechanisms was found to be an important explanation for the effective functioning of all four mechanisms.

Part III strengthened the findings of the previous part. It was uncovered that not only in the EU, but even more so in other international organizations two elements play a crucial role in the effective functioning of compliance mechanisms: 1. a correct match between the character of the underlying obligations and the compliance mechanisms; and 2. the possibilities for interaction between the different mechanisms within one organization. This became clear after the application of the analytical framework to three organizations: the OECD, the WTO and the IMF.

A soft mechanism works well in an organization like the OECD where the underlying obligations are mostly of a soft character and where the goal of the
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The mechanism is to change the mindset of the Member States, persuading or pushing them in a certain direction, rather than to induce compliance with hard obligations. The OECD peer review mechanism is a process intended to increase information sharing, transparency and policy analysis of and between Member States. Not the recommendations themselves, but the process leading up to their formulation is what matters. Moreover, the output the OECD produces in shape of reports, statistics, and analyses are used extensively by national governments. Through this channel, the OECD is also able to change the way Member States think and act. The OECD is a prime example of a good match between the character of the compliance mechanism and that of the underlying obligations.

In the WTO, the underlying obligations are mainly of a hard character. It was found that the dispute settlement system is set up as a relatively hard enforcement mechanism with a broad managerial base. Consultations and negotiations play an important role in this intergovernmental organization, where the Member States remain the masters of the dispute. *Vice versa*, the enforcement elements of the mechanism ensure the effectiveness of the managerial efforts. Consequently it was found that the dispute settlement mechanism is quite effective in achieving its goal of solving disputes between the Member States.

In addition to this relatively hard dispute settlement system, however, there is also a soft peer review system in shape of the TPRM. This system is set up in a way very similar to the OECD peer review mechanism, but lacks actual scrutiny measures and does not involve making recommendations to the Member States. In contrast to the OECD system the TPRM is generally not considered an effective mechanism. The institutional and operational divide between the dispute settlement system and the TPRM, the fact that findings from the TPRM cannot be used for enforcement purposes and the mismatch between the soft mechanism and the hard underlying obligations were revealed as the reasons for its ineffectiveness.

In the IMF, then, where the rules are of both a soft and hard character, the potentially effective combination of a managerial and an enforcement mechanism is undermined by several drawbacks in the set-up of the system. Most importantly, the Article IV consultations are a soft surveillance mechanism meant to oversee compliance with hard and soft obligations, but without any real enforcement capabilities. A certain balance between managerial and enforcement elements was found missing, while there is no successful interaction with the one enforcement type system the IMF does have in shape of the Balance of Payments Programs.
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The aspects that were found to be fundamental for the effective functioning of compliance mechanisms pertain to the match between the character of the underlying obligations and the mechanisms, and the possibility for interaction between and mutual reinforcement of compliance mechanisms within one organization. Where there is a perfect match, such as in the OECD, the mechanism functions quite effectively. Where there is a mismatch such as occurs in the IMF, the system is rendered incapable of targeting actual compliance. And when there is no interaction between the mechanisms within one organization as is legally prohibited in the WTO, the effective functioning of each mechanism is much less than it potentially could be. The analysis of the functioning, advantages and drawbacks of the compliance mechanisms in these three international organizations offers an explanation of the positive effects the introduction of soft mechanisms in the EU have had on the classic infringement procedures.

First, it is clear that soft managerial type elements play an important role in the effective functioning of compliance mechanisms, also when the underlying obligations are mostly of a hard character. Applying only hard enforcement type measures is not only potentially quite costly given the involvement of a legal framework and judicial procedures, but are also relatively ineffective. Using a hard mechanism to address managerial type problems such as miscommunication or information asymmetries will not solve these types of problems. We can compare this to disciplining an allegedly disobedient child: when you ask a child to put on its shoes, but it is not yet capable of tying his shoelaces, yelling at the child or even physical abuse will not make him tie them any faster.

Second, a mismatch between the type of compliance mechanism and the character of the underlying obligations will render the mechanism’s functioning less effective. Applying soft measures to induce compliance with hard obligations will work to some extent, depending on the sources for the non-compliant behavior. However, if there is no enforcement mechanism available as back-up, there is less incentive for the non-compliant Member State to conform to the rules. Especially when the Member State is intentionally non-compliant, a lack of hard measures will make the mechanism function below its optimal level.

Third, when different types of compliance mechanisms exist alongside each other in one international organization it should be made possible for them to interact with each other. It was for example found in the WTO that when there is no possibility for interaction, the hard as well as the soft mechanism are ren-
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dered less effective, and one of them may even become “totally useless”, as one respondent phrased it.³

These three elements are all to a large extent existent in the mechanisms studied for the EU, which explains why it was found that the EU compliance system functions quite effectively. Of course, this does not mean that the EU system is perfect. All four organizations that were studied in this thesis can and should learn something from their counterparts that can increase the effectiveness of their compliance mechanisms, as the next section will summarize. In addition, some general recommendations will be made based on the findings in the dissertation and on some of the problems that were encountered along the way of the analysis.

Implications and Recommendations

1. The analysis in this dissertation has shown that it is possible to construct a compliance mechanism based on certain (predefined) objective principles, given the specific set-up and character of an international organization. Given the experience with an array of compliance mechanisms in the EU over the course of its existence, and taking into account best practices as seen in other organizations, the time has come to develop a more evidence-based policy for designing and introducing new mechanisms, instead of doing this on an *ad hoc* basis.

2. In introducing new compliance mechanisms, heed needs to be taken of the possibility of fragmentation of the supply of options for redress for individuals and businesses in the EU. It is essential that complainants know where they can go, and how their problems can be addressed effectively. Fragmentation will not only confuse these users of the systems, but will also render the interaction between the mechanisms less than optimal – *in der Beschränkung zeigt sich erst der Meister*.⁴

3. The analysis for the EU was limited to certain mechanisms targeting non-compliance with the rules of the Internal Market. As a follow-up to this study, it should be examined what the findings in this dissertation mean for

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³ Respondent #3.
⁴ J.W. von Goethe, ‘Natur und Kunst’, 1802. However, as Frasier said: “Ah, but if less is more, just think of how much more “more” will be!” (Frasier Television Series (David Angell et al), Season 7 Episode 13: ‘They’re playing our Song’).
compliance mechanisms in other areas of EU law. Especially those areas that are excluded from the application of the classic infringement procedures could benefit from this analysis.

4. In order to perform a robust analysis of the effectiveness of compliance mechanisms, it is essential to have access to decent statistical information. The statistics for the EU mechanisms found in publicly available documents, especially those for the infringement procedures, SOLVIT and EU Pilot, are not reported in a consistent manner. Given the frequent changes in the way the data is presented throughout the years, it is a challenging task to perform a thorough and fruitful comparative analysis. In the interest of transparency, it is recommendable to publish more consistent reports offering comparable data.

5. The OECD peer review system seems to work quite effectively since its soft mechanism matches the soft character of the underlying obligations. However, some instruments are adopted or drafted by the OECD that do include legally binding obligations for the signatories to these instruments. Examples are the Anti-bribery Convention or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. It would be interesting to examine how compliance mechanisms laid down in such Conventions would hold up in light of the findings in this dissertation.

6. The WTO dispute settlement system is quite effective as well in solving disputes between the Member States. The TPRM on the other hand is a good example of how a mismatch between the character of a compliance mechanism and its underlying obligations renders its functioning ineffective. Both the (managerial part of the) DSU as well as the TPRM would benefit in terms of effectiveness if the divide between the two systems were removed, providing an institutional and legal link and options for interaction between them.

7. The IMF surveillance mechanism also suffers from a mismatch between the soft character of the mechanism and the partly hard character of the underlying obligations. First, harder, enforcement type elements should be added to the mechanism in shape of an actual procedure, with a greater probability of repercussions or sanctions being applied. Member States should be more involved in the peer review process, and the recommendations following Article IV consultations should be followed up more stringently. Second, the interaction with the Balance of Payments programs is less than optimal.
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Especially the lack of balance between smaller and larger, or developed and developing economies created by the link between the Article IV consultations and the Balance of Payments programs should be addressed.