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When does the EU commission listen to experts? Analysing the effect of external compliance assessments on supranational enforcement in the EU

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ABSTRACT

How does the European Commission respond to external expert reports about member states' non-compliance? We theorise that expert compliance assessments affect the Commission's monitoring costs and information about governments' probability of compliance. More precisely, the Commission is likely to launch infringements, when information is provided by institutions with extensive expertise that reveals practical non-compliance. However, reports about severe non-conformity indicate that governments will not reform their policies. Therefore, the Commission is expected to initiate infringements if the domestic conditions are favourable for compliance (government and societal EU support and active civil society). Analysing 63 EU directives and 27 countries, we find that enforcement depends on external expertise and practical non-compliance. Moreover, the Commission launches infringements against severe non-conformity when it is supported by civil society. Thus, the Commission utilises expert assessments strategically and it does not necessarily prioritise high levels of non-conformity.

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KEYWORDS Enforcement; European Commission; external expert assessments; non-compliance

Introduction

The fragmentation of political authority in the European Union (EU) has led to delegating enforcement powers to non-majoritarian supranational institutions. The European Commission (the Commission), in particular, is credited

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for serving as the chief 'guardian of the treaties' by monitoring and enforcing non-compliance in Europe. The Commission is a powerful enforcement actor: it can launch infringement proceedings against law-deviating member states, which could culminate to a referral to the European Court of Justice (ECJ) and could even lead to monetary sanctions. Monitoring and enforcement are crucial aspects of supranational systems of governance by ensuring that member states will keep their commitments after EU policy adoption. In the EU context, lack of enforcement is detrimental for state cooperation, as persistent non-compliance will render EU policies ineffective.

Nevertheless, many studies contend that the Commission is not purely a technocratic enforcement agent, but it wields its enforcement powers selectively, based on political considerations (König & Mäder, 2014; Steunenberg, 2010). In addition, recent research by Kelemen and Pavone (2021) shows that since 2004, the Commission has been more reluctant to lodge infringements, when these would aggravate relations with the EU member states (Kelemen & Pavone, 2021).

However, there is limited research on how evidence about state non-compliance with EU law affects the Commission incentives to wield its enforcement powers. In this study, we address this research gap by analysing whether the EU enforcement agent responds to instances of non-compliance reported by external legal and policy experts. We address the following question: *To what extent do expert assessments about non-compliance affect the Commission's decisions to start infringement proceedings?*

The Commission increasingly relies on third parties, including consultancies, legal experts and academic institutions, to evaluate the implementation of EU policies across different member states (van Voorst & Mastenbroek, 2017, p. 642; Zhelyazkova *et al*., 2016). Third-party monitoring helps the EU monitoring agency avoid resource-intensive and politically fraught 'in-house' investigations in the member states (Börzel *et al*., 2012; Tallberg, 2002). As the 'guardian of the treaties', the Commission is expected to consider the evidence produced by external experts seriously. However, the Commission is also likely to prioritise the most credible compliance problems, and cases where enforcement will successfully induce behavioural change in the member states. We contribute to existing research by focusing on characteristics of third-party monitoring and the level of non-compliance as a function of enforcement success. In particular, the costs of monitoring compliance decrease when instances of non-compliance are reported by agencies with extensive expertise and the Commission has information about non-conform practical implementation. Nevertheless, the Commission is less likely to succeed in convincing member states to comply with the EU rules, when this will entail extensive policy changes. In this case, enforcement is unlikely to successfully resolve issues of non-conformity, unless the Commission encounters favourable domestic conditions for enforcement.

We analyse the relationship between expert assessments and Commission enforcement activities using a unique dataset on external expert reports of compliance with 63 directives from four policy areas: Internal Market and Services, Environment, Justice and Home Affair (JHA) and Social Policy. The dataset distinguishes between reported instances of non-compliance and infringement proceedings, enabling studying the strategic decisions of the Commission to launch infringements.

The findings reveal that the Commission does not automatically respond to external reports about non-compliance. Instead, the EU's enforcement agency considers the expertise of external monitoring institutions. Furthermore, the Commission does not pursue compliance with reported severe legal problems that reveal high conformity costs, unless enforcement is supported by a vibrant civil society. Our findings contribute to debates about enforcement in the context of supranational law and on the legitimacy of supranational institutions. As supranational governance is becoming increasingly contested by both political elites and citizens, it is an open question whether international organisations continue to fulfil their functions dutifully or yield to member states' pressures to avoid backlash.

Centralised enforcement in the EU: the infringement procedure

In the context of supranational enforcement, the Commission is the EU's central monitoring agency that is responsible for safeguarding compliance by the member states (McCormick, 2015, pp. 169–172; van Voorst & Mastenbroek, 2017). Relative to other enforcement institutions, the Commission is considered to be 'exceptionally powerful' (Kelemen & Pavone, 2021, p. 4). One of its most important competences is the ability to launch infringements against non-compliant member states. The infringement procedure consists of three consecutive stages designed to increase external pressure on member states to comply with EU law (Tallberg, 2002). At the first stage, the Commission sends a 'letter of formal notice' (LFN) to governments suspected of violating EU law. If the member state provides an unsatisfactory response to the letter, the Commission can issue a reasoned opinion (RO) – specifying the nature of the non-conformity. The procedure culminates with a referral to the ECJ, where the court decides on the case and can impose financial sanctions. However, the Commission rarely resorts to litigation, and the majority of cases are resolved before the final stage (Börzel, 2021; Börzel *et al*., 2012; Hofmann, 2018).

According to Tallberg (2002), the infringement procedure represents a 'management-enforcement' ladder. The management and enforcement perspectives are widely considered as two distinct (but complementary) approaches to compliance and enforcement. Based on the management perspective, most compliance problems are the result of insufficient

administrative capacities and ambiguous rules (Chayes & Chayes, 1993; Hille & Knill, 2006; Tallberg, 2002). In terms of enforcement, the early stages of the procedure give rise to pre-trial negotiations between the Commission and governments that help clarify EU obligations. Conversely, enforcement scholars emphasise that law violations are intentional and depend on the policy preferences of governments and domestic actors involved in the implementation process (Downs *et al*., 1996; König & Mäder, 2014; Thomson, 2010; Zhelyazkova, 2013). In this case, enforcement entails increasing the costs of non-compliance by referring non-compliant member states to the ECJ.

Moreover, there are different reasons for opening infringement cases. The Commission can launch a case if a member state fails to notify an implementing measure before a specified deadline for EU directives (delayed transposition). In this case, the infringement procedure starts almost automatically. The second type pertains non-conformity cases, where a member state has either incorrectly transposed or implemented an EU directive. Many scholars argue that the Commission has more discretion to launch non-conformity infringements (Cheruvu & Fjelstul, 2021; Hartlapp & Falkner, 2009; Steunenberg, 2010), as it can follow its own interpretation of what constitutes non-compliance. Furthermore, member states incur higher costs of complying with non-conformity proceedings, as this entails modifying national legislation and changing the behaviour of domestic industries (Cheruvu, 2022). Consequently, non-conformity cases are particularly prone to under-enforcement due to the Commission's political considerations.[1]

The politics of supranational enforcement: state-of-the-art

Ideas about the political nature of EU enforcement are well established in academic debates. Various empirical findings show that the Commission does not always start proceedings against non-complying member states (Falkner *et al*., 2005; Hartlapp & Falkner, 2009). Hartlapp and Falkner (2009) reported that the Commission did not initiate infringements in 51 per cent of the cases in which they identified non-compliance in the area of social policy. Recent studies find that the Commission was also hesitant to initiate and continue infringement cases for application failure regarding EU asylum policies during the refugee crisis (Lang, 2020; Schmälter, 2018).

A popular explanation for under-enforcement is the limited capacity of the EU monitoring institution to identify and process compliance problems across different member states and policy areas. Consequently, the Commission increasingly relies on decentralised and private enforcement by national courts as a substitute for the infringement procedure (Falkner, 2018; Hofmann, 2018). Moreover, in the early 2000s the Commission established specialised platforms to address societal complaints (e.g., EU Pilot) and resolve internal market disputes between businesses and citizens (SOLVIT)

through structured dialogue with national bureaucratic institutions. A recent study shows that EU Pilot has increased the efficiency of the infringement procedure by preventing accidental non-compliance, while allowing the Commission to focus on intentional law violations (Cheruvu & Fjelstul, 2021).

However, capacity-based accounts do not fully explain supranational under-enforcement, when the EU Commission has the necessary information to prosecute non-compliance. Infringement proceedings also entail political costs (Fjelstul & Carrubba, 2018; Steunenberg, 2010). In a recent study, Kelemen and Pavone (2021) argue that the Commission's strategic behaviour reflects the politics of forbearance where the Commission deliberately prioritises 'conciliatory political dialogue over rigorous law enforcement' (Kelemen & Pavone, 2021, p. 3). Based on this argument, under-enforcement is driven by a political choice, even when the Commission has the necessary capacity and resources. In particular, the EU Commission has dual responsibilities to both propose legislation at the supra-national level and enforce compliance with the adopted decisions. Thus, the EU guardian of the treaties depends on the member states' support for pushing through its proposals at the decision-making stage. Kelemen and Pavone (2021) explain that growing levels of Euroscepticism among citizens and political elites have increased member states' resistance to supranational policymaking and enforcement. Providing extensive qualitative evidence, they argue that the Commission has been sacrificing its responsibilities as the 'guardian of the treaties' to enhance its role as 'an agent of integration' – in other words, it deliberately refrains from prosecuting non-compliant member states to safeguard political support during EU policymaking.

Conjectures that political considerations interfere with the Commission enforcement activities are not new. Early work has already indicated that the Commission may not sanction (powerful) non-compliant states, if this would endanger securing their support for future policy proposals (Börzel, 2001; Börzel *et al*., 2012; Mendrinou, 1996). However, quantitative studies show limited empirical evidence that the Commission allows deviations from more powerful and influential member states (Börzel *et al*., 2012; Fjelstul & Carrubba, 2018). For example, different studies show that bigger countries (that hold more votes in the Council) are more likely to obtain infringement cases (Börzel *et al*., 2012; Fjelstul & Carrubba, 2018). A plausible explanation is that the Commission especially values compliance by more politically important countries 'that control a larger part of the economy, society, and population of the EU' (Fjelstul & Carrubba, 2018, p. 438).

In line with the enforcement approach, decisions to start infringement proceedings also depend on the probability of winning a case at the ECJ (Fjelstul & Carrubba, 2018; König & Mäder, 2014; Steunenberg, 2010). In particular, König and Mäder (2014) reveal the EU's central monitoring agency refrains from prosecuting non-complying states when the probability of success is

low, and the costs of litigation are high. High diversity of state preferences and the absence of domestic groups favouring compliance decrease the probability that the Commission will be successful in a court trial. In this case, other member states and domestic actors will not support enforcement and will not provide information to the Commission about their implementation efforts (König & Mäder, 2014, p. 260). Moreover, the EU monitoring institution can postpone enforcement if it does not believe it can bring the member state to comply. Thus, the Commission can permit non-compliance in the short term, while launching infringements when the political conditions are more favourable (Cheruvu, 2022).

Finally, models on strategic enforcement focus on the progression of infringement proceedings (Cheruvu, 2022; Fjelstul & Carrubba, 2018), but do not account for initial compliance decisions that have led to their instigation (see König & Mäder, 2014 as an exception). However, Kelemen and Pavone (2021) report a drop of 67 per cent in the instigation of infringement cases since 2004. Furthermore, the Commission's political considerations are especially prominent in decisions to open infringement cases. The start of the infringement procedure exposes compliance problems to wider audiences increasing the chance that non-compliance will attract the attention of affected interest groups and individuals. This limits the ability of the Commission to terminate cases at a later stage in the absence of member states' implementation reforms. Therefore, it is unlikely that the Commission will lodge infringements, unless it is prepared to pay the litigation costs at a later stage.

The relevance of expert assessments for Commission enforcement

Despite growing scholarship on EU enforcement, there is limited research on how information about non-compliance affects the Commission enforcement decisions. Arguably, the Commission has different ways to collect information about member states' non-compliance. First, national governments are obliged to notify relevant implementing instruments regarding EU directives. Instead, information about non-conformity is less systematic and requires legal expertise and resources. Much like other oversight institutions, the Commission can rely on reactive 'fire-alarms' sounded by domestic groups and individuals (McCubbins & Schwartz, 1984; Tallberg, 2002) and proactive 'police-patrols' in the form of own inspections (Börzel & Knoll, 2012; Smith, 2015; Tallberg, 2002). Reactive oversight, however, depends on domestic levels of societal mobilisation (Cichowski, 2007), which vary across countries (Howard, 2003; Schrama, 2017). In a similar vein, on-site checks in the member states tend to be costly, time-consuming and politically contentious (Börzel & Knoll, 2012).

Therefore, an important source of compliance-related information is third-party monitoring, conducted by consultancies, legal experts and academic institutions (van Voorst & Mastenbroek, 2017, p. 642; Zhelyazkova *et al*., 2016). The EU Commission often relies on external consultancies to assess the conformity of national legislation and collect data about practical implementation. While some expert assessments are specifically conducted to facilitate the Commission monitoring activities, others are prepared by national industries or academic institutions interested in the implementation of a specific directive. Moreover, in some policy areas, independent expert groups regularly report on national legislation and practices (e.g., European groups of legal experts in the field of anti-discrimination).

The literature on evaluation identifies different types of utilisation of external expertise. External assessments can be used instrumentally to make direct decisions based on evaluation results (Johnson, 1998). In this case, the Commission is expected to respond to evidence for non-conformity by immediately starting infringement cases. Alternatively, evaluations could be used to accrue knowledge (conceptual use), contribute to long-term learning and reflection about a policy or a programme (process use) or because they serve political self-interest (symbolic use) (Johnson, 1998). In all three scenarios, evaluations do not trigger an immediate reaction. Under what conditions would then the Commission use assessments instrumentally and start infringement cases based on reported non-compliance?

We argue that expert assessments affect the Commission incentives to enforce compliance by decreasing its monitoring costs and increasing the likelihood of enforcement success. External assessments decrease the Commission information disadvantage vis-à-vis EU member states, while reducing the costs for 'police patrolling' governments through own investigations (McCubbins & Schwartz, 1984). Furthermore, external expertise informs the Commission about governments' costs of compliance. Even if the Commission has indisputable evidence that a member state is in violation of EU law, it can still refrain from enforcement if it does not believe that this will be effective in inducing compliance. External assessments about non-compliance thus inform the Commission about the severity of implementation problems. Higher levels of non-conformity with an EU law require more extensive changes to national legislation. In this case, the Commission may not be able to convince member states to bear the costs of compliance, unless its enforcement actions are supported domestically.

External monitoring expertise and the scope of non-compliance information

Unlike previous studies, our theoretical argument focuses on how the Commission uses external expertise to monitor implementation and learn about

member states' compliance costs. In particular, the probability of successful enforcement increases, if issues of non-conformity are identified by institutions with extensive legal expertise. Outside expertise reduces the time and resources that the Commission needs to allocate to monitoring member states' implementation (Fjelstul & Carrubba, 2018). Conversely, the Commission will not immediately react to reports produced by specific industries with narrow expertise on an issue. While these agencies may have specialised knowledge on some aspects of the policy at hand, the Commission will need further information and resources to determine whether a government has fully complied with all policy requirements in an EU act. This is especially the case for EU directives, which constitute broad pieces of legislation with different issues requiring implementation.

Moreover, assessments by industries with narrow expertise could be confounded by political or economic interests. In this case, domestic actors and member states benefiting from non-compliance can successfully challenge the Commission enforcement activities (König & Mäder, 2014). The Commission can even incur reputation loss if enforcement decisions are based on limited information. Recent studies show that the Commission cares about its reputation and avoids actions that threaten to undermine its image as an effective guardian of the Treaties (van der Veer, 2022). As a result, the Commission strives to maintain an image of a credible enforcement institution whose activities are informed by the evidence-based expertise of member states' compliance efforts (Zhelyazkova, 2020).

> H1a: The Commission is more likely to start infringement proceedings against non-conformity, if the evidence for non-compliance comes from an agency with extensive expertise.

Similarly, the Commission's costs of monitoring depend on the scope of information provided by external agencies. The more extensive the information, the lower its information disadvantage about policy implementation. The Commission's information disadvantage decreases if it has evidence for member states' non-compliance for both legal and practical implementation. Compliance scholars contend that the Commission does not have sufficient resources to monitor the application of EU policies on the ground (Hartlapp & Falkner, 2009; Versluis, 2007; Zhelyazkova *et al*., 2016). This allows member states to shirk on their EU obligations during practical implementation, as the risk of detection and enforcement is lower. Information about practical non-compliance further reduces the monitoring costs of the Commission. It also reinforces its bargaining position by signalling to non-compliant member states that the enforcement agent has multiple grounds to challenge them in court. In this case, the Commission can more credibly threaten to escalate infringement cases to Court referrals. Finally, issues of practical implementation directly affect EU citizens and are more likely to generate complaints

by affected individuals and groups, further prompting the Commission to start infringements.

> H1b: The Commission is more likely to start infringement proceedings against non-conformity, if it also has evidence for extensive practical non-compliance.

Member states' costs of compliance

The Commission does not only consider its monitoring costs, but also the probability that states will eventually comply with the EU rules. Governments that incur high compliance costs are unlikely to yield to enforcement pressures and remain recalcitrant, expecting supranational courts to be more lenient, when domestic costs of implementation are too high. Under these circumstances, enforcement institutions refrain from bringing an action against the member state, because they do not believe this can induce compliance (Carrubba & Gabel, 2017; Cheruvu, 2022, p. 377). This is especially the case if the political situation is not favourable toward compliance and the government lacks the political will to accept costly supranational demands.

External expert assessments affect the Commission inferences about member states' probability of reforming national policies. In particular, high levels of reported legal non-conformity inform the EU's monitoring agency that a government may not be able or willing to meet EU obligations, as this will entail extensive legal changes and reforms to remedy non-compliance. In such cases, the Commission may refrain from starting infringement cases, anticipating that enforcement will not bring a member state to comply with the EU rules, unless the political costs of compliance are low.

Political costs refer to the willingness of national governments to implement reforms, either because they support the EU policies or because they are compelled by domestic audiences to comply (Cheruvu, 2022). For example, pro-integrationist governments could utilise supranational pressures for compliance to overcome opposition to domestically costly reforms. Moreover, Europhile governments are more susceptible to the Commission enforcement pressures than their Eurosceptic counterparts, as the former value their reputation as EU law-abiding countries. In a similar vein, governments strive to appear compliant with the EU policies when national publics are supportive of the EU rules. Given that EU litigation could politicise non-compliance and attract the attention of wider audiences, these member states would be more likely to resolve their compliance problems at the early stages of the infringement procedure. We, hence, expect that government and citizen support for EU integration improves the political conditions for compliance.

Conversely, member states with high levels of political and societal Euroscepticism are more likely to resist the Commission enforcement pressures.

Recent research argues that growing Euroscepticism has made member states more antagonistic towards EU enforcement and the Commission less likely to wield its enforcement powers (Kelemen & Pavone, 2021). In sum, we expect that the Commission is more likely to enforce compliance with domestically costly reforms if the political situation is conducive to compliance.

> H2a: The more supportive 1) EU citizens and 2) governments are towards the EU, the more likely it is that the Commission will start infringement proceedings against severe cases of non-conformity.

In a similar vein, civil society activism provides for favourable enforcement conditions. Civil society is an intermediary structure that offers opportunities for citizens to mobilise and engage in collective action, when government policies deviate from societal interests (Wollebæk & Selle, 2007). In EU policy implementation, civil society has a dual function. First, it assists the Commission in monitoring government performance and increases the transparency of non-compliance (Börzel, 2010; Schrama & Zhelyazkova, 2018). Thus, civil society further decreases the Commission's monitoring costs. Second, citizens in countries with a vibrant civil society are more likely to hold their governments accountable for the negative effects of non-compliance with EU policies. Consequently, civil society could serve as a bottom-up enforcement mechanism that increases member states' pressure to rectify severe cases of non-compliance. In this case, the Commission is more likely to start infringement cases, if it believes that enforcement will be supported by domestic groups.

> H2b: The more active civil society is in a member state, the more likely it is that the Commission will start infringement proceedings against severe cases of non-conformity.

Research design

To test hypotheses, we rely on a recent dataset on conformity assessments across 27 member states in four policy areas: Internal Market, JHA, Environment and Social Policy (Zhelyazkova, 2020; Zhelyazkova *et al*., 2016). The four policy areas vary in the number of annual infringements: high in Environment, moderate in JHA and Internal Market, and low in Social Policy. Moreover, these sectors differ regarding the Commission's enforcement activism. For example, Internal Market policies are more supranationally integrated and concern core objectives for both the member states and the EU institutions related to the common market. The Commission has also shown strong activism in prosecuting deviations in Environment policy to tackle climate change issues. Thus, member states are more likely to accept compliance pressure in Internal Market and Environment policy. Conversely, JHA

and Social policy directives are less integrated at the EU level and address nationally sensitive topics (accommodation of refugees, anti-discrimination in employment) that traditionally fall under national competences. Therefore, member states are more likely to resist pressures for compliance and the Commission could refrain from enforcement (Hartlapp & Falkner, 2009; Schmälter, 2018).[2]

Most reports were prepared by independent consultancies (e.g., law firms, environmental agencies, etc.) employing country experts in the relevant policy fields. In a few cases, compliance assessments were also conducted by academic networks and institutes as well as non-government organisations and think-tanks. The dataset covers all evaluation reports prepared by external agencies in the period between 2005 and 2013 regarding directives from the four policy areas. Thus, it includes information about the United Kingdom, but excludes Croatia. The time frame is chosen to account for the Central and Eastern European (CEE) member states that joined the EU in 2004 and 2007. The final sample includes conformity assessment reports regarding 63 EU directives on Social Policy (11), Internal Market (13), JHA (18) and Environment (21).

Measuring Commission enforcement: infringement proceedings

The dependent variable records whether the Commission started infringements against a member state on a directive when the external report had explicitly identified a non-conformity issue. The Commission infringement database provides information about individual stages of the procedure regarding individual member states and directives (LFN, RO and ECJ referral). We only analyse infringement cases (LFN) that were opened against non-conformity[3] (LFN = 1, otherwise 0).

Agency expertise: external monitoring

Monitoring expertise is measured based on the characteristics of the external oversight institutions. In line with previous research, the measure for monitoring expertise captures the amount and diversity of resources that an external institution has to inspect member states' compliance with various issues and at different stages of the implementation process (Zhelyazkova, 2020). An oversight institution has narrow expertise if it assesses member states' *legal conformity in relation to only few specific aspects of one directive* (coded 0). Monitoring expertise is limited if an external institution evaluates legal compliance in relation to all provisions of *multiple directives from one policy area* (coded 1). Consultancies have diverse expertise, if they report on member states' legal compliance with *different policy areas* (e.g., Environment and Internal Market) (coded 2). Finally, agencies with extensive monitoring

expertise report on different sectors and analyse different stages of the implementation process (e.g., both legal and practical implementation) (coded 3). For example, Milieu Ltd is a typical agency with extensive expertise, as it regularly conducts conformity-checking studies of the transposition of directives related environmental, immigration and social EU policies. Furthermore, Milieu also evaluates the practical implementation of EU directives through surveys, interviews and questionnaires.[4] We measure external monitoring expertise as a continuous variable in the main analysis and as a categorical variable in the robustness checks (see Table B12 and Figure B2 in the appendix).

Practical non-compliance

As discussed earlier, some expert institutions provide information about practical non-compliance. For example, Article 8(1) of the Services Directive states 'all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through the relevant point of single contact'. A Eurochambres study (2011) reports that many countries had points of single contact that did not provide a complete set of formalities, which we code as a practical problem. Practical non-compliance is measured as the share of provisions with practical problems relative to all relevant and assessed provisions in a directive. The dataset contains 320 observations related to practical implementation in 27 member states.[5]

Level of legal non-conformity

We assume that member states face higher costs to implement legal reforms, the higher the number of incorrectly transposed provisions of a directive based on the expert assessments. Directive provisions comprise of articles and sub-articles that have implications for national legislation and administrative practice. Based on the reports, we coded cases of incorrect transposition (legal non-compliance) for each (relevant) provision in the EU directives. These provisions were assessed as separate issues in the reports and were evaluated as either correctly transposed or not. At the directive level, the measure captures the share of legally non-conform provisions relative to all assessed directive provisions. The final dataset contains 794 observations regarding member states' level of legal non-compliance with EU directives.

Political costs of compliance

We follow existing research by measuring the political costs of compliance in relation to domestic preferences towards the EU (Cheruvu, 2022; Fjelstul &

Carrubba, 2018). First, societal support for EU integration is computed based on different Eurobarometer surveys related to issues from each of the four policy areas. Eurobarometer has regularly asked respondents whether they believe that particular policies should be decided by the national government (coded as 1), or by the EU (coded as 2). The variable takes the average score for the years we have information on societal preferences regarding a policy sector. Second, information about EU government support was taken from the Chapel Hill surveys on party positions (Polk *et al*., 2017). The measure records the average position on EU integration for all parties in government, weighted by their seat share in the government coalition in the year that the directive was implemented by a member state.[6]

Active civil society can also alleviate the political costs of compliance. Civil society is measured through civic participation capturing the percentage of respondents in Eurobarometer surveys who volunteer in organisations with issue areas in the study.[7] We consider participation in the following organisations: '*an organisation for protection of the environment*' (Environment), *consumer organisations* (Internal Market), *an international organisation: human rights* (JHA). In Social Policy, the sampled directives focus on issues of antidiscrimination and gender equality. Thus, we measure participation in *organisations for the defence of the rights of minorities* and *interest groups for specific causes (such as sexual orientation or women's issues)*. The variable specifically accounts for involvement in groups that are supportive of the EU directive objectives covered in our sample. This is important because civil society organisations (CSOs) can also act as veto players to policy change.

Control variables

The analysis additionally controls for characteristics of the member states, specific directives and expert assessments that could interfere with the Commission response to expert evaluations. At the country level, the Commission may be more lenient towards states that hold more power in EU policymaking and towards influential domestic interest groups. Member states' voting power is quantified based on the commonly used Banzhaf index (1965). Unfortunately, there is no available dataset on the influence of domestic interest groups in the implementation of EU policies. Instead, we control for country-level corporatism based on the ICTWSS database on institutional characteristics of trade unions, wage setting, state intervention and social pacts (Visser, 2015). It is expected that national implementation outcomes are more likely to reflect the preferences of powerful interest group in corporatists than in pluralist systems.

At the directive level, the analysis accounts for policy complexity, amending directives and the European Parliament (Parliament) involvement in the adoption of a directive. More complex directives increase the costs of

compliance. In this case, the Commission may be more lenient towards non-compliant countries, as the reasons for non-compliance rest on the EU policy. To measure directive complexity, we use the number of recitals preceding the directive's articles, which is the most prominent indicator for complexity (Treib, 2014). *Amending* directives are easier to implement and do not require extensive legal changes by national authorities, increasing the probability of compliance. Directives adopted jointly by the Council and the Parliament potentially decrease the likelihood that the Commission will cater to member state preferences during enforcement. As a joint legislator, the Parliament may exert pressure on the Commission to enforce compliance, even when national representatives in the Council contest the decision.

Finally, we consider specific features of the evaluation reports. Longer reports may provide more detailed and extensive information about non-compliance, decreasing the Commission monitoring costs. Conversely, reports published long after the transposition deadline may identify fewer compliance problems as national governments had more time to meet the EU requirements. Thus, all models control for the *length* (number of pages of compliance assessment allotted to a particular country) and *timing* of assessment reports (number of days between a directive's transposition deadline and the publication of the report).[8]

Descriptive analysis: reported non-compliance and infringement cases

Before testing the hypotheses, we first compare reported non-compliance (legal and practical) based on the external assessments with the number of issued LFNs across time, policy areas and countries. Figure 1 maps the observations on reported legal and practical non-compliance and LFNs across time. Although it appears that reported legal non-compliance peaked in 2007, this is largely due to the high number of reports in the JHA field in that period.[9] Overall, reported legal non-compliance is rather stable over the years, while reported practical non-compliance increased in the 2010s. Conversely, the trends in infringement proceedings suggest that the Commission does not respond to surges in reported non-compliance by issuing more infringement cases the following year. These observations support insights from the evaluation literature. External assessments are often not used for instrumental purposes (Johnson, 1998), given that infringement proceedings do not automatically reflect reported levels of non-compliance.

Figure 2 shows that differences across policy areas are least pronounced for reported legal non-compliance, with a slight lead by JHA directives. Instead, instances of reported practical non-conformity are considerably more prominent in JHA. In contrast, infringement proceedings against non-conformity are mostly issued in Environment policy.

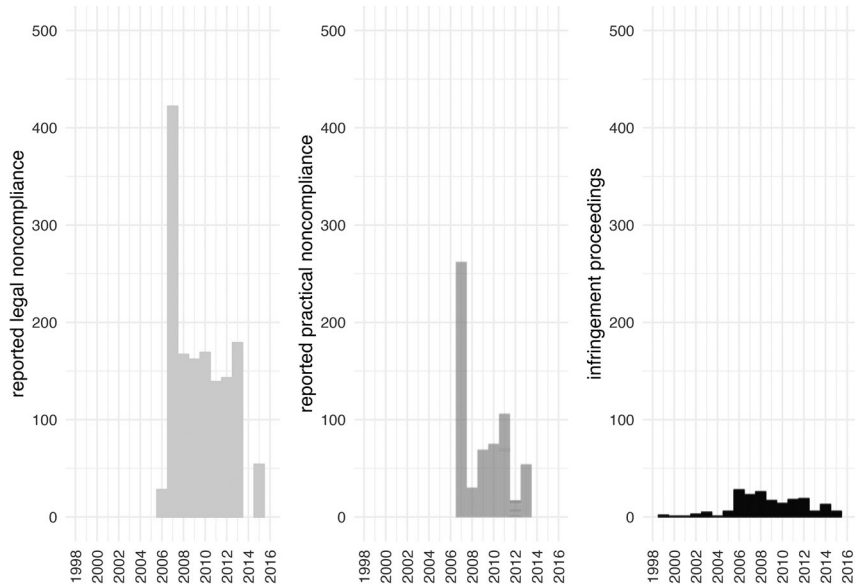

Figure 1. Reported non-compliance (legal: left; practical: middle) and infringement proceedings (right) over time. Note: bar plots are superimposed, not stacked.

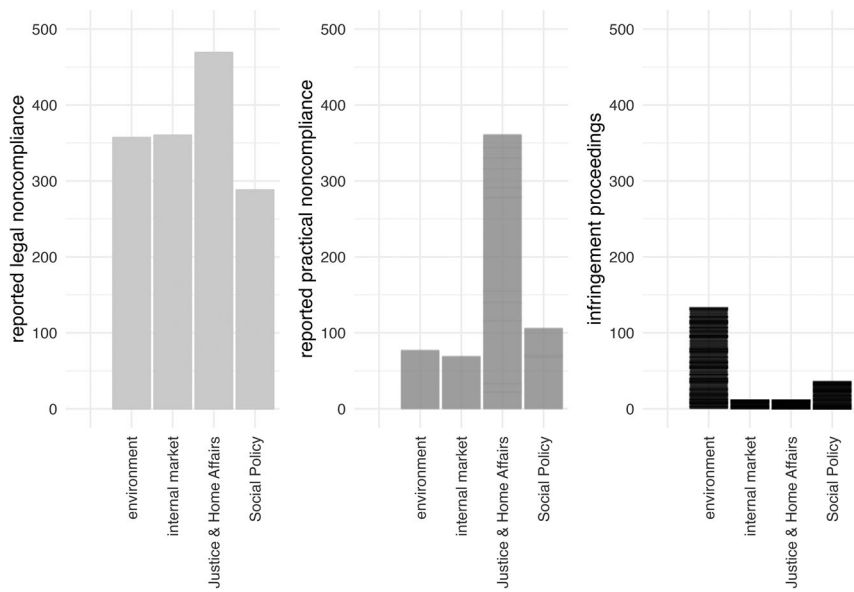

Figure 2. Reported non-compliance (legal: left; practical: middle) and infringement proceedings (right) by policy area.

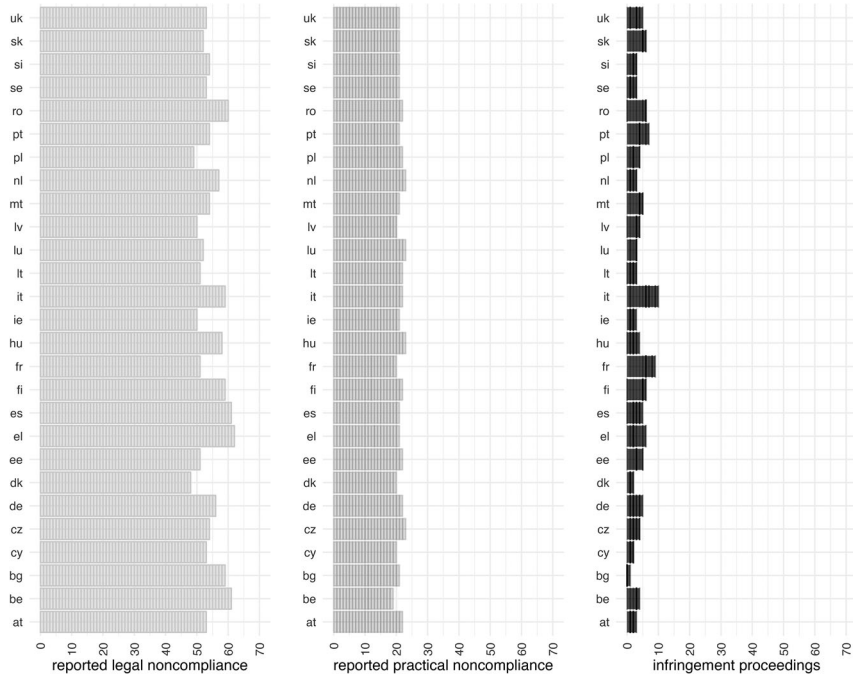

Figure 3. Reported non-compliance (legal: left; practical: middle) and infringement proceedings (right) by Member States.

Finally, Figure 3 does not show pronounced country-level differences in non-compliance, while there is slightly more variation in the number of infringement cases. This supports the idea that the Commission has a more varied response to member states' compliance assessments.[10]

The effects on Commission enforcement in cases of reported non-compliance

We test our hypotheses by analysing the conditional probability that the Commission will launch infringements against a member state, given that an external expert reported non-compliance in the assessment report. The analysis is based on multilevel logit models with random effects at the directive level. The baseline multilevel model showed that 60 per cent of the variation in the dependent variable is explained by between-directive differences,[11] whereas country-level differences are very small (1 per cent)[12](Maas & Hox, 2005).

The analysis is presented in five multilevel logistic regression models (see Table 1) based on 688 observations across 63 directives and 24 member states. The only exception is Model 2 which includes reported

Table 1. Multilevel logit analysis infringement cases opened against non-compliance.

	Model 1	Model 2	Model 3	Model 4	Model 5
(Intercept)	−4.96	−2.73	−4.22	−3.57	−5.08
	(4.63)	(15.95)	(4.76)	(4.75)	(4.57)
Agency expertise	1.18 ***	0.38	1.19 ***	1.18 ***	1.20 ***
	(0.33)	(0.76)	(0.33)	(0.33)	(0.33)
Legal non-compliance	2.15	−6.55	−4.92	−12.48	−1.12
	(1.68)	(5.18)	(10.03)	(13.51)	(2.37)
EU government support	−0.50 **	−0.33	−0.62 *	−0.49 *	−0.51 **
	(0.19)	(0.40)	(0.26)	(0.19)	(0.19)
EU societal support	−0.63	1.56	−0.58	−1.25	−0.65
	(0.87)	(1.98)	(0.87)	(1.03)	(0.87)
Civic participation	−0.05	0.28	−0.04	−0.05	−0.17 *
	(0.06)	(0.16)	(0.06)	(0.05)	(0.09)
Corporatism	−0.01	−0.20	−0.02	−0.01	0.04
	(0.20)	(0.44)	(0.20)	(0.20)	(0.20)
MS' voting power	0.12	0.21	0.12	0.11	0.11
	(0.07)	(0.14)	(0.07)	(0.07)	(0.07)
Number of recitals (log)	0.39	−0.68	0.38	0.41	0.39
	(0.70)	(2.46)	(0.71)	(0.69)	(0.69)
Amending directive	−0.44		−0.45	−0.48	−0.40
	(0.90)		(0.90)	(0.88)	(0.88)
Adoption Council & EP	0.07		0.08	0.09	0.03
	(1.02)		(1.02)	(1.00)	(0.99)
Report time (log)	0.43	−0.98	0.42	0.39	0.48
	(0.46)	(1.32)	(0.47)	(0.46)	(0.45)
Report length (log)	−0.18	1.39	−0.18	−0.14	−0.17
	(0.33)	(0.76)	(0.34)	(0.33)	(0.33)
Justice & Home Affairs	−1.75	0.16	−1.75	−1.76	−1.71
	(1.10)	(1.67)	(1.11)	(1.09)	(1.07)
Practical non-compliance		3.90 *			
		(1.65)			
Legal non-compliance*EU government support			1.19		
			(1.66)		
Legal non-compliance*EU societal support				6.59	
				(5.97)	
Legal non-compliance*Civic participation					1.52 *
					(0.73)
Random Effects					
σ^2 (within-directive variance)	3.29	3.29	3.29	3.29	3.29
τ_{00} (between-directive variance)	3.47	2.79	3.50	3.29	3.24
N	688	274	688	688	688

* $p < 0.05$ ** $p < 0.01$ *** $p < 0.001$.

practical non-compliance and it is consequently based on 274 observations only (see Tables B2 and B3 in the appendix for descriptive statistics).[13] Due to the small sample size, Model 2 excludes some of the directive-level variables that were not significant to avoid overfitting the model.

Model 1 tests the effect of external agency expertise on the likelihood of the Commission starting a non-conformity proceeding (Hypothesis 1a). We find that the Commission is more likely to start infringement proceedings when information about non-compliance is provided by an agency with extensive expertise. The effect is illustrated in Figure 4. All else equal, the

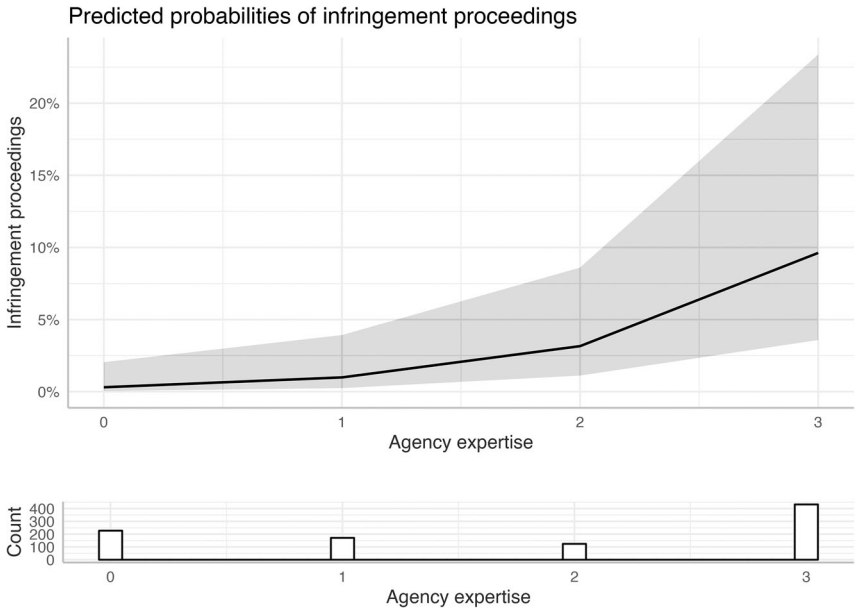

Figure 4. Predicted probabilities of infringement proceedings by level of agency expertise.

probability of issuing an LFN increases by almost 10 per cent when non-compliance is reported by a highly expert agency. The finding is in line with the argument that assessment reports decrease the Commission monitoring costs (Fjelstul & Carrubba, 2018; König & Mäder, 2014; Steunenberg, 2010).

Model 2 presents the results on the effect of reported practical non-compliance by external experts on the Commission decision to start infringement proceedings (Hypothesis 1b). As expected, information about practical implementation problems prompts the Commission to lodge infringements against law-violating member states. Figure 5 further illustrates that high practical non-compliance increases the average probability of infringement cases to 23 per cent. The wide confidence intervals, however, show that the effect substantially varies due to the limited observations with reported high practical non-compliance. Nevertheless, the effect remains robust in different model specifications, demonstrating that the Commission responds to information about member states' failure to implement the EU directives on the ground. This finding also supports the argument that information about practical non-compliance decreases the Commission information disadvantage vis-a-vis member states.

At the same time, we find that the level of legal non-compliance does not have a significant effect on infringement proceedings. In other words, serious legal problems (i.e., a high number of incorrectly transposed provisions) do

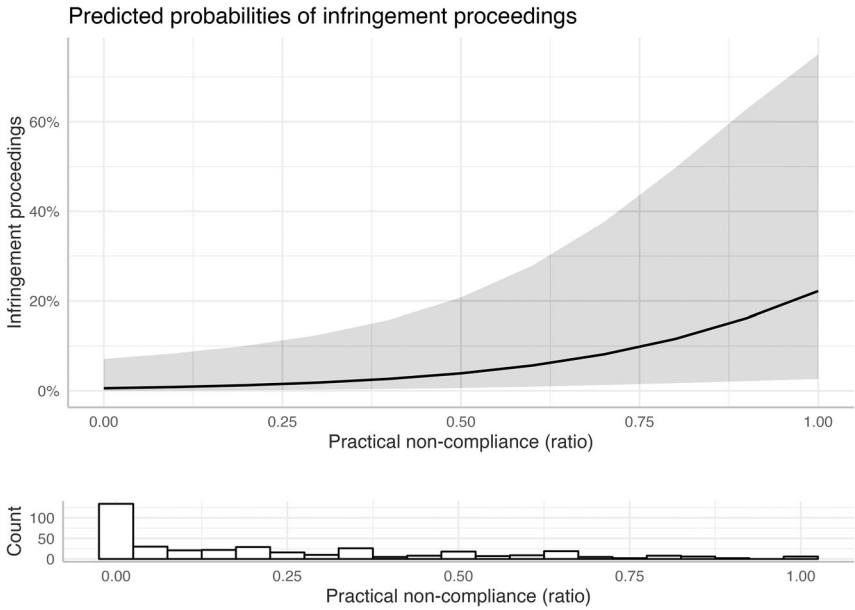

Figure 5. Predicted probabilities of infringement proceedings by ratio of practical non-compliance.

not necessarily prompt the Commission to initiate infringement proceedings. As discussed earlier, higher levels of reported non-compliance signal to the Commission that the member states may be reluctant and unable to meet the EU policy requirements. Therefore, enforcement is likely to depend on domestic political costs and conditions for compliance. Models 3 and 4 test the extent to which the Commission is more likely to start infringement proceedings against higher levels of non-conformity when government (Model 3) and societal support for EU integration (Model 4) are high (i.e., political costs are considered to be low; Hypothesis 2a). We do not find support for the hypothesis that government EU support prompts the Commission to enforce non-compliance, when policy reforms are domestically costly (see Figure 6). In a similar vein, citizen support for EU integration does not significantly increase the likelihood of initiating infringement proceedings. Nevertheless, the analysis in Table 1 shows that government EU support diminishes the probability of non-conformity proceedings more directly. More precisely, the Commission is significantly less likely to issue LFNs against governments that are more supportive of EU integration, when the assessment report identified an issue of non-conformity. The average probability of launching infringements diminishes from 14 per cent (for highly Eurosceptic governments) to 4 per cent (for highly Europhile government). We discuss possible explanations in the conclusion.

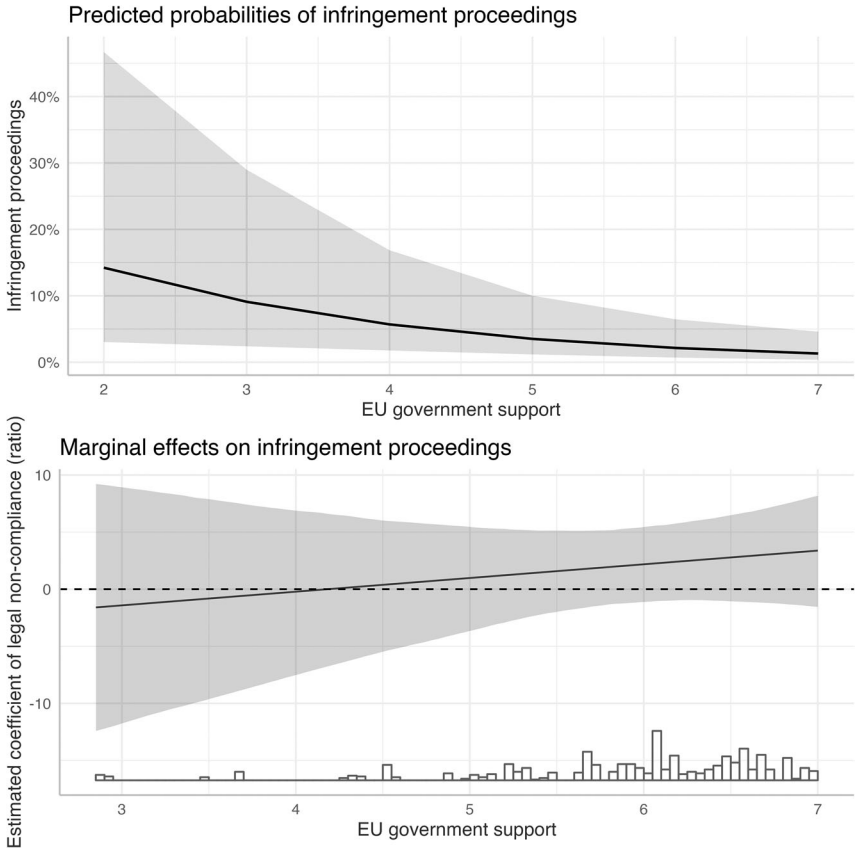

Figure 6. Predicted probabilities of infringement proceedings by levels of EU government support (above) and estimated coefficient of legal non-compliance on infringement proceeding by levels of EU government support.

Finally, Model 5 presents the effect of civil society activism on the likelihood that the Commission will start proceedings against high levels of legal non-compliance (Hypothesis 2b). We find that higher levels of civic participation significantly increase the likelihood of infringement proceedings against extensive non-conformity. Figure 7 presents the marginal effect of legal non-compliance at different levels of civic participation. The effect of legal non-conformity turns significant when civic participation is higher than 3.5 per cent based on the Eurobarometer surveys. The effect is not significant for cases of very low civic participation in the selected groups. However, the left-skewed distribution indicates that this pertains to the majority of cases. Moreover, 73 per cent of the observations with very low civic participation are CEE member states (reporting less than 0.5 per cent civic participation). Conversely, civic participation is higher in the EU-15 member states. This result supports findings that the benefits from

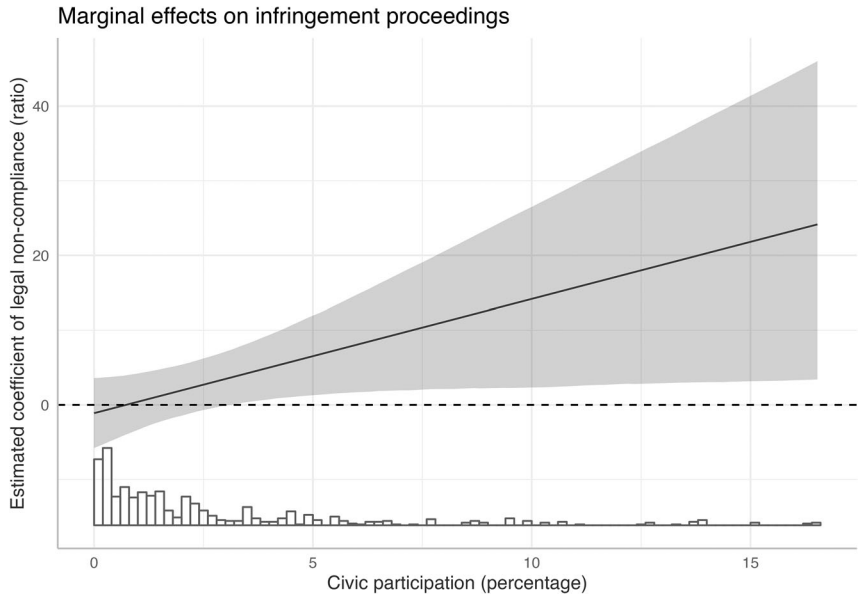

Figure 7. Estimated coefficient of legal non-compliance on infringement proceedings at different levels of civic participation.

bottom-up activism are not equally distributed across member states (Börzel, 2010; Cichowski, 2007; Howard, 2003).

Robustness analysis

We also conduct robustness analysis to verify the main findings, which are presented in the appendix. First, we check for selection biases in the data based on the availability of assessment reports for each member state. We replicated the findings using Heckman selection models, where the selection equation includes additional explanations why the Commission may require the services of external agencies. Thus, we control for reporting clauses in a directive (= 1, otherwise 0) obliging governments to submit regular reports about their implementation activities. Moreover, some member states are more transparent about their activities due to strong Freedom of Information (FOI) rules. We measure government transparency based on the World Economic Forum (WEF) dataset (Schwab, 2015). The variable captures how easy it is for businesses to obtain information about changes in government policies. The results from the selection model are consistent with the main findings (Table B8). Furthermore, the test of independent equations revealed no signs of selection bias.

Second, another relevant indicator for civil society strength concerns the involvement of CSOs in policymaking. We replicated the findings using data

from the V-dem project (Coppedge *et al*., 2019) on government consultation practices with major NGOs. The robustness checks reveal non-significant negative interaction effect (Table B11), indicating that CSO involvement does not necessarily diminish perceived compliance costs. CSOs could act as veto players to policy change and may even have vested interests in maintaining non-compliant policies that they previously advised governments to adopt.

Third, the observations could also depend on the year of assessment and the type of institutions assessing compliance. For example, many of the reports were produced by the same external consultancies. In the robustness analysis, we present models with both *Year* and *Agency fixed effects* (Tables B9 and B10).

Finally, we address the possibility that agency expertise is endogenous to the Commission enforcement decisions. At least in some cases, the Commission may delegate monitoring powers to external agencies with high levels of expertise because the EU enforcement agent finds compliance with certain directives more important. We replicated the results using Heckman models, where the selection equation seeks to explain whether an assessment is conducted by an agency with extensive expertise (Table B13). The analysis also controls for the level of priority a Commissioner may place on monitoring compliance in a given policy area. The variable is based on the Commissioners' former party affiliations at the time of member states' implementation and their positions on cultural and economic issues (ParlGov database, Döring *et al*. (2022)). More conservatively leaning Commissioners may put less priority on monitoring compliance with EU legislation related to asylum and environmental issues. On the other hand, more economically right-leaning Commissioners will monitor compliance with social policy less rigorously, while the opposite is expected for internal market policies. While this is a crude proxy for Commission policy preferences, it captures the extent to which the Commission may be politically apathetic towards compliance and thus invests fewer resources in monitoring. We find that Commission enforcement apathy is positively associated with assessments conducted by agencies with extensive expertise. In other words, the Commission is reluctant to invest resources for own investigations and to collect additional compliance-related information when its priority on compliance is low. Instead, the Commission prefers to rely on information provided by agencies with extensive expertise on different policy areas. Moreover, controlling for Commission enforcement apathy in our multilevel model does not affect the main results (Model 1, Table B14).

Discussion and conclusion

The EU system of governance is based on the premises that member states realise the EU objectives through implementation and compliance. In this

context, supranational enforcement is important for ensuring the EU policies are properly implemented across all member states. The aim of this study was to analyse how the Commission responds to external expert reports about member states' non-compliance. While different studies show that the Commission wields it enforcement powers strategically (Fjelstul & Carrubba, 2018; Kelemen & Pavone, 2021; König & Mäder, 2014; Steunenberg, 2010), we still lack insights how the EU enforcement institution uses external information about non-compliance. This is an important research gap, given that the Commission rarely conducts own investigations in the member states but it predominantly relies on third-party monitoring (Börzel, 2001; Smith, 2015; Zhelyazkova, 2020). Thus, this study sheds light on the responsiveness of the Commission to expert evidence on non-compliance and whether the Commission enhances or diminishes the effectiveness of EU law though its actions.

It was expected that external expert assessments affect the Commission monitoring costs and the probability that enforcement will bring member states to comply. In particular, information provided by monitoring institutions with extensive expertise decreases the Commission information disadvantage vis-à-vis non-compliant member states and the resources needed to conduct own investigations. Information about practical non-compliance also signals to member states that the Commission has extensive information about their implementation activities. The findings from the analysis support these arguments illustrating that the Commission selectively follows third-party reports about non-compliance based on the expertise of external monitoring institutions and practical non-compliance. The reliance on extensive expert assessments is in line with the instrumental use of evaluations (Johnson, 1998), as information about non-compliance triggers an enforcement response, at least under certain circumstances.

At the same time, assessment reports describing severe compliance problems in the EU member states also signal that member states will not implement the EU rules despite enforcement actions. Consequently, the Commission may refrain from wielding its powers if it believes that infringement proceedings will not be effective. It was expected that the Commission would consider the political situation in a country and start infringements if national governments, citizens and civic society support the EU. The findings suggest that pro-EU governments and citizens do not convince the Commission to lodge infringements, when compliance would require extensive policy changes. However, the Commission responds to civic participation by starting non-conformity proceedings, when member states substantially deviate from the EU objectives. This finding suggests that the Commission seeks the support by domestic civil society to push for reforms that national governments are otherwise unlikely to carry out. Civil society could compel governments to reform non-compliant policies, as affected individuals mobilise in

collective action to express their grievances against law-deviating member states. In sum, favourable conditions for bottom-up enforcement positively influence the propensity of top-down enforcement by the Commission, when domestic reforms appear to be costly. Future research should further elucidate whether the Commission similarly responds to other domestic actors, including businesses, NGOs and national courts. A more negative spin on this finding is that member states with generally low levels of civic participation are less likely to be subject to supranational enforcement. Given that EU countries differ systematically in civic participation (Cichowski, 2007; Howard, 2003), the Commission tendency to react to cases of active civil society leads to unequal enforcement and compliance practices across Europe.

Moreover, the analysis reveals that information about extensive (legal) compliance problems does not automatically trigger infringement proceedings. At the same time, one could argue that the guardian of EU treaties should prioritise exactly those instances of severe non-compliance. The findings support general insights from evaluation studies that the instrumental utility of expert assessments is only one possible use of evaluations (Johnson, 1998). Future research should shed light on the conditions for alternative uses of expert assessments beyond enforcing compliance. For example, compliance assessments also help the Commission accrue knowledge about the quality of EU policies and the need for revising them. In line with the 'process' and 'conceptual' use of evaluations, the Commission may refrain from enforcing the EU rules when non-compliance is due to highly ambiguous objectives, but instead propose revisions of the EU policies. Future work should address whether and how assessments affect the potential trade-off between enforcement and policy revision at the supranational level.

Moreover, we also find that the Commission is less likely to initiate infringements against pro-EU governments. One possible explanation is that the Commission is more likely to negotiate settlements with more pro-EU governments ahead of time and thus does not launch infringement proceedings in the first place. This is in line with Cheruvu and Fjelstul (2021), who argue that the EU Pilot allows the Commission to negotiate settlements with governments without launching infringement proceedings. Alternatively, it is possible that the Commission does not want to antagonise pro-EU governments but targets Eurosceptic governments that are already ideologically hostile to supranational institutions. General evaluation studies have already shown the expert evaluations can be used symbolically to justify political decisions (Johnson, 1998). Thus, expert assessments and infringements could be used to mobilise pro-EU domestic coalitions against Eurosceptic governments by exposing non-conformity issues. At the same time, the Commission has been reluctant to lodge infringements against the Eurosceptic governments in Hungary and Poland for violating the EU's rule of law

norms. Future research should shed more light on the effects of growing Eurosceptic backlash across member states on supranational enforcement.

Notes

1. Similar to other studies on supranational enforcement, we assume that the Commission is a unitary actor, as political and enforcement decisions are taken in the College of Commissioners.
2. While our empirical focus is limited to four policy areas, compliance assessments span all sectors . Due to the detailed coding of non-compliance, it is not feasible to include all policy areas in the analysis. We discuss the data collection procedure in Part A of the appendix.
3. The Commission does not distinguish between deviations concerning legal and practical implementation. Therefore, the dependent variable captures infringement proceedings against either type of non-conformity.
4. Arguably, the measure for agency expertise does not capture the depth of knowledge or the quality of assessment reports. One could even argue that agencies with narrow expertise could provide more competent assessments of member states' compliance. Unfortunately, there is no better measure for external expertise, as rating the quality of compliance assessments would be subjective. Nevertheless, our measure is an appropriate indicator for the amount and diversity of resources dedicated to member states' compliance assessments and the need for investigations by the Commission. Furthermore, we also control for the length of the reports and, in the robustness analysis, we compare the different categories of external expertise.
5. The smaller number of observations is due to limited data on practical implementation. Once an EU directive has been incorporated in national legislation, many of its provisions are directly applicable to national citizens and businesses and do not need to be handled by administrative actors.
6. The Chapel Hill dataset does not include information about Cyprus, Luxembourg and Malta, which decreases the number of observations to 688 in the main models. In the appendix, we present analysis without relevant control variables to verify the results on a higher number of observations (Table B5 in the appendix).
7. Data was taken from Eurobarometer 62.2 for 2004, 66.3 for 2006 and 76.2 for 2011, and merged with the same or closest years of reported implementation.
8. Additionally, we include the log of some control variables – number of recitals, report length and timing – because the models failed to converge due to high variability in the scale of these variables.
9. To ensure that the overrepresentation of JHA reports does not affect the results, we control for this policy area in the analysis. As a robustness check, we also controlled for all policy areas (Table B4 in Appendix).
10. In the appendix, we also show directive-level differences in reported non-compliance and infringement proceedings (Figure B1). In general, directive-level differences in infringement cases are more prominent.
11. See Table B1 in the appendix.
12. Design effect = 1 + (average cluster size – 1) * ICC; if smaller than 2, there is no design effect and not deemed necessary to use a multilevel model. The design effect for member states was 1.2, while it was 37.9 for directives. As a robustness

check, we ran both models including crossed random effects for member states and directives and models with robust standard errors. The results are presented in Table B6 and B7 in the appendix.

13. We replicated the analysis without the variable on EU government support due to missing information for Cyprus, Luxembourg and Malta (Table B5 in the appendix).

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No potential conflict of interest was reported by the author(s).

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