

Compliance with EU Environmental Law

The Iceberg is Melting

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Abstract

Environmental policy is one of the policy fields where European integration went particularly far during the last decades. Not only did the size of the environmental acquis grow rapidly over the past 30 years. The EU has also become the main driver for environmental policy output in the member states whose number has tripled. This deepening and widening has led researchers to expect more rather than less non-compliance with EU environmental legislation, particularly since the Commission's resources have not kept up with the growth in law and member states. EU environmental policy has indeed witnessed severe compliance problems during the last decades and the European Commission was forced to initiate the highest number of legal procedures against the Member States for breaching EU environmental law. Yet, this paper shows that the implementation gap has in fact narrowed over the past 25 years. Except for the Southern enlargement, taking on new member states has not exacerbated the EU's compliance problem in the field of environmental policy. We explain this by pointing to European Commission's adjusted compliance strategy and the development of new instruments strengthening member state capacities in implementing EU environmental legislation. While this often led to a short term increase in infringements, their overall numbers have declined since the mid-1990. At the same time, EU environmental policy has also become less demanding by amending existing rather than setting new legislation.

Keywords:

Environmental Policy, Compliance, Implementation, Enlargement, European Commission

1. Introduction

The main driver behind the development of a comprehensive body of environmental legislation and its “journey to center stage” (Haigh 2015) was to prevent member states from misusing national regulations as non-tariff barriers in the Internal Market (Zito 2000). Even though becoming a proper EU competence rather late, environmental policy has been one of the policy fields where European integration went particularly far during the last decades. Not only did the size of the environmental *acquis* grow rapidly (Holzinger *et al.* 2006). The EU has also become the main source of environmental policy output in the Member States (Jordan and Adelle 2012, Delreux and Happaerts 2016). At the same time, EU environmental policy has been suffering from serious compliance problems. In fact, it is the policy area with the second highest number of violations of EU law even without controlling for the legislation in force. The Wild Birds and the Fauna, Flora, Habitat Directives are still the least complied pieces of EU legislation in the history of the EU. The high level of non-compliance in this core area of European integration has fuelled concerns about a (growing) compliance problem in the EU as a whole (Collins and Earnshaw 1992).

Yet, the body of environmental *acquis* has not only massively grown over the past 30 years. The EU tripled in members. If we control for the increase in the number of environmental laws and in the member states that could potentially violate them, non-compliance has fluctuated but overall declined since 1994. We argue in the following that decreasing non-compliance is part of a secular trend which is not derivative to changes in member-state- or sector-specific factors. Rather, conditions for non-compliance today are different from what they were forty years ago because the nature of EU law has changed. EU (environmental) law has not only become less costly to comply with as it tends to amend existing rather than introduce new legislation. Regarding the fluctuations within the declining trend of non-compliance, we argue that these have been largely driven by changes in the Commission’s compliance strategy. The Commission has developed a whole set of instruments to strengthen the compliance capacity of (smaller) and (new) member states. Pre-accession conditionality, for instance, explains why unlike Southern Enlargement in the 1980s, the accession of 12 new members in the 2000s has not caused a spike in non-compliance with EU (environmental) law. So, the conclusion of Collins and Earnshaw in the seminal Special Issue of this Journal edited by Judge 25 years ago still holds: “[...]the problems of implementation has taken on greater importance as Community legislation has become more a more vital component of member states’ environmental protection policies.” (1992, p. 247).

To demonstrate our arguments, the first part of the paper briefly summarizes research on (non-) compliance with EU environmental policy legislation paying particular attention to changes over time. The second section presents a longitudinal analysis to show that non-compliance with EU environmental law has fluctuated but overall declined. For our assessment, we use a unique dataset of 2,143 infringement proceedings the European Commission officially opened against member states for violating environmental law in the past four decades. In the third section, we discuss to what extent the EU compliance and implementation literature can account for the two major findings revealed by our temporal analysis. The fourth section concludes by looking at the policy implications of our main arguments and by identifying new avenues of research

2. As Time Goes By: The Implementation of EU environmental Legislation

EU policies adopted in Brussels have to be legally implemented and practically applied in the member states. In theory, EU law supersedes national regulations and entrenched practices. In practice, however, there is substantial cross-temporal, cross-country and cross-policy variation in compliance with EU law. For more the past decades, the literature has sought to explain what most identified as a growing compliance problem in the EU.¹ Qualitative studies usually focus policy practices within states that lead to the legal adoption (or non-adoption) of EU policies or their practical implementation (or non-implementation). In this context, studies on the implementation of EU environmental policy have been particularly popular in the late 1990s (Demmke 1994, Knill 1998, Haverland 1999, Knill 1999, Knill and Lenschow 2000a, Jordan 2001, Börzel 2003). Not only did these studies highlight the existence of a substantial implementation gap in EU environmental policy. They made essential contributions to shaping the theoretical and conceptual understanding of the research agenda on compliance in the EU.

Despite a rich state of the art, researchers have seldom investigated variation across time. They tend to start from the assumption that the EU is facing a compliance problem and seek to explain why that is. The major causes of non-compliance are seen in the member states. Accordingly, country-specific variables, such as state power and state capacity, are the focus of the analysis to account for differences in non-compliance. Since these variables are rather time invariant, they would not lead us to expect much change over time.

The accession of Greece, Portugal, and Spain in the 1980s triggered a debate on whether the

¹ For good overviews of the literature see Treib 2006 and Angelova, Dannwolf, and König 2012.

EU has a “Southern problem” (La Spina and Sciortino 1993; Pridham and Cini 1994; Falkner *et al.* 2005). The three Southern newcomers had significant problems in complying with EU law, particularly in the field of environmental policy. The literature blamed these problems on some common deficiencies shared by Mediterranean countries with regard to their administrative and political systems, the weakness of civil society, and low levels of socio-economic development (Aguilar Fernandez 1994; Pridham 1994; Pridham 1996; Spanou 1998; Eder and Kousis 2001; Eder and Kousis 2001, Börzel 2003, Koutalakis 2004).

The 1995 EFTA enlargement brought in three new countries from the North. It did not cause much concerns regarding implementation and compliance, partly because Austria, Sweden and Finland were regarded as “environmental pioneers” (Lauber 1997, Kronsell 2002). The accession of the 10 Central and Eastern European (CEE) countries in 2004 and 2007, in contrast, revived the debate about environmental laggards in the EU (Sedelmeier 2008; Sedelmeier 2012; Falkner *et al.* 2008). Indeed, the CEE countries have shared many symptoms of the ‘Mediterranean Syndrome’: inefficient administrations ridden by patronage and corruption, legacies of authoritarianism, weakly organized societal interests, and low levels of socio-economic development (Börzel 2009, Börzel and Buzogany 2010b). Moreover, the environmental *acquis* had grown considerably rendering its implementation more costly compared to 30 years before putting further strains on the already quite scarce administrative and political capacities of the candidate countries. Many students of EU environmental policy-making expected a slowdown or even set back (Holzinger 1995; Holzinger and Knoepfel 2000; Jehlicka and Tickle 2004; Schreurs 2004; Liefferink *et al.* 2009).

Apart from debates over the effects of enlargement, compliance and implementation research has been largely silent on longitudinal change. Yet, the three compliance theories dominant in the literature allow to derive three different arguments why we might see an increase or decline in non-compliance over time. Enforcement approaches would point to changes in the monitoring and sanctioning capacities of the European Commission. For the management school, non-compliance should change depending on how demanding EU law is on the member states and how effective the Commission is in managing compliance through clarifying behavioural requirements and assisting the member states in coping with compliance costs. Legitimacy theories, finally, focus on the EU’s socialization effects. The more time EU law had to become part of domestic law, the more European citizens have become accustomed to the EU law-making institutions and the more public support the EU enjoys, the more compliance with EU becomes taken for granted and less non-compliance

should occur (Börzel and Sedelmeier 2017). While this suggests less non-compliance over time, a growing body of EU environmental law to enforce and an increasing number of member states to monitor, support and socialize, respectively, should lead us to expect more rather than less non-compliance, particularly since the Commission's resources have not kept up with the growth in law and member states.

3. Assessing Non-compliance across Time

3.1 Measuring non-compliance

To trace non-compliance over time, we use time series data on infringements of EU environmental law. As specified in Art. 258 TFEU, the European Commission can open infringement proceedings against member states in violation of EU law. It can base its action on complaints lodged by citizens, petitions and questions by the European Parliament, non-communication of the transposition of Directives or simply its own initiative. The infringement proceedings consist of various stages, which start with a "formal letter" and continue with a "reasoned opinion". If member states fail to respond adequately to the Commission's inquiry, it can refer the case to the European Court of Justice, which ultimately can impose a financial penalty.

Unlike other quantitative measures of non-compliance, infringement proceedings have the advantage of covering all types of legal acts and possible violations. Notification data, for instance, only refers to the timely transposition of Directives into national law; it does not cover the incorrect legal implementation of Directives or the incorrect application of Directives, Regulations and Treaty Articles. While the Commission is neither capable nor willing to legally pursue all violations it detects, we have found no evidence of a bias in our infringement data towards certain member states or policy sectors (Börzel et al. 2010). Infringement proceedings are certainly no measure for the absolute level of non-compliance in the EU. But as a representative sample, they remain the most systematic and comparable source of information on non-compliance that allows to trace variance across member states, policy sectors, and, of course, time.

The Berlin Infringement Database (cf. Börzel and Knoll 2012) includes 2,341 infringements cases which the Commission brought against member states between 1978 and 2016 in the field of environmental policy. Unlike the data published in the European Commission's Annual Reports on Monitoring the Application of Community Law² or on DG Environment's

² Cf. http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm, last access March 15, 2017.

“Legal Enforcement” site,³ our dataset contains more detailed and policy sector specific information regarding the nature of non-compliance, the type of law infringed on, the violating member state, and the measures taken by EU institutions in response to non-compliance.

We use the reasoned opinions as a measure for non-compliance for two reasons. First, for the first stage of the infringement proceedings, the formal letter of warning, the Commission only provides aggregate data on the total number of cases brought against individual member states – information on individual cases are considered confidential. Second, reasoned opinions concern the more serious cases of non-compliance as they refer to issues that could not be solved at the previous, unofficial stages. Note that more than two-thirds of all the cases in which the Commission sends a warning letter get settled before it officially opens proceedings by issuing a reasoned opinion.

3.2 Temporal patterns of non-compliance in the European Union

How has non-compliance with EU environmental law fared over the past 25 years? Has the subsequent deepening and widening of the EU exacerbated its implementation gap? Has the Southern problem turned into an Eastern problem?

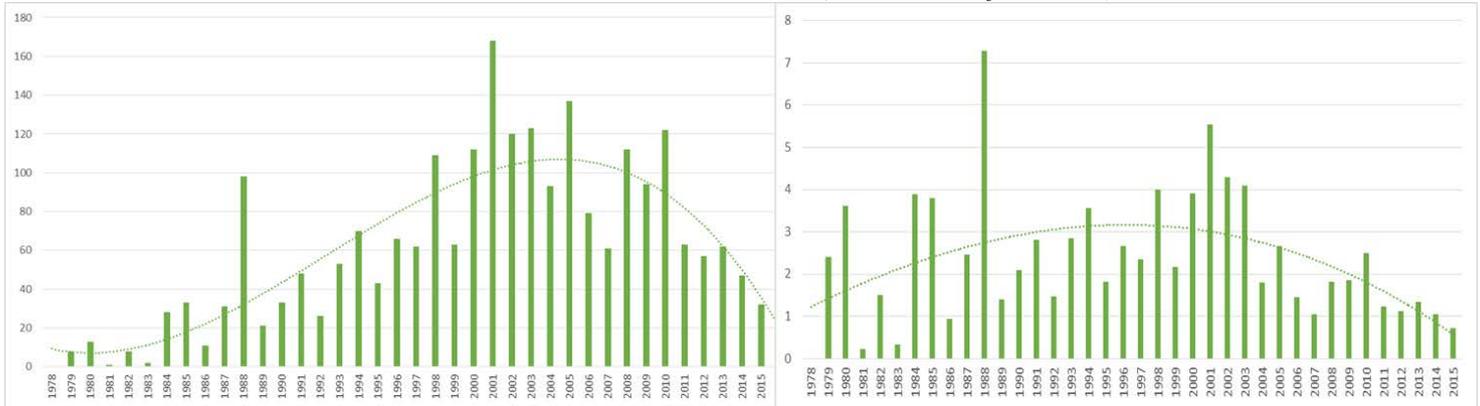
As explained in the previous section, infringements may only capture the “tip of the iceberg” (Hartlapp and Falkner 2009). We have no means to measure how large the iceberg really is. What we can do, however, is assess whether the visible part of the iceberg has changed size over time. Simply comparing the number of infringement proceedings across time does not say much about changes in the level of non-compliance in the EU. The number of environmental legal acts in force has increased almost six times since 1978; 19 more member states have joined the EU that can potentially violate them. We measure reasoned opinion against the number of EU environmental laws in force multiplied by the member states in a given year that could infringe them. Compare figure 1 and figure 2 to see what difference it makes when we control for violative opportunities. Figure 1 shows the overall distribution of reasoned opinions per year sent 1978-2016. Numbers had gradually increased until 2000 and then started to drop – despite 13 more member states joining. Figure 2 depicts reasoned opinions against the legislation in force and the number of member states in a given year. If we control for violative opportunities, non-compliance with EU environmental law started to decline already in the mid-1990s.

³ <http://ec.europa.eu/environment/legal/law/compliance.htm>, last access March 15, 2017.

[Figure 1 and 2 about here]

Figure 1: Annual Reasoned Opinions (ENVI)
Absolute numbers, 1978-2016

Figure 2: Annual Reasoned Opinions (ENVI) Relative to Violative Opportunities
(Directives in force*MS), 1978-2016

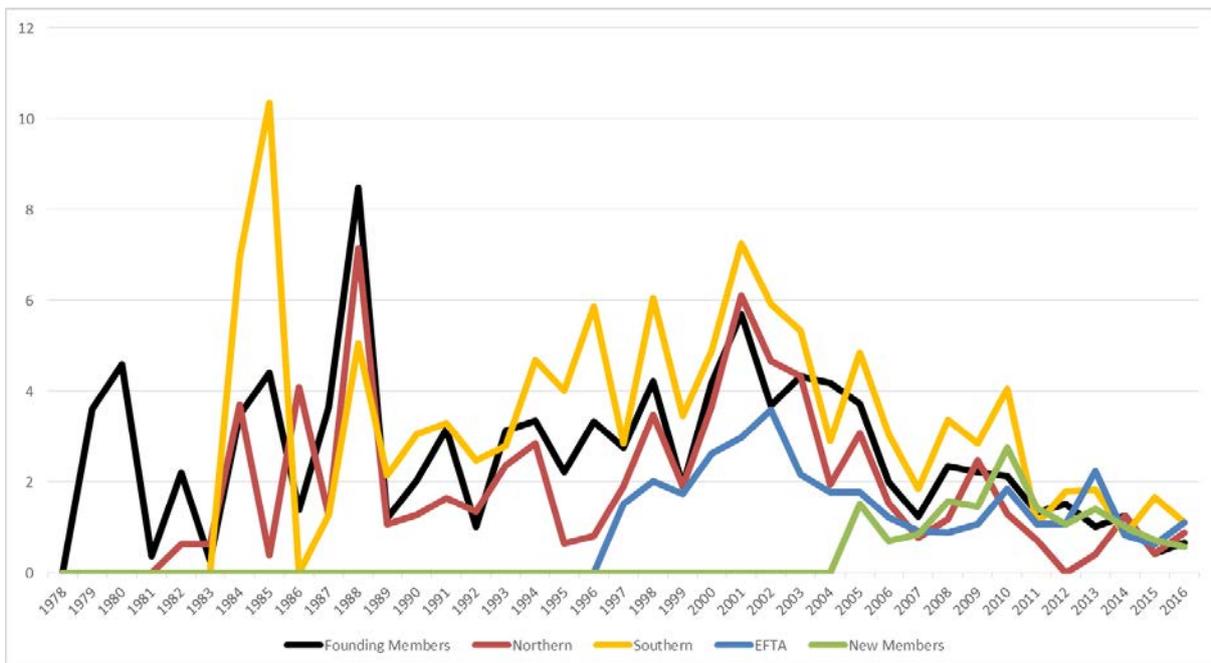


Source: Own compilation with data from the Berlin Infringement Database.

The implementation gap in environmental policy has narrowed rather than widened since 1994. At the same time, we observe considerable fluctuation. While enlargement has not reversed the declining trend in non-compliance, it may account for temporary spikes. Figure 3 reproduces figure 2 but groups the average reasoned opinions relative to violative opportunities by member states joining the EU in the same year.

[Figure 3 about here]

Figure 3: (Average) Annual Reasoned Opinions Relative to Violative Opportunities in the Area of Environmental Policy per Member State, Group Means



Source: Own compilation with data from the Berlin Infringement Database.

The first spike in 1983/4 was clearly driven by Greece, which had joined in 1981. Note that there is on average a two-year lag between the occurrence of a violation and the Commission sending a reasoned opinion in seeking redress. Accordingly, the effect of Portugal's and Spain's accession in 1986 started to show in 1988, and again, in 1993-95, when the period of grace the Commission had granted them ultimately expired (Börzel 2001). At the same time, the other member states also saw a significant increase in non-compliance after the Single European Act had entered into force 1987, which indicates that something else than Southern enlargement must have gone on. While relative numbers started to drop in the second half of the 1990s, they flared up a few times: in 1998, in 2001, 2005, and 2010. Three of the four spikes coincide with the accession of new member states. At the same time, numbers went up for all member states, not only for the newcomers.

In sum, the various enlargement rounds certainly left a mark on the trajectory of EU non-compliance. Yet, they can neither explain the downward trend since the mid-1990s nor can they fully account for the periodic spikes.

4. Understanding Non-compliance: Stricter Enforcement, Better Management or Higher Legitimacy?

Compliance research has focused on country- or sector-related variables, such as veto players, voting power, or administrative capacity, to explain violations of EU law. However, the three major theoretical approaches that dominate the literature also offer some arguments why we might see a decline in non-compliance across time. Enforcement theories focus on stronger monitoring and sanctioning capacities of EU institutions. For the management school, non-compliance should decrease, the less demanding EU law is on the member states and the more the EU is capable of managing compliance through clarifying behavioural requirements and assisting the member states in coping with compliance costs. Legitimacy theories, finally, focus on the EU's socialization effects. The more EU law becomes part of domestic law and the more European citizens support the EU as the law-making institutions, the more compliance with EU becomes taken for granted and less non-compliance should occur.

It would go beyond the scope of this paper to systematically test these alternative accounts of declining non-compliance. What we can offer is a matching of changes in the enforcement and management capacities of and support for the EU, respectively, with changes in non-compliance over time.

4.1 Enforcement

The Commission has some powerful tools at its disposal to enforce EU law. Monitoring and sanctioning non-compliance is contingent on resources. While the Commission has never been capable of detecting and legally pursuing all instances of non-compliance, monitoring and sanctioning non-compliance in 28 member states with diverse legal systems is more difficult than 30 years ago, when there were only nine to watch (Hartlapp and Falkner 2009: 296-297; European Commission 2002). Contrary to its public image (see e.g. Moravcsik 2001), Brussels' infamous bureaucracy has always been comparatively small. It still equals the size of the administration of a European city like Cologne with its one million citizens. The Commission may launch its *own investigations*. Amidst its limited resources, however, it heavily relies on decentralized monitoring information provided by citizen and business *complaints*, *parliamentary questions* and *petitions* (suspected infringements), on the one hand, and member state (not) notifying the Commission about the transposition of directives into national law (*non-notifications*), on the other.

The consistency and availability of information on suspected infringements vary significantly; and the data cannot be broken down by policy sectors. Figure 4 and 5 provide an overview of the years 1988 to 2010 for which data are consistently available. The Commission used to launch between 200 to 300 *own investigations* per year – with the exception of the late 1980s, where the numbers were three times as high, probably due to the intensified effort of the Commission to enforce EU law to complete the Internal Market. The numbers increased again post-Eastern enlargement but quickly returned to previous levels and have been dropping to an overall low in 2010. This may be related to the introduction of new instruments such as SOLVIT and EU Pilot, designed to resolve compliance problems without resorting to infringement proceedings (see below), which provide the Commission with increasing information on potential cases of non-compliance reducing the need for launching own investigations.

Parliamentary questions and *petitions* have been much more limited but also peaked around the completion of the Internal Market and the introduction of the Political and Economic and Monetary Union in the first half of the 1990s. They briefly flared up in 1991, probably also related to the completion of the Internal Market, and again around Eastern enlargement (2002-2004) and have declined ever since. *Complaints* steadily increased till the early 1990s, then started to drop but rose again in the mid-1990s to an overall high in 2002. Afterwards, numbers have continuously declined, particularly after 2004. This may be due to SOLVIT and

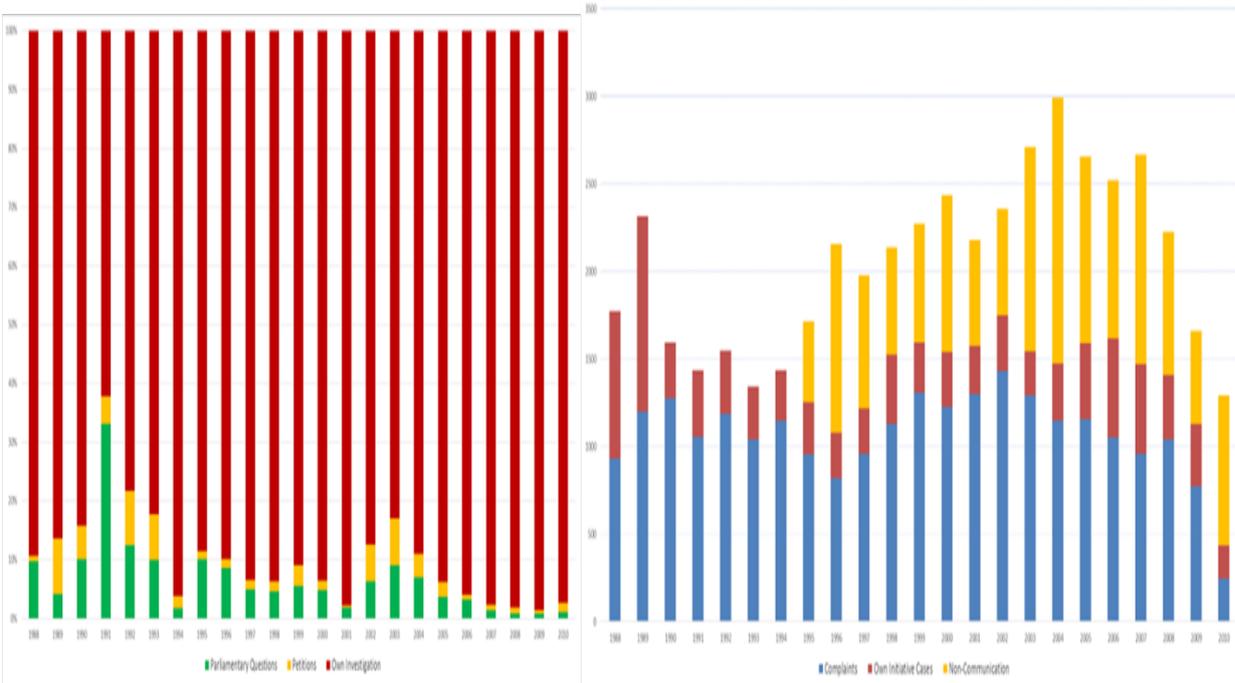
EU Pilot (Koops 2011: 180-181). Both offer alternative venues for business, societal organizations, and citizens to articulate their grievances about non-compliance.

Non-notification (non-communication) patterns, finally, are more diverse and appear to be largely driven by enlargement effects. Numbers were high in 1996, after Austria, Finland, and Sweden had joined and sky-rocketed in 2004, after the EU had admitted 10 new members and peaked once more in 2007 when Bulgaria and Romania joined.

[Figure 4 and 5 about here]

Figure 4: Parliamentary questions, petitions, and own investigations, 1988-2010

Figure 5: Complaints, own initiatives non-communication, 1988-2010



Source: Own compilation with data from the Annual Reports 1989-2011.

Overall, monitoring information fluctuates quite significantly. There is no linear upward or downward trend in own investigations, complaints, petitions, parliamentary questions, and non-notifications, which would match the overall decline in infringements.

While the Commission heavily relies on decentralized mechanisms to monitor non-compliance, sanctioning is centralized in the power of the Commission to initiate infringement proceedings. They do not only provide a means to name and shame member states. The Maastricht Treaty introduced the possibility of imposing *financial penalties* on Member States that failed to comply with judgments of the European Court of Justice (Article 260 TFEU). Art. 260 became effective in 1993, just when infringement numbers relative to

violative opportunities had started to decline. It was invoked for the first time by the ECJ in 2000, in a procedure the Commission had started against Greece in 1997 for not taking measures against the disposal of toxic and dangerous waste into the Kouroupitos, a river in Crete.⁴ It is questionable whether the mere anticipation of financial sanctions started to bring infringements down seven years before the member states learned that the ECJ was prepared to impose them. In 2009, Art. 260 (2) of the Lisbon Treaty removed the necessity for the Commission to send a reasoned opinion before asking the ECJ to impose a financial penalty for non-compliance with its ruling. This may speed up the sanctioning procedure by between eight to 18 months (Peers 2012). Moreover, Art. 260 (3) introduced a fast-track procedure allowing the Commission to ask the ECJ for imposing financial sanctions if a member state has not notified the transposition of a directive without a respective ruling of the ECJ under Art. 258. It remains to be seen whether this will further propel the decline in non-compliance.

Another mechanism of naming and shaming is the *Internal Market Scoreboard*, which was established in 1997. Twice a year, it reports on the performance of member states, and their progress thereof, in implementing Single Market directives. The actual scoreboard allows for a direct comparison of member state performance. The worst-performers are put on the spot, not only among fellow governments but also in the public media (Tallberg 2002: 63). Since it was only introduced in 1997, the Internal Market Scoreboard has at best reinforced the downward trend. Cases of non-notification in this sector had dropped before 1997 and started to rise in 1998 until they reached an overall high in 2004 and 2007. Cases of incomplete and incorrect transposition and incorrect application of directives reached a high in 1995 after which they dropped but climbed up again till they reached their overall high in 2006 before they entered into a steady decline. These roller-coaster dynamics are unlikely to have been driven by the introduction of the Internal Market Scoreboard.

4.2 Management

Over the past 30 years, the EU has improved its capacity to manage compliance. First, the Commission developed a series of mechanisms of consultation and negotiation to weed out cases caused by legal uncertainty and misunderstandings. The *SOLVIT* network introduced in 2002 and the *EU-Pilot* centers established in 2008 provide quick answers to questions and solutions to problems arising in the application of EU laws. Since the inception of SOLVIT in

⁴ Case C-387/97 (*Commission v. Greece* [2000] ECR I-5047).

2002, the case load has subsequently increased from 285 to 2,228 in 2015.⁵ The majority of the cases originate with business. Over the past years, SOLVIT managed to solve more than 80 per cent of the cases submitted without having to launch an infringement proceeding (Hobolth and Sindbjerg Martinsen 2013: 1417). It is hard to tell whether the successful resolution of compliance problems through SOLVIT has resulted in a decline of infringement proceedings, since the Commission does not provide data on letters of formal notice by sector, year and type of violation. The overall number of letters sent on the basis of complaints went down after SOLVIT had been introduced. SOLVIT is to provide an alternative venue for citizens and companies to seek redress for violations of EU law that affect their rights and interests (Koops 2011: 180). However, the aggregate number of reasoned opinions for violations of Internal Market directives has not declined since the introduction of SOLVIT. EU Pilot has worked in a similar way as SOLVIT for cases outside Internal Market law. The Commission has processed more than two-thirds of the cases (Commission of the European Communities 2014: 10). Since EU Pilot was only introduced in 2008, it is too early to tell whether it has helped to reduce problems of improper application of directives outside the Internal Market. Moreover, only 15 of the 27 member states initially participated, the other joined a year later. Similar to SOLVIT, the workload of EU Pilot initially increased over the years; in 2013, about 1,500 new files were opened. Two years later, however, the numbers went down to 881.⁶ Complaint-based infringement proceedings dropped sharply after 2008 (Koops 2011: 30). Yet, it is unclear whether this is really related to the introduction of EU Pilot (Koops 2011: 181-184). The Commission ceased publishing data on the source of infringements in 2010.

Second, in order to help member states cope with adopting to European law and adapting national legislation, the EU grants transition periods and (temporary) exemptions. Such *differentiated integration* (Holzinger and Schimmelfennig 2012, Leuffen *et al.* 2013) has been irrelevant to environmental policy at the level of treaty law. Rules that exempt member states from their obligations to comply with certain EU legal acts, in contrast, increased over the years and peaked in the early 2000s. Their share in the legislation in force, however, has been decreasing over time. Each of the enlargement rounds saw a peak as a result of temporary

⁵ http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/solvit/index_en.htm#maincontentSec4, last access September 8, 2016.

⁶ http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm#maincontentSec4, last access September 8, 2016.

exemptions granted to new member states that joined in these periods. For example, the Southern and Eastern European newcomers received derogations for fully applying some emission standards of the Large Combustion Plant Directive (Börzel 2009). Yet, these exemptions were temporary. Moreover, the EU has become ever less generous with granting them – new members are expected to do their homework before they are allowed in. Accordingly, the relative importance of differentiated integration for the EU's secondary law has declined. Less than 10 per cent of all legal acts in force, mostly directives, contain opt-out clauses that have been used by at least by one member state. Most of these opt-outs are temporary, i.e. are terminated by member states opting in (Schimmelfennig and Winzen 2014). Thus, differentiated integration may explain why non-compliance has not increased after enlarging the EU. It does not account, however, for the declining trend.

Third, another way of easing the compliance burden for member states is to make EU laws less complex and more precise. Directives are framework legislation; they define broad goals and have to be explicitly incorporated into national law while member states are free to choose by which measures. *Regulations*, by contrast, are more specific and directly applicable; they automatically override national laws, and are, hence, more likely to be complied with. The EU has always used more regulations than directives. They make up for more than 87 per cent of the legislation in force. Yet, the vast majority of EU environmental law takes the form of directives. Almost all infringements involve the delayed or incorrect implementation of directives. If EU environmental policy suffers from a compliance problem, it relates to directives. Not surprisingly then, the declining trend of non-compliance has been largely driven by decreasing infringements of directives.

The decline in non-compliance with directive could be explained by directives becoming less complex and more precise. However, findings on complexity in terms of increased work load are inconsistent. Some studies point to a positive (Ciavarini Azzi 2000; Michael 2006; Kaeding 2006; Kaeding 2008b; Zhelyazkova and Torenvlied 2009), others to a negative (Thomson 2007; Thomson, Torenvlied, and Arregui 2007), and a third group finds no clear effect (Mastenbroek 2003; Haverland and Romeijn 2007; Steunenberg and Rhinard 2010;) on non-compliance. Equal disagreement reigns in the literature when it comes to member state discretion in implementing and enforcing directives. Discretion is reversely related to the degree of precision. There is evidence that the more leeway member states have in implementing EU law, the more likely they are to (ab)use it (Steunenberg and Toshkov 2009; Kaeding 2008b; Versluis 2007; Zhelyazkova and Torenvlied 2009). Others, however, have

found exactly the opposite – the more detailed legal acts are, the less discretion they grant the member states and the more likely they are to be violated (Thomson, Torenvield, and Arregui 2007: 704; Thomson 2007: 1002; Zhelyazkova, Kaya, and Schrama 2016). Even if directives have come less complex and more precise, the contradicting findings of existing studies cast serious doubts that this could explain the melting of the iceberg.

Fourth, to assist member states in compliance, the EU can draw on financial and technical assistance under various *EU funds* and *funding programs*. The Cohesion Fund and several Community programs, such as the Action for the Protection of the Environment in the Mediterranean Region (MEDSPA), the Regional Action Programme on the Initiative of the Commission Concerning the Environment (ENVIREG), or the Financial Instrument for the Environment (LIFE), provide(d) funding for assisting member states in complying with EU environmental legislation. In a similar vein, the EU established pre-accession funding schemes in the Eastern enlargement process supplying Central and Eastern European candidate countries with significant financial and technical assistance (cf. Sissenich 2007: 54-57). Technical assistance was organized through ‘twinning’ programs and TAIEX, the EU’s Technical Assistance Information Exchange Office. Member state experts have assisted candidate states in developing the legal and administrative structures required to effectively implement selected parts of EU environmental legislation. Civil servants who have specific knowledge in implementing certain EU policies are delegated to work inside the ministries and government agencies of the accession countries, usually for one or two years (Dimitrova 2005). Transgovernmental networks have not only helped build the capacities of accession countries. Exchanges between national administrators in charge of implementing EU law foster the development of a common understanding of what compliance entails and facilitate processes of mutual learning from best practice on how to achieve compliance. One of the oldest and most effective networks is the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL). It was set up in 1992 as an informal Network of European regulators and authorities concerned with the implementation and enforcement of environmental law. Likewise, EUFJE (European Union Forum of Judges for the Environment) seeks to promote the enforcement of national, European and international environmental law by exchanging experiences on environmental case law or training judges. Besides SOLVIT and Pilot, the Internal Market Information system (IMI), an IT-based information network that links up national, regional and local authorities across borders, shall foster transborder communication and cooperation strengthening the capacities of member state administrations to execute EU law.

The volume of EU Structural Funds and the Cohesion Fund has subsequently expanded and sector specific funding programs have multiplied.⁷ So have transgovernmental networks. Country studies provide ample evidence on how EU capacity-building has helped accession countries and (new) member states improve their compliance with EU law. Pre- and post-accession financial instrument and twinning programs have played a major role in bringing new member states into compliance and may explain why Eastern enlargement has not exacerbated the EU's compliance problems (Dimitrova 2002; Grabbe 2003; Schimmelfennig and Sedelmeier 2004; Börzel 2009). What is less obvious is how funds and networks should have brought down infringements of directives in the old member states, which drive the down-ward trend that started before the three enlargement rounds of 1995, 2004, and 2007 that more than doubled the number of member states.

4.3 Legitimacy

Socialization is a matter of time. Yet, the length of membership has no effect on non-compliance. Two of the original six are the worst compliers, while the newest members excel (see below). As regards support for the EU as the law-making institution, European integration progressed essentially by stealth and left Europeans largely detached from the EU during the first 25 years. Their “permissive consensus” (Lindberg and Scheingold 1970) was sufficient for European and national elites to push forward. This started to change with the completion of the Internal Market in the early 1990s and the setting-up of a Political and Economic and Monetary Union as the next step of European integration by the Maastricht Treaty. The more European integration deepened and widened, the more politicized it became being subject to public controversy and opposition (Risse 2015). While elites have remained committed to European integration, public support for the EU started to decline and Eurosceptic parties to rise (Hooghe and Marks 2007; Risse 2010). These developments should undermine public acceptance of EU law, and, hence, lead to more rather than less non-compliance with EU law.

What has increased is the power of parliaments in EU environmental policy-making, both at the EU and the national level. With every change of the Treaties, the EP received a greater say and is by now an equal co-legislator with the Council. Likewise, all member state legislatures have obtained the right to scrutinize EU legislation before it gets adopted at the EU level by

⁷ For 1978-2008, see EU Budget 2008 Financial Report, available at http://ec.europa.eu/budget/library/biblio/publications/2008/fin_report/fin_report_08_en.pdf, last access December 10, 2014. For 2008-2013, EU Commission Budget in Figures, available at http://ec.europa.eu/budget/figures/index_en.cfm, last access December 10, 2014.

receiving information on the goals and contents of legislative proposals and on the position of their national government; on the latter, they may issue statements that their governments have to take into consideration in the Council negotiations (Raunio and O’ Brennan 2007; Sprungk 2010). At the EU level, Protocol 2 in conjunction with Art. 5.3 TEU establishes an early warning mechanism, which member state parliaments can invoke to have the Commission review a draft proposal, if one third of them consider it a violation of the principle of subsidiarity (“yellow card”).⁸ If the majority of national parliaments do so, the Council or the European Parliament can vote the proposal immediately down.

Overall, democratic accountability has increased with parliaments gaining power in EU law adoption, both at the EU and the member state level. As expected, infringements in general, and problems of delayed transposition in particular, have substantially decreased since 1994. But is this correlation really indicative of a causal effect? First, research has found that directives that were adopted under co-decision, i.e. with strong participation of the EP, result in more, not less non-compliance (König and Luetgert 2009).

Second, scrutiny of EU law-making by national parliaments has at best a weak effect on the quality of parliamentary transposition of directives (König 2007; Luetgert and Dannwolf 2009; Sprungk 2011). This is above all related to the limited involvement of national parliaments in the implementation of EU law. While regulations are directly applicable, most directives are implemented by non-parliamentary measures (König and Mäder 2014a).

Third, in those cases where national parliaments are involved, they tend to delay transposition (Haverland *et al.* 2011; Kaeding 2006; Mastebroek 2003; Steunenberg and Rhinard 2010) – yet, only under certain conditions, which are related to enforcement and management arguments rather than legitimacy (Sprungk 2011, Sprungk 2013). Politically salient directives are likely to trigger political opposition. The more domestic actors oppose a directive because of the costs it incurs, the more reluctant parliaments are to transpose it. Their reluctance is all the higher, the more public attention a directive receives at the domestic level (Versluis 2007). As research on the implementation of the EU’s Water Framework Directive shows, besides political sensitivity and public visibility of a directive, the capacity of national parliaments to process the adoption of implementation measures in time is crucial (Sprungk 2010).

⁸ Article 7 of Protocol No 2 to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality.

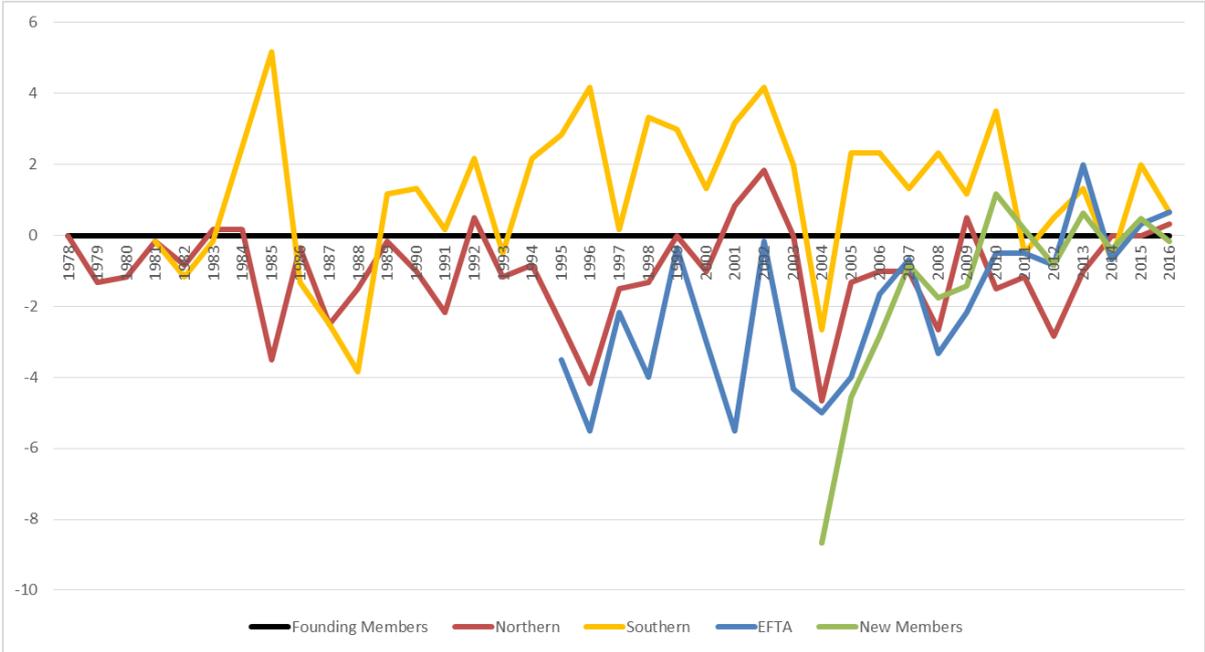
In sum, none of the three compliance approaches can account for the declining trend in non-compliance in the EU since the mid-1990s. Both the enforcement and the management capacities of the EU have steadily increased. This should go hand in hand with a decline in non-compliance, which it does. However, significant improvements in EU monitoring, sanctioning and capacity management do not coincide with changes in infringement numbers, particularly if we control for violative opportunities and information effects. While the increasing use of regulations has made EU law less demanding on member state capacities, it is the implementation of directives that drives non-compliance dynamics in the EU. The growing role of parliaments in EU decision-making could explain the regression of transposition problems. National legislatures are more inclined to swiftly and correctly transpose EU directives into national legislation because they had a chance to scrutinize the draft proposals and because the European Parliament acts as a co-legislator. However, less than a fifth of EU directives require the approval of member state legislatures. If they do, parliamentary involvement in the decision-making stage may promote compliance – but, only if EU directives are not politically controversial.

Enforcement and management factors, however, do help explain fluctuations in the downward trend. The seven periodic spikes (see Figure 3) are largely driven by changes in the Commission's compliance strategy, often related to an (upcoming) enlargement. The 1984/85 peak was the combined effect of Greece's accession and the publication of the first annual report of the Commission on the implementation of EU law in 1984 (Börzel 2001). The second peak in 1988 was not only driven by Portugal and Spain but the Commission's more aggressive enforcement strategy in order to ensure the effective implementation of the Internal Market (Tallberg 1999). Its official completion scheduled for 1992 also explains the third peak in 1994. The significant increase in infringements in the EU in 1998 was less related to the EFTA enlargement in 1995 but due to an internal reform of the infringement proceedings in 1996. Avoiding any accusations, letters were to be issued more rapidly than before. And indeed, the number of letters sent increased significantly after the reform had been implemented, which also drove the numbers of reasoned opinion up (Börzel 2001). The second highest peak in 2001 reflects again a fortified effort of the Commission to get the house in order before the big bang enlargement. Likewise, the last two flare-ups in 2005 and 2010 are related to the Commission's strategy to level the playing field between new and old member states counteracting concerns about an "Eastern problem". Figure 6 shows that these concerns were unfounded – the Southern member states are the only ones that have consistently complied worse than the average of the founding members. The other three

enlargement rounds have alleviated rather than aggravated non-compliance with EU environmental law.

[Figure 6 about here]

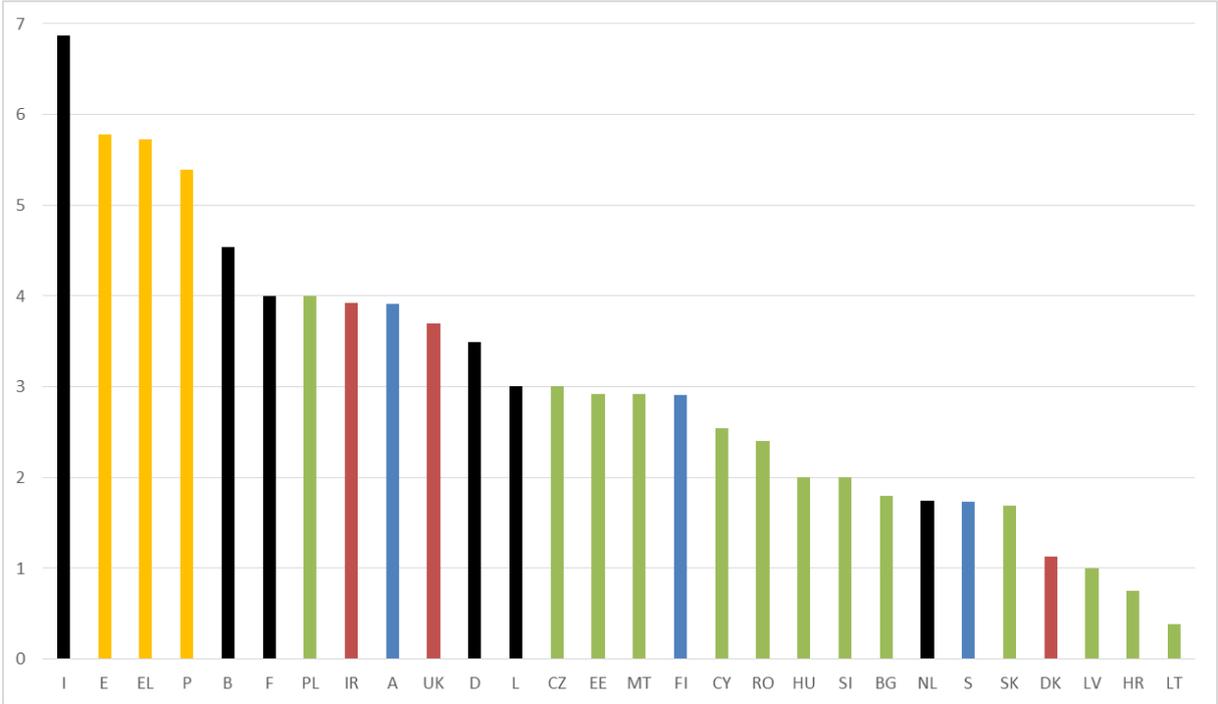
Figure 6: Non-compliance of Accession Groups Compared to the Founding Member Baseline



Source: Own compilation with data from the Berlin Infringement Database.

Finally, while member states appear to converge in their compliance performance, strong variation within the different groups of accession countries remain (cf. Börzel and Sedelmeier 2017; Zhelyazkova *et al.* 2017). The cohesiveness of groups defined by their length of membership should not be overstated. Italy is a founding member of the EU but its compliance performance with EU environmental policy clearly puts it not only geographically with the Club Med of worst performers. Likewise, Poland shows clear tendencies of becoming an environmental laggard. Three other Eastern European countries, Lithuania, Croatia, and Latvia, in contrast, are top performers not only among the new members, but in the EU as a whole. Finally, Sweden has joined the Nordic group of environmental leaders, while Finland and Austria belong to the upper and lower middle field, respectively. The member state ranking in environmental policy largely corresponds to the general leader-laggard patterns (Börzel *et al.* 2010). Only the UK trails behind its otherwise above average performance. This may be related to its more reactive problem-solving approach, which tends to clash with the precautionary one favoured by Germany and the Nordic countries (Héritier, 1996 #3487); (Knill, 1998 #4007)).

Figure 7: Average Annual Number of Reasoned Opinions in the Area of Environmental Policy per Member State, 1978-2016



Source: Own compilation with data from the Berlin Infringement Database.

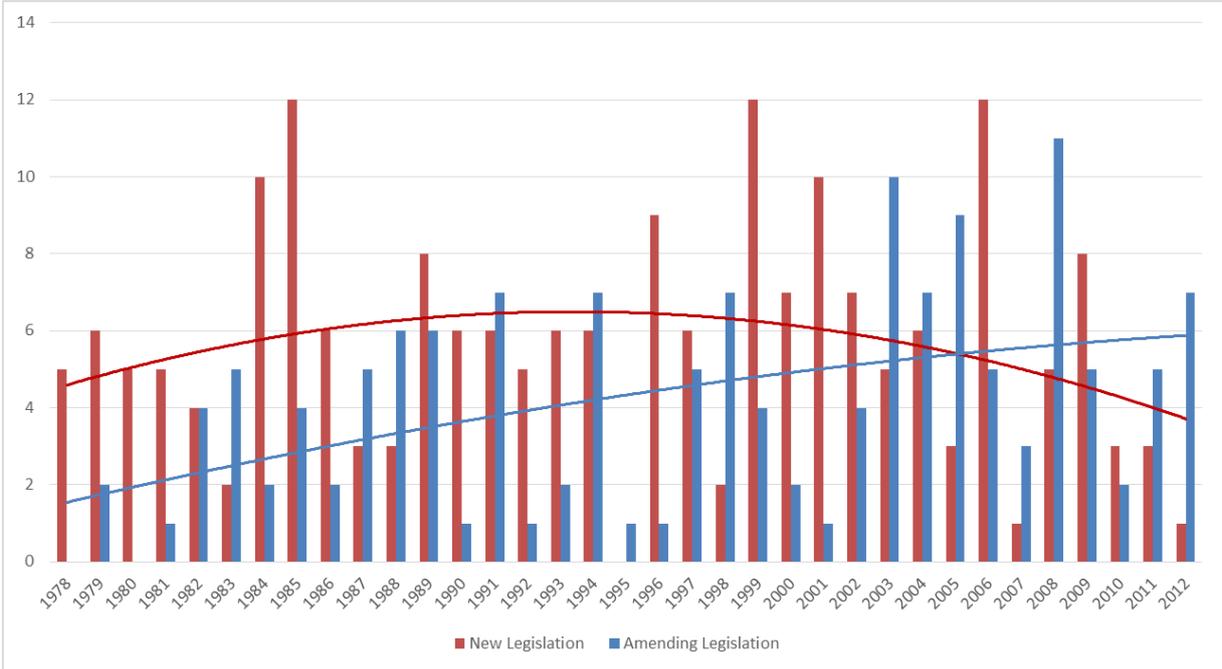
4.4 It’s the Capacity, Stupid!

The lack of an East-West divide in non-compliance with EU law is again related to the compliance strategy of the Commission. Compliance research has shown that administrative capacity is a powerful factor in explaining why some member states comply less than others (Mbaye 2001; Hille and Knill 2006; Börzel *et al.* 2010). Accordingly, the Commission’s use of pre-accession conditionality and pre-accession assistance towards the Central and Eastern European candidate countries explains why they perform better than their Southern counterparts despite equally low administrative capacities (Börzel and Sedelmeier 2017). In other words, the capacities of the CEE to comply with EU law are higher than their generally low bureaucratic quality suggests. The establishment specific capacities for the implementation of EU law is not captured by general capacity indicators. To be sure, many qualitative studies of environmental policy find significant implementation problems (Orru and Rothstein 2015, Marek *et al.* 2017) or show that in some fields, such as climate policy, the CEE states are indeed among the brakemen (Braun 2014a, Braun 2014b). But there is also sufficient evidence of conflicts related to implementation of community legislation (Buzogány 2015, Sotirov *et al.* 2015) or of the empowerment of pro-compliance constituencies (Börzel 2010, Andonova and Tuta 2014, Dimitrova and Buzogany 2014)

suggesting that EU policy are more than “empty shells” (Dimitrova 2010) in a “world of dead letter” (Falkner *et al.* 2008).

Capacity-related arguments, finally, also account for the overall decline in non-compliance. The Commission has not only helped build the capacities of member states to comply with EU environmental law. EU environmental law has also become less demanding. Figure 8 shows that the EU has increasingly adopted environmental laws amending existing rather than establishing new legislation since the completion of the Internal Market in 1992.

[Figures 8 about here]



Source: Own compilation using data obtained from the dataset compiled by Dimiter Toshkov, “Legislative production in the EU, 1967-2012” <http://www.dimiter.eu/Data.html>, last access March 23, 2014.

Legislation that further elaborates or updates regulatory standards and technical issues is less demanding on the member states in its implementation. As a result, amending legislation is less likely to be violated than new legislation (Mastenbroek 2003; Kaeding 2006; Haverland and Romeijn 2007; Luetgert and Dannwolf 2009; Steunenber and Rhinard 2010). Data is only available till 2012. However, a recent study by Steinebach and Knill on the evolution of EU regulatory activities in the environment finds that the continuous trend of policy expansion has stagnated since 2010. “More precisely, the period from 2011 to mid-2013 marks the longest time span of regulatory inactivity over the last two decades” (Steinebach and Knill 2017: 438). As a result, EU environmental legislation in force has declined since 2012. Due to the crisis, the EU appears to be reluctant to adopt any legislation new or otherwise (see Knill et al. in this special issue). The Commission’s waning policy activism is

mirrored by its greater focus on (managing) compliance. The combined effect of less (new) legislation and continued efforts at strengthening the capacities of member states to comply with existing legislation will keep narrowing the implementation gap in environmental policy.

5. Conclusion

This paper shows that the implementation gap in environmental policy has narrowed over the past 25 years – despite a tripling of member states that have to comply with a four times larger environmental acquis. Except for the Southern enlargement, taking on new member states has not exacerbated the EU’s compliance problem. On the contrary, in response to their (anticipated) accession, the Commission has adjusted its compliance strategy, developing instruments to strengthen member state capacities to effectively implement EU environmental legislation. While this often led to a short term increase in official infringements, their overall numbers have declined since the mid-1990. Next to capacity-building, EU environmental policy has also become less demanding by amending existing rather than setting new legislation.

Our findings have implication for the future of EU environmental policy. First, there is no contradiction between deepening and widening, at least when it comes to compliance. This is, second, because compliance is primarily a matter of administrative capacity rather than political willingness. A “centralized Community inspectorate”, as it was already discussed in the Special Issue of this Journal 25 years ago, is not only “[...] at present politically unrealistic, if not possibly inappropriate” (1992, p 213); it would not make much of a difference. Strengthening and harmonizing the implementation activities in the member states – something increasingly discussed (and practiced) in recent years in the context of EU environmental policy (Pallemaerts 2014, Angelov and Cashman 2015, Hedemann-Robinson 2016) – appears much more promising.

We close our analysis by highlighting some avenues for further research in the field of compliance with EU (environmental) legislation. Our analysis contributes to the literature on the implementation of EU legislation by providing a quantitative overview from a policy sector that has a predominantly market-correcting character by setting production and product standards to fight environmental pollution (Art. 191 TFEU). However, EU environmental law has become highly diverse in terms of policy tools and governance approaches (Holzinger *et al.* 2006). We also know that EU legislation differs to a large extent when it comes to the clarity, comprehensiveness, consistency, and practical recommendations regarding

implementation of individual legal acts. Little is known whether there are structural differences in how different types of legislation are complied with in the member states – or whether there are differences in how the Commission guards the Treaty in this regard. This also raises the question whether “better” quality, i.e. more comprehensive, clear and consistent legislation is actually better complied with – a question of particular relevance in light of the European Commission’s Better Regulation Agenda and the recent “Make it Work” Initiative that aims at harmonizing drafting provisions on compliance assurance in EU environmental law.

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