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# National resistance to EU policies: When member states litigate against the Commission

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## Abstract

With the intensification of EU integration, the probability of implementation conflicts between member states and the Commission increases. Cases of national resistance to supranational enforcement actions have gained importance, as shown by the increase in member states' use of litigation against the Commission's measures via annulment actions. What is, however, still puzzling is the conditions under which member state governments engage in litigation and when do they dutifully obey to Commission's implementation demands. Drawing from different branches of the literature, we identify three possible litigation rationales: the desire of member states governments (1) to maximize financial resources, (2) to defend decision-making competences, and (3) to maximise the political trust that citizens and institutional partners have in them. We assess the relevance of these litigation rationales based on recent cases of annulment actions raised against the Commission by national or regional governments in Spain and in Germany. We find that all three litigation rationales play a major role in explaining the recourse to litigation. National governments decide to go to court when litigation can contribute to maximising their financial resources, decision-making competences and political trust.

## Introduction

With EU integration intensifying in level and scope (Boerzel 2005), the potential for national resistance to EU policies has increased (Bauer and Hartlapp 2010, Saurugger and Terpan 2013). First, as a consequence of the “ever closer” integration process, the range of potential topics to argue about increases. Second, following the enlargement as well as the empowerment of the European Parliament and other actors such as the ECB or EU agencies, national preferences are ever more diluted as a result of the multiplicity of actors taking part in the EU policy process. Third, the growing presence of national interest groups and public opinions in EU affairs has considerably increased the pressure on national governments (Crespy 2010), especially in times of crises where EU policies gained political saliency (Saurugger 2014). More than ever, member states have to implement policies they did not agree with in the first place. Besides, there is an increasing scope of discretionary decisions that are delegated to the Commission as an implementation and enforcement actor. While member states may be in favour of a given policy, they are increasingly subject to Commission-led implementing decisions that may bring consequences not anticipated by the member state in the first place. Against this background, it has become ever more urgent to understand national resistance to EU policies (Crespy and Saurugger 2014). We still know little about the rationales underpinning national resistance emerging in the implementation process. Why do member states decide to resist to EU policies?<sup>1</sup>

In this paper, we take an innovative approach to the question of national resistance to EU policies. While compliance scholars generally look at the Commission’s pursuing the member states with infringement proceedings, we turn this approach upside down and focus on situations when the member states decide to challenge the Commission before the Court. National governments litigating against the Commission’s implementation measures indicate cases of explicit national resistance.

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<sup>1</sup> This question has been essentially addressed within the debate about compliance in the EU. The compliance literature, however, is insufficient to grasp the question of national resistance to EU policies. Analytically, it deals with all types of non-compliance, including non-intentional ones (e.g. due to the lack of administrative capacities), the latter forming the majority of cases of non-compliance (Zhelyazkova et al. 2016). Methodologically, it is generally limited to an empirical focus on the transposition of EU directives or on infringement proceedings, which produces incomplete, contradictory and biased results (Hartlapp and Falkner 2009).

Legally, such proceedings take the form of annulment actions, which allow the judicial review of measures adopted by EU institutions.<sup>2</sup>

When a member state wants to challenge an EU measure, they must raise an annulment action within two months following the publication of the contested measure. If they fail to do so while not complying with the measure, the Commission may initiate infringement proceedings. Any intervention of the Court after the two months delay would be limited to the evaluation of the member state's compliance with the measure, the legality of which cannot be challenged any longer. Annulment actions are thus a crucial tool when member states do not want to comply with a given EU measure.

To study annulment actions raised by the member states against the Commission. Bringing together different branches of the literature, we have conceptualized three possible reasons for which member states might want to bring the Commission before the Court. We thus conjecture that governments may decide to litigate to 1) preserve their financial resources, 2) protect their decision-making competences, or 3) maximise the political trust they enjoy at home. We subjected this categorisation of litigation motivations to a relevance check based on case studies of annulment actions raised by Spain and Germany against the Commission. Out of the 14 cases studied, 13 cases are explained by one of the three litigation motivations (financial resources, decision-making competences or political trust) and each litigation motivation is illustrated with at least one case of each country. These results confirm the relevance of our categorisation for explaining national resistance to EU policy implementation measures.

## Three motivations to litigate

Our purpose is to explain the motivations underpinning governments' decisions to resist to EU policies via litigation. By contrast to the analytical approach used in the compliance literature, we focus on the 'why', not on the 'when', that is, we search for the motivations for litigation, not for the factors of litigation. While motivations relate to governments' interests, explanatory factors are contextual elements that work as incentives or constraints on governments' decisions to adopt a certain behaviour. In other words, our goal is to identify governments' political interests motivating litigation - not the factors making the choice for litigation more attractive than non-litigation.

This section provides a theoretical identification of possible rationales that may motivate governments to turn to the courts. Although there are different branches of literature dealing with litigation, none

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<sup>2</sup> While annulment actions were essentially designed to sort disputes between EU institutions or between the member states and EU institutions, private and sub-national actors may also raise annulment actions against EU measures, although only under very restrictive conditions.

of them has specifically addressed the question of the motivation for litigation, and public actors – like governments- are rarely considered as potential litigants; existing studies on litigation rather focus on private companies and social movements. To palliate this gap, we have combined the existing work on litigation with political science literature giving insights on interests underlying the choices of governmental actors in a multi-level system. This allowed us to develop three possible rationales for governmental litigation against EU measures: preserving financial resources, protecting decision-making competences, and maximising political trust in the domestic context.

### Preserving financial resources

There is a vast literature on the economics of litigation that studies the conditions and modalities of litigation by private actors (Posner 1973, Gould 1973, Priest and Klein 1984, Bebchuk 1984). Typically, this kind of work searches the conditions under which conflicts are brought before the courts, instead of being solved via settlement or other types of conflict resolution mechanisms, such as arbitration. This literature relies on the assumption that litigants are driven by the willingness to maximise wealth and examines the impact of different factors such as information asymmetry, legal procedures, and probabilities to win on the risk-benefit analysis made by private actors when deciding to go to court. In sum, this literature considers that there is only one possible motivation for litigation, which is wealth maximisation, and examines the impact of various factors on actors' perception of the financial benefit and risks represented by litigation.

Wealth maximisation, while being a particularly relevant rationale for understanding the behaviour of private actors, shall also find application with public actors. If public actors' behaviour may be motivated by other kinds of interests such as power, public actors too, care about their financial resources and their budget. Bureaucracies have been conceived as self-aggrandizing actors, searching to maximise their budget and expand their services (Niskanen 1971). This assumption also applies to governments whose capacity of action largely depends on the national budget. Politicians are indeed searching to maximise revenues (Brennan and Buchanan 1980) and to limit unnecessary or non-priority expenses.

Yet, some decisions of the European Commission may, in some cases, have a negative effect on member states budgets. As a guardian of the Treaties, the Commission must make sure EU law is complied with, and was given enforcement powers to this end. The Commission's enforcement powers can lead to the adoption of financial sanctions against the member states. Member states may be tempted to avoid assuming financial sanctions imposed by the Commission. Challenging those enforcement decisions of the Commission before the ECJ via annulment actions is a way to do so. If the ECJ finds that the Commission's decisions is illegal, the decision is annulled and the member states would not have to pay the financial sanction. This is supported by the literature, which revealed that a

large amount of annulment actions raised by the member states are found in the agriculture policy and challenge Commission decisions that impose financial corrections on the member states for failing to respect EU rules regarding the conditions under which EU funds are distributed to beneficiaries (Bauer and Hartlapp 2010). This suggests that member states litigated in order to have these decisions cancelled so as to avoid the financial correction.

In sum, the maximisation of financial resources shall explain a significant part of annulment decisions initiated by the member states against the Commission. The underlying mechanism is straightforward: member states litigate to have the decision annulled by the Court, which is what would free them from paying financial sanctions.

### Protecting decision-making competences

Litigation can have an impact on the distribution of decision-making competences in a political system. We know that courts may have a profound impact on the structure of governance and politics, i.e. on the distribution of power among political actors and their strategic behaviour and interactions. Stone Sweet's theory about the judicialization and the construction of governance (Stone Sweet 1999) details the endogenous process through which the characteristics of a polity can become gradually altered and even profoundly changed through actors' recourse to litigation.

In federal states, courts have a significant influence on the shape and evolution of the multilevel decision-making arrangement (Baier 2006). Hence, judicial review plays a particularly important role in the federal countries. It is often portrayed by lawyers as a tool that allows protecting the constitutionally enshrined federal arrangements against attempts by the federal or regional governments to overstep each other's competences (Baker and Young 2001, Ryan 2011). Courts capacity to shape federal arrangements is particularly prominent in countries with a high number of veto players in the executive and legislative branches (Swenden 2006: 79). Being a highly fragmented polity, the EU appears particularly prone to judicial influence on the distribution of power between the EU and national level. The ECJ has indeed been able to fundamentally transform the relationship between the EU's and national legal orders (Burley and Mattli 1993, Stone Sweet and Brunell 1998).

Theoretically, legal or constitutional provisions about competence distribution can be seen as incomplete contracts (Farrell and H  ritier 2007) whose judicial clarification may be induced via litigation (Hadfield 1994). When a public authority is confronted to what seems a competence overstep by another institution, they can bring the case to the court. By doing so, they invite the judiciary to make an interpretation of the legal or constitutional provisions that distribute decision-making competences, i.e. they ask for a judicial specification of the provisions that shall serve as a barrier against future similar attempts of competence overstep.

This mechanism is likely to be activated by the member states against the European Commission for two reasons. First, the Commission has the fame to practice competence creep (Weatherhill 2004, Prechal 2010). Second, the high number of veto players involved in EU decision-making makes it difficult for individual member states to counter-act the Commission and limit its autonomy through the adoption of legislation or treaty change. This makes the ECJ a likely venue for the member states willing to put a hold to the Commission's extensive interpretation of its competences.

We can find support to this argument in the literature. Bauer and Hartlapp's observed peaks in the number of annulment actions in the years following the adoption of new Treaties. This seems to indicate member states resistance against Commission's attempts to stretch its power by exploiting the legal uncertainties resulting from the adoption of new rules (Bauer and Hartlapp 2010: 209). A concrete example is also provided by Schmidt (1998) who explains how, in the late 1980s, the Commission launched the liberalization of the telecommunications sector bypassing the member states, based on an extensive and innovative interpretation of treaty provisions. Although the member states did not contest the move made by the commission in substance, they brought the case before the Court. The reason why they litigated was, precisely, to limit the Commission's capacity to repeat this legal strategy in the future; to achieve this, they wanted to have the Court clarifying that directives can only be adopted by the Council (Schmidt 1998: 173).

Protecting their decision-making competences is thus likely to play a role in member states' decisions to initiate annulment procedures against the Commission. In such cases, the member states shall invite the ECJ to clarify the interpretation of the legal provision underpinning the Commission's measure, hoping the Court will limit the Commission's capacity to base future actions on its extensive interpretation of EU law. In terms of causal mechanism, litigation for protecting competences thus consists in engaging in a fight about legal interpretation.

### Maximising political trust

Scholarship about the legal mobilization of social movements shows that litigation, independently from the outcome of the trial, can increase social movements' credibility and public support (McCann 1998, Lobel 1994, NeJaime 2011). By initiating judicial proceedings, a social movement can transform the public's perception about its action, allowing them to gain the public's trust, sympathy, and support. We think that this mechanism also applies to governments who might be inclined to litigate against the Commission as a way to signal trustworthiness to their constituency in order to gain political trust and support.

Political trust is a highly valuable resource for governments. For leaders, political trust translates into citizens' support for their policies (Hetherington 2005, Rudolph & Evans 2005, Davis & Silver 2004,

Chanley et al. 2000). Political trust also smoothens the functioning of the political system (Miller 1974, Levi & Stoker 2000, Gambetta 1998, Coleman 1994) and increases leaders' chances to be re-elected. No wonder then, that leaders are engaged in the unceasing work to maximise it (Bourdieu 1991: 18).

If most variables accounting for political trust are exogenous to the government itself, governmental action is a factor on which political leader can have an influence. Among exogenous explanations affecting political trust we find variables, such as democratic institutions (Mishler & Rose 2001, Segovia Arancibi 2008), demographic variables (Macoubrie 2006, Christensen and Laegreid 2005), societal characteristics (Newton and Norris 1999), exogenous events and the saliency of international issues (Hetherington & Rudolph 2008, Chanley 2002). Yet, governmental action is certainly the most debated factor of political trust. In this category, particularly relevant to explain political trust are: governmental performance (Citrin 1974, Chanley et al. 2000, Hetherington 1998, Van De Walle & Bouckaert 2003, Keele 2007), the alignment between the policies adopted and the public's preferences (Miller 1974) and leaders' personality (Citrin 1974, Citrin and Green 1986).

In fact, it is less governmental performance, responsiveness and leadership than the public's *perception* of these qualities that matter for political trust. Trust is a relational concept that is based on perception. To be trusted, trustees need to signal trustworthiness to their principals (Bacharach & Gambetta 2001). This is a basic sociological mechanism that applies in a wide variety of situations. Companies use third-party certification labels to signal trustworthiness (Aiken et al. 2004); bureaucracies craft their public communication in order to improve their reputation, that is the public's perception of their capacities and performance (Maor et al. 2013). Just as companies and bureaucracies, governments need to convince their own audience, their constituency, about their trustworthiness.

In this context, measures imposed by the Commission on the member states may provide an opportunity for governments to signal their trustworthiness by challenging these measures before the Court. Decisions of the European Commission can sometimes have a very negative impact on some sections of the society, or be at odds with widely shared preferences within a given public opinion. Such situations of external pressure have the potential to boost political trust. It was found that political trust rises as international issues, especially those involving threat, become more salient (Hetherington & Rudolph 2008, Chanley 2002). With external threats, people expect their leaders to do something. Those who make a good performance in these situations, projecting the image of a caring leader taking energetic and effective action to protect his/her constituency, shall enjoy a significant boost of political trust, as illustrated by Georges W. Bush after the September 11 attacks (Bennister and Worthy 2012). By litigating against those decisions of the Commission that gain politically saliency for their strong mismatch with the preferences of the national public opinion,

governments show their alignment with their constituency's preferences and their responsiveness to their concerns. In short, defying the Commission to take side with their people is a way, for governments, to signal trustworthiness.

Adam et al. (2015) give an illustration of this mechanism in a case of annulment action initiated by the Austrian government against the Commission. Austria requested the Commission to reduce the quota for freight trucks transiting through Austria in order to lower the environmental impact of these transits in the country. As the Commission refused to do so, public protest broke out and several social movements emerged in Austria to defend the environmental perspective. Taking stock of the politicization of the issue, the Austrian government decided to show and publicize its opposition to the Commission's position by initiating an annulment action against the Commission's refusal to lower the quota (Adam et al 2015: 188-189).

Hence, annulment actions raised by member states against the Commission can be motivated by the former's willingness to maximise political trust. In this scenario, governments use litigation to signal trustworthiness to their constituency. We expect this motivation to carry explanatory value for bottom-up litigation when Commission's decisions become politically salient in the member states for antagonizing at least some section of the population.

## Case selection, operationalization and data collection

We conjecture that there are three motivations that explain why member states litigate against the Commission. Our objective is to evaluate the relevance of this categorisation of litigations motivations, i.e. the extent to which these motivations find echo in the empirical reality, and the extent to which they can explain annulment actions. In other words, we do not engage in the assessment of their respective explanatory power or in the identification of the conditions under which each of them is playing a decisive role in the decision to litigate. The confirmation (or disconfirmation) that the three motivations conceptualized do play a role in litigation is our research purpose.

To evaluate the relevance of these motivations, we have confronted it to a series of recent annulment cases against the Commission initiated by national and regional governments in Spain and Germany. To assess the relevance of these motivations, it was necessary to diversify as much as possible the range of potential motivations underlying the annulment cases selected. We have proceeded in two steps for the case selection. First, we selected two countries (Germany and Spain) to pick annulment cases from, and then we selected the annulment cases within these countries. Let us turn to the first step: we selected Germany and Spain. First of all, the selection of countries is not a selection of cases as such – the cases in this paper being annulment actions. We selected countries where annulment actions come for the sake of synergy in terms of data collection, which, as will be explained below,



relied mainly on interviews. Given that we need to diversify the range of potential motivations, we needed countries with a significant number of annulment actions to maximise the extent to which the selected cases cover the variety of motivations underlying annulment actions. Spain and Germany, which are among the countries that raised most annulment actions per year (Bauer and Hartlapp 2010), fulfil this first criteria.

Second, capturing the variety of existing motivations calls for choosing countries with different litigant profile, in order to maximise the possibility to meet different types of motivations across the cases selected. There is an important difference between the inclination of Germany and Spain to turn to the CJEU, as shown by the number of preliminary rulings raised from both countries - high for Germany, low for Spain (Bauer and Hartlapp 2010). Besides, among the annulment actions raised by Spain, most of them are related to financial sanctions in EU spending policies, suggesting that the financial rationale plays a particularly important role there. The opposite is true for Germany, where the relative importance of EU funds in the group of national cases is much lower. This suggests that both countries might differ regarding the types of motivations underlying their annulment actions.

Once the countries chosen, we selected the annulment cases. Here again, our selection method aimed at maximising the variation in the type of motivations driving annulment actions. We first listed all cases of annulment actions raised between 2010-2015 by national and regional governments in Germany and Spain. First, we found that the group of annulment actions related to the use of EU funds (regional or agriculture funds) was very homogeneous: they all challenge Commission's decisions of financial correction for having misspent the EU budget. Unlike in other policy fields, annulment actions in EU funds are rather transparent in terms of underlying motivations. Since they all deal with EU fines, the probability that all (or nearly all) the EU funds cases are related to the financial motivation is very high. Besides, the number of cases related to EU funds – compared to the other policy fields – is high. There was thus a risk that a random selection of cases would select many EU funds related cases, thereby limiting the possibility to explore other potential motivations. To avoid falling into this situation, we treated the group of EU funds cases as one analytical unit, instead of focussing on individual cases within this category. Then, we randomly picked up 6 cases per country among those remaining cases - not related to EU funds.

The data collection is essentially based on semi-structured interviews and document analysis. We interviewed the key stakeholders who took part in the decisions to litigate in the cases selected: the state attorneys and the civil servants from the relevant ministries. For each case, we asked the interviewees to reconstruct the decision-making process of litigation, and asked a series of questions aimed at uncovering the criteria and considerations that had driven the decision to litigate.

To facilitate the interpretation of how the cases relate to our list of motivations, we used two indicators, related to the objectives of the action and the mechanism that justified the use of litigation. The main indicator was the objective targeted by the litigating government. In case they mentioned, as main explanation for their action, anything related to finances, budget, or money, we classified the action as being motivated by financial interests. When they expressed worries about their decision-making autonomy in the future, we would classify the action as being motivated by the maximisation of decision-making competences. Finally, when they explained that had to maintain or restore a good relationship with their constituency or partners, we would classify the action as being driven by political trust.

The second indicator, which we used as an additional insight to complement to the first one, is based on the mechanism justifying the use of litigation. Depending on the objective pursued, the underlying causal mechanism justifying the use of litigation differs. When the member states challenge the Commission in order to avoid having to pay a certain amount of money, the litigation is used as a way to have the Commission's decision cancelled. There, member states raise an annulment action simply because they want the supranational measure to be annulled. Hence, when member states justify their action because they want to annul the decision, this speaks for a financial interests driven action.

The mechanism is not as straightforward for the other two litigation rationales. When member states litigate to protect their competences, their major concern is to ring fence the Commission for the future, to put a halt to the Commission's competence creep in order to preserving their decision-making autonomy. Whether the Court annuls or not the contested decision is of secondary importance to them. There, what matters most is to have the Court interpreting the law, in order to clarify the Commission's room for manoeuvre in the future. Hence, interviewees mentioning the necessity to have the Court clarifying the interpretation of the law would indicate the relevance of a decision-making competence driven action.

Finally, when a government litigates in order to preserve or maximise its political trust, the outcome of the ruling is also of secondary importance. Here, litigation is mainly used as a signal, showing publicly that they engage in a fight against the Commission - independently from what happens after the judicial action is filed. Anytime the interviewee mention the need to show and demonstrate something to another actor, this hints towards the relevance of the political trust rationale.

While our three motivations are neatly separated analytically, they may overlap empirically. In some cases, the decision to litigate may combine several motivations. In this situation, we classify the case as relating to the motivation that has played the most important role in governments' decision to litigate.

## Illustration with Spanish and German annulment cases

This section illustrates the three litigation rationales with cases from both countries. All three litigation rationales are matched by at least one Spanish and one German case (see table 1). And only one of the selected case did not fit any of the motivations elaborated in the theoretical section. The cases studied thus provided a good support to our categorisation of litigation rationales.

	Spain	Germany
Financial resources	Funds <sup>3</sup>	Funds (ex: Potato Starch)
Competences	Tax scheme	Sanierungsklausel EEG Leipzig-Halle + Dresden
Political trust	Molluscs Digital TV Coal Ciudad de la Luz	Toys safety BMW Milk
Other	EPSO Staff	

Table 1: Allocation of the cases in the categorisation of litigation rationales

### Financial interests

#### *Agriculture funds in Spain*

In Spain we found many cases of annulment actions in the agriculture directed against so-called financial corrections imposed by the Commission. When the member states spend EU agriculture funds, they must do so in accordance with EU law. When they fail to do so, the Commission imposes a decision of financial correction, to recover the misspent money. In Spain, the competence for managing EU agriculture funds is a competence of the autonomic communities. When an irregularity is committed, the responsible community has to bear the costs of the financial correction. Yet in the area of EU funds, regional government are not allowed to raise direct actions before the CJEU; they must make a petition to the state to litigate on their behalf.<sup>4</sup> In these cases, money is the main drive behind nearly all petitions made by the autonomous community to litigate. This is particularly true when the amount of the financial correction is high. At the level of the state, since resources are

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<sup>3</sup> This gathers all annulment actions initiated by the Spanish government in questions related to agriculture or regional funds.

<sup>4</sup> ECJ Judgment 22 March 2007, Case C-15/06, Regione Siciliana v Commission [2007] ECR I-2591, para. 36.

limited, the state attorneys then filter the different requests and follow-up on those cases that are of higher financial significance and that are most likely to succeed.

#### *Agriculture funds in Germany and the potato starch case*

The rationale followed by German actors in the field of agriculture funds is similar, although the application of these criteria leads to very few annulment actions. This is because the irregularities committed in the spending of EU agriculture funds are very limited and the amount of the financial corrections there is generally very low. The only annulment case that was initiated in the last 8 years is the potato starch case. This case is based on a misunderstanding between the Commission and German administrative authorities, due to the way the EU regulation had been translated in German.

There is a minimal price, regulated by the EU, that applies to the potato sold by the potato producer who benefits from EU aids. To make sure the producer does not sell the potato below the minimal price, EU regulation stipulates that national authorities can only pay the aid once the producer has received an amount of money corresponding to the minimal price for the potato sold. When a given amount of potato is sold, the delivery can be done in several steps, and the payment is done, accordingly, in several instalments. In this case, after delivering 41% of the potato produced, the producer receives 41% of the minimal price, and this goes on with the second and third deliveries, until 100% of the potato is delivered and paid. After the producer receives 41% of the minimal price corresponding to the delivery of 41% of the potato produced, the German authorities granted 41% of the aid to the producer. This was, according to the Commission, an irregularity: the producer could only receive the aid after having received 100% of the minimal price of the potato sold. The question was the following: does the 100% of the minimal price relate to the potato sold, or to the potato delivered? While Commission was the opinion that the 100% of the minimal price relates to the amount of potato sold, the German authorities, based on the German version of the regulation, contended that it relates to the minimal price for the amount of potato delivered. Based on the English version of the regulation, the auditors claimed there was an irregularity, which was denied by German civil servants who insisted that the German version of the regulation was different. In spite of the confusion due to the linguistic differences, the Commission decided to impose the financial correction. The amount of the correction was high (6,3 million Euros) for a relatively small Land (Brandenburg). Besides, German civil servants and state attorneys were convinced that they were right. So they decided to litigate - and they won.

## Decision-making competences

### *Germany's law for renewable energies*

In order to encourage the production of renewable energies, Germany has designed a sophisticated pricing mechanism. German consumers buy the electricity at a price that is higher than what the market price would be; the difference is then used to subsidise the producers of renewable energies. A consequence of this policy is the high price of electricity in Germany, which is particularly problematic for energy intensive consumers, those industries for which the price of electricity is a crucial factor of production. To palliate for this disadvantage, the law excludes energy intensive consumers from the application of this pricing mechanism. This allows them to consume electricity at what would be the normal market price.

The Commission found that the special regime enjoyed by energy intensive consumers constituted state aid. This was contested by Germany who disagreed on the Commission's interpretation of the concept of 'state resources', the use of which is a key criterion in the identification of state aid. In the mechanism designed to subsidise renewable energies (and therefore in the exclusion of energy intensive consumers from this mechanism) the money follows a circuit between stakeholders without ever transiting through any kind of state fund. From Germany's viewpoint, this excluded the qualification of 'state resources', which implied that the mechanism could not qualify as state aid. According to the Commission, the design, by the state, of the pricing mechanism (and the exclusion of energy intensive consumers from it) constituted the 'use of state resources', which therefore qualified as illegal state aid.

It was the first time that the Commission made such an extensive interpretation of the concept of state resources. If the design of such a mechanism was now seen as illegal state aid, the range of possible state aid cases in the future could dramatically increase. Concerned about the foreseeable broadening of the remit of state aid law, to the detriment of national autonomy and willing to defend its legislation, Germany, raised an annulment action against the Commission's decision. While the case was examined by the Court, Germany and the Commission negotiated a new version of the renewable energy law, planned to enter into force in 2004. As a result of the compromise reached with the Commission, Germany did not need to defend their former legislation any longer: a new version of the legislation – which won the approval of the Commission – was ready. Interestingly, they nevertheless decided not to withdraw the case. This decision was, precisely, because they wanted to have the Court's interpreting the notion of state resources, hoping the CJEU could protect their autonomy in the future, by ruling that the Commission's interpretation was not in line with the treaties - or, at worse, to clarify the legal situation.

### *Spanish tax scheme*

The European Commission recently started to examine national tax legislation to identify advantages that could result from some tax provisions, with a view to apply state aid law. Indeed, tax advantages are generally only granted to some beneficiaries who comply with specific criteria. The extent to which these criteria can be seen as implying a *selective effect* – key criteria in state aid law - can be subject to debate. Indeed, only those provisions that are *selective* can qualify as state aid.

After a first series of cases related to regional aid in the Basque country debated in the early 2000s, the Commission confirmed its interest in national tax legislations. In the late 2000s, the Commission adopted a few decisions qualifying national tax provisions as illegal state aids, notably in Spain and Germany. This move surprised the member states who used to see tax legislation as measures of general applicability, deprived of selective effect. Several annulment actions against these decisions followed, some of them initiated by the member states who were keen to put a halt on the Commission's competence creep. The cases related to tax amortisation in Spain are examples of such annulment actions.

There is a Spanish taxing scheme that allows companies based in Spain, who have acquired shares in a company established abroad, to deduct from the basis of assessment for corporation tax in Spain, part of the sum paid to acquire the share, corresponding to what is called the financial goodwill. The Commission examined this measure and concluded that, in so far as it provides a fiscal advantage to those companies that invest abroad, the measure was 'selective'. Hence it constituted state aid and the corresponding financial advantages granted to the beneficiaries should be recovered by the state.

Two companies affected by the Commission's decision, Autogrill España and Banco Santander, challenged it before the CJEU and won in first instance - the judgement was delivered in 2014 (T-219/10 and T-399/11). Unlike the Commission, the General Court considered that the derogation from the normal tax regime granted to companies investing abroad was not sufficient to find that the measure is 'selective'. The selectivity criteria requires that the beneficiaries of the aid corresponds to a category of undertakings that can be distinguished on the account of their specific characteristics (e.g. location, sector, etc.). This was not the case here, as any company has the possibility to realize an investment abroad.

The Commission appealed the judgment in 2015 and the Court is now examining the case. In the appeal, three countries decided to intervene in the case in support of the companies opposed to the Commission: Spain, Ireland and Germany. Spain's motivation to intervene in the case is twofold. While they are interested in defending their legislation and tax scheme, their decision to intervene was also largely due to the willingness to oppose the Commission's interpretation of the selectivity criteria and

its extensive application to national tax regimes. As for Germany, while the contested measure was a Spanish one, they felt concerned because the decision of the Commission threatened to broaden significantly the realm of application of EU state aid law, to the detriment of national autonomy in tax policy. Their intervention had a clear and explicit purpose: they wanted to ring-fence the Commission in the area of tax law.

Recently, the Spanish authorities adopted a new binding administrative interpretation of the tax scheme that consist in extending the mechanism to *indirect* investments abroad, i.e. to the acquisition of shares of a foreign holding company (previously, the scheme used to be applied to *direct* investment abroad only). The Commission declared this move in breach of EU state aid law and Spain decided to contest this decision before the General Court, the motivations of this decision being the same as for their intervention in the Autogrill España and Banco Santander cases. While keen on defending their law and administrative practice, they also took benefit from the opportunity to argue once again before the Court that the Commission's interpretation and application of the selectivity concept in tax law is erroneous.

## Political trust

### *Germany and the EU toys safety regulation*

Following a series of problems with toys safety in the mid-1990s, the Commission decided to completely revise EU **toys safety** regulation. Based on a scientific report, the Commission issued a proposal, which was highly contested by Germany. Based on scientific evidence, Germany argued that the limit values for the chemical substances in toys proposed by the Commission were too lenient. Germany faced a tough opposition in the Council and the directive was finally adopted.

The protection of children's health is a very salient issue for the German public, and the topic was followed very closely by the German parliament, civil society and press. The pressure on the Minister for consumer protection was high. All Germany waited to see what she was going to do to protect German children. After the adoption of the directive, they decided to take advantage of the three year delay for transposition to negotiate with the Commission a lowering of the limit values for chemical substances in comitology. Over time, seeing that the concessions made by the Commission on the limit values were too marginal to meet Germany's safety standards, German civil servants considered another option. The Treaty allows member states to keep national regulatory standards than are stricter than EU standards when they can prove that their standards guarantee a higher level of safety. Germany made a formal request to the Commission for deviating from EU toys safety regulation, which was only partially approved. This meant that, for some chemical substances, Germany would have to implement EU safety standards.

Since the preparation of the directive, the German minister for consumer protection had regularly committed herself to do whatever she could to protect German children, mentioning she was not afraid to go to Luxemburg if a judicial action against the Commission was needed. She was then under great pressure to sue the Commission to follow-up on her promises. But the minister responsible for the industry had an opposite view on the issue. Concerned about how the difference in regulatory standards in Germany and the rest of Europe would affect German toys industry, he was opposed to litigation. Finally, realizing that it was politically risky for him too, to defend the interests of the industry to the detriment of children's health, he agreed with the ministry for consumer protection, and Germany raised an annulment action against the Commission. They partially lost in first instance, appealed, and lost the appeal. The German public accepted the sentence did not politically sanction their leaders who had made their best to protect their interests.

### *Conflicts and loyalties in the Spanish coal sector*

In 2010, in order to protect its national **coal** sector, Spain adopted a measure that gives to the electricity produced from indigene coal (coal extracted from national mines) a preferential access to the electricity pool. As a result, in spite of its low efficiency, the electricity that is produced out of indigene coal would have a priority access to electricity consumers, by-passing other more efficient sources of energies. This guaranteed access to the electricity market implies that national coal mines can continue to produce, while the production and distribution of electricity from other sources (e.g. imported coal, gas) would lose market shares. Spain notified the measure to the Commission as a state aid aiming at guaranteeing the supply of energy (because national coalmines are the only reliable national source of energy) and the Commission accepted the aid.

Several actors were adversely affected by the Commission's decision to allow such a distortion to the competition on the electricity market. Besides the electricity companies that were disadvantaged by the measure, the autonomic community of Galicia was particularly preoccupied. In Galicia there are three power plants operated with imported coal or gas, and one important LNG terminal. Because the electricity produced with imported coal and gas would lose market shares, it was feared that these power plants and the LNG terminal, as well as all the economic activity that developed around these industrial centres, were endangered and that many people would lose their jobs. The public opinion and the municipalities were very preoccupied and were requesting to the Galician autonomous community to do something about it. There has been, for example, a demonstration of over 2000 people in the city of A Coruna, protesting against the 'Decreto del Carbon' (the Spanish measure favouring national coalmines which had been approved by the Commission).<sup>5</sup>

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<sup>5</sup> <http://www.elmundo.es/elmundo/2010/10/16/galicia/1287228192.html>



Galician civil servants felt compelled to respond to the concern of their constituency and decided to litigate, which they did on two fronts. They first – unsuccessfully – challenged the Spanish law before the national Supreme Court, before raising an annulment action before the CJEU against the Commission’s decision to allow the Spanish state aid. As they anticipated that the CJEU might challenge their legitimacy to raise a direct action against the Commission, to be on the safe side, they also requested to the Court the right to intervene in the action raised by Castelnou, a small electricity company. Yet the Court rejected this demand because they considered that the Commission decision did not have a direct and immediate impact on the autonomous community. Seeing that the Court denied Galicia’s legitimation to intervene in the Castelnou case, Galician’s lawyers anticipated that the legitimacy would also be denied in the direct action raised in parallel by Galicia. Since the issue had cooled down in the meantime, they evaluated that withdrawing the action would not have much impact in the press, and they decided to withdraw the case.

## Discussion

In the face of the growing tensions within the EU, it has become more important than ever to understand the phenomenon of national resistance to the EU—in particular resistance by administrative partners in the emerging multilevel system of governance. Most work done in regard to this question relates to the literature on member states’ compliance with EU rules. Very much top-down, this strand of research has empirically essentially focussed on infringement proceedings launched by the Commission to correct the way Member states implement EU policies. By contrast to these works, we adopt a bottom-up approach. Instead of talking about compliance, we analyze national resistance; and Commission driven infringement procedures leave the floor to annulment actions raised by the member states to contest those EU measures they disagree with.

Our focus on litigation allowed us to tap into other research fields, namely the economics of litigation and judicial politics, which shed a new light on the question of national resistance to and non-compliance with EU policies. We developed three litigation motivations, according to which member states may challenge EU measures before the Courts in order to 1) preserve their financial resources, 2) protect their decision-making competences, 3) maximise their political trust at home. Our 14 case studies in Spain and in Germany have confirmed the relevance of the categorisation. Out of 14, 13 cases of annulment actions are explained by one of the three motivations identified theoretically; and all three motivations are illustrated by at least one Spanish and one German case. This means that, first, the motivations identified have a very strong explanatory power, second, all three motivations are empirically relevant, and third, the relevance of the three motivations survives in distinct national contexts.

We can conclude that there are essentially three reasons for national resistance to EU policies. Governments resist to the EU in order to 1) preserve their financial resources, 2) protect their decision-making competences and 3) maximise their political trust at home. One must however be careful before generalizing these findings, which may be affected by our case selection. Future work in other countries would be helpful to confirm and/or complement our results. Likewise, it would be interesting to assess the relevance of our categorisation for grasping other types of national resistance to the EU (else than manifested through litigation, see Saurugger and Terpan 2013).

Beyond its substantial findings, by focusing on governments' motivations for resistance (instead of factors of non-compliance) this paper makes relevant analytical contributions to the literature on compliance in the EU. First, we conceive national resistance as a decision made by purposeful actors (whereas non-compliance tends to be perceived as an outcome, often caused quasi mechanically by institutional factors such as the number of veto players or administrative capacities). In contrast with the top-down compliance approach, our focus allows us to grasp the bottom-up political dynamics underlying resistance in the implementation process.

Second, the analytical focus on motivations allows us to conceive resistance as a tool that can serve various purposes. We can thus distinguish different types of resistance, depending on its underlying political goal. This constitutes an important added value to the literature on compliance, where non-compliance tend to be treated as a binary variable (compliance vs non-compliance). Comparative studies typically compare countries based on their number of non-compliance cases, not on the type of non-compliance that characterizes them. Acknowledging that there are several types of national resistance, as well as of non-compliance, opens new research questions. Future work could, for example, investigate the national variations in the relative importance of the different motivations behind their resistance. We could for example explore the reasons why the financial interest explanation is relatively more important in Spain than in Germany; and why the protection of decision-making competences was relatively more important in Germany than in Spain.

Hopefully, our empirical and analytical contributions to the literature of compliance and resistance to EU policies will encourage other researchers to push the boundaries of the EU policy implementation research field.

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