

Cooperation and Expected Policy Compliance in the Council of the EU

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Abstract

This paper focuses on the relation between expected policy non-compliance and cooperation in member state negotiations in the Council of the EU. The central prediction made in the paper is that the possibility to generate cooperative agreements in the Council is affected by expectations about policy compliance. Using new survey data, it is tested whether risks for non-compliance affect the member states' cooperative choices, and if the level of that non-compliance risk, as well as the reason for the non-compliance risk, matters for this relationship. The results indicate that non-compliance risks affect the negotiators' willingness to strike cooperative agreements, but that they are insensitive to the level of that risk, as well as the reason for it.

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Introduction

This paper deals with the problem of non-compliance in international relations, and how the risk of non-compliance affects decision-making. An international rule-based system is dependent on its members following the rules that have been agreed. Yet, non-compliance with international rules is a recurring problem in the still anarchic international system. Even in a comparatively strict regulated system of cooperation within the European Union, non-compliance with agreed rules is a problem. The EU Commission has a supervisory function when it comes to policy compliance, and regularly reports on issues where they consider the member states to not comply with the joint rules by failed transposition or implementation. A recent example of member states not complying with joint rules, which has gained some public attention, came in the wake of the 2015 migration crisis, where some member states refused to follow the burden-sharing agreement on relocation of migrants from the member states at the EU's external borders (European Commission 2017).

The issue of non-compliance in the EU has received much scholarly attention. This compliance research has for instance been devoted to how the system for securing compliance is designed (Tallberg 2002), but also what factors that explain non-compliance (e.g. Falkner et al. 2007; Mastenbroek 2005). Less attention has been given to the effects of non-compliance on the sustainability of cooperation within the EU. In a wider perspective, the problem with non-compliance is the threat it poses to the very survival of an international organization, by introducing free-riding that lowers the effectiveness of the organization and feeds distrust. Cooperative behaviour is generally believed to be reciprocal, both if looking at individual level behaviour (e.g. Ostrom 1998) and if looking at state behaviour in international politics (Keohane 1986), where the own behaviour is influenced by the expectations held about other actors' behaviour. Consequently, non-compliance can be expected to be reciprocated and have negative effects, both on others' willingness to comply but also on their will to cooperate already when a decision is about to be taken. In this paper, the focus is on the latter effect, and whether non-compliance, or the mere prospect of it, affects EU member states' willingness to continue cooperation and make policy decisions.

The paper utilizes new survey data with 251 elite respondents who work as representatives of the 28 member states to the Council of the EU, and which was collected during the spring and summer 2018. The results presented in this paper come from two survey experiments testing how different levels of non-compliance risks, and different reasons for a non-compliance risk, affects member state negotiators' willingness to cooperate. The survey treatments themselves are shown to not affect the respondents indicated likelihood of

cooperating. Instead, it is shown that any information about a non-compliance risk makes the negotiators willing to adjust decisions to accommodate the associated concern, and thereby try to make it possible for the other member state to comply. Such adjustments indicate that negotiators care about non-compliance risks, but is also seen as evidence that agreements become shallower when a non-compliance risk is introduced. There is thus an effect of non-compliance risks on the type of cooperation that can be achieved in the Council of the EU, which at least partly is in line with the reciprocal prediction that the paper derives.

The paper is structured as follows. The coming section introduces the phenomenon of non-compliance in the EU, and the system for securing it in a comparative perspective. This is followed by a section on the theoretical logic of the paper, which develops three hypotheses about the reciprocal relation between non-compliance and decision-making cooperation in the EU. Following this, the data and operationalisations are presented. The fourth section presents the results of the survey, followed by a final section with discussion and conclusion about the effect of non-compliance risks for the negotiations and cooperation in the Council of the EU.

Non-compliance in the EU

Non-compliance is a central problem for the functioning of the EU, and whether a decision will be complied with or not depends on a number of factors. The institutional mechanisms in place to enforce decisions are important (e.g. Tallberg 2002), but so are factors such as political preferences or administrative constraints (e.g. Fjølseth and Carrubba 2018). These sources of non-compliance have been a central study object for researchers on EU governance, including the link between opposition or conflict at the decision-making phase and later cooperation through rule compliance (e.g. Falkner et al. 2004; Zhelyazkova 2013). But the reverse relation is less understood, i.e. if non-compliance, or the risk thereof, affects cooperation in decision-making.

Non-compliance is here understood to mean behavior that do not correspond to what a particular agreement stipulates, commonly in the form of explicit legal rules (Simmons 1998). Also the EU compliance literature have empirically focused on regulatory compliance and adopted EU legislation (e.g. Falkner et al. 2007; König and Mäder 2014; Perkins and Neumayer 2007), where non-compliance can take the form of incorrect or absent transposition and/or implementation of joint decisions leading to practices that do not correspond to the joint laws and decisions (cf. Panke 2010, 15). But the notion of compliance can be extended to also cover areas where the EU merely have coordination competences, even if the legal enforcement is

weaker in these areas. In foreign policy for instance, decisions can take the form of e.g. Council conclusions, and compliance can then be understood as whether member states act and speak in accordance with those conclusions or not. Similarly, in other areas where EU competences are limited to coordination measures, compliance can still be understood in terms of whether the member states implement recommendations and generally act in accordance with what the coordination stipulates.

The EU system for enforcing EU law builds on a number of tools, including infringement procedures against member states on the initiative of the Commission or another member state and the preliminary reference procedure used by national courts to guide their interpretation of EU law (e.g. Phelan 2018). In both cases the EU Court of Justice has a prominent role of adjudicating potential disputes in interpretation. It has been argued that the delegated powers to the EU, and the available tools to enforce the common legislation, are comparatively strong in the EU (Abbott et al. 2000; Tallberg 2002; Tallberg and McCall Smith 2014). Others have nuanced this image and argued that the supranational institutions have strategic considerations that underlie their choices of initiating, or carry out measures against potential non-compliance (Fjelstul and Carrubba 2018; König and Mäder 2014). In terms of its available institutional mechanisms however, the EU system for enforcement is comparatively strong, which should generally decrease the concerns about non-compliance. The EU is also different from many other international systems for securing compliance, such as the WTO, in which compliance is secured by interstate mechanisms rather than supranational mechanisms (Tallberg and McCall Smith 2014). The cooperation problem with the structure of a prisoner's dilemma can in interstate systems be resolved by applying a tit-for-tat strategy towards states that do not comply (retaliation with authorized own non-compliance) (Poletti and De Bièvre 2016). Such retaliatory mechanisms, or other forms of unilateral safeguard or escape mechanisms used in many other international treaties, does not exist in the EU legal order (Phelan 2018). Such responses would therefore constitute infringements in themselves, which is costly if addressed through the EU's supranational proceedings.

The enforcement mechanisms available for different EU policy areas differ, but for regulatory decisions there are the ultimate hard possibility for the Commission to ask the Court of Justice (ECJ) to impose fines on member states that fail to comply with joint rules. Irrespective of these available strong mechanisms, member states still occasionally fail to comply with joint rules or decisions (Falkner 2016; Fjelstul and Carrubba 2018). In addition, in cases where compliance with EU laws are tested in national courts via preliminary references in the ECJ, it is not guaranteed that the national courts will actually abide by the rulings of the

ECJ (e.g. Conant 2012). This means that even if enforcement mechanisms are generally relatively strong at the EU level, the system has its limits and non-compliance continues to pose a problem. This apparent risk for non-compliance should exist for all decisions, and be acknowledged already when taking them.

The reciprocal relation between non-compliance and cooperation in the EU

While the EU system for securing compliance is thoroughly studied, the effects of non-compliance are less understood. Non-compliance is a central problem for the effectiveness of international regimes (Tallberg 2002), but it is also believed that the possibilities to enforce an agreement should factor in when actors decide whether to commit to it (cf. Poletti and De Bièvre 2016, 5). For instance, in the extreme case when no actor believes that others will comply with a decision that is about to be made, why should they bother making it? It is here therefore hypothesised that non-compliance has negative effects on the appetite for cooperation in a more general sense and that it thereby ultimately is a threat to the sustainability of international legal regimes such as the EU. The relation studied in this paper is hence between cooperation in two policy-making phases, and how anticipated non-cooperative behaviour (non-compliance) at the implementation phase affects cooperation at the decision-making phase.

Non-compliance in international cooperation is an effect of an enforcement problem that essentially stems from a lack of enforcement capacity of a centralised authority with a legitimate monopoly of violence. This is often understood to leave actors in a strategic structure of a prisoner's dilemma, in which defection from a joint agreement is associated with some short-term benefits that comes from free-riding², and provides incentives to not comply at the implementation phase (Fearon 1998). It highlights a well-recognised clash between short-term self-interested behaviour of defection and long-term rational behaviour of cooperation for the provision of a common good (e.g. Dawes 1980), which in the most pessimistic accounts would make international cooperation unlikely³. Yet, international cooperation sometimes both occur and is sustainable. The reasons for this are manifold, but has been argued to follow a selection

² Most issues that are dealt with in the international system can be modelled as this type of cooperation problem, with the possibility of free-riding by non-compliance for comparative advantage (for exceptions see Snidal 1985). EU decision-making have to a large extent also sought to limit the possibilities of free-riding, by addressing e.g. regulatory competition (Holzinger 2005; Holzinger and Sommerer 2011) or burden-sharing (Thielemann 2018). While this alters the payoffs of the game, it does not by necessity take away the incentives to (secretly) avoid compliance.

³ With this strategic structure, cooperation is predicted to be unlikely also if the parties are individuals, which is described as a collective action problem (e.g. Olson 1965).

effect in which states cooperate only when they will also be able to follow the joint rules (Fearon 1998). It is also an effect of institutional design, by which the enforcement problem can be mitigated by increasing the cost of non-compliance through different forms of institutional measures. In the case of the EU this means that the member states have delegated tasks of oversight and judiciary functions to supranational institutions as a way to demonstrate a credible commitment to sustained cooperation (Moravcsik 1998).

It has for long been noted that strong enforcement mechanisms are effective in securing compliance with joint rules, but also that they affect decision-making. In particular, strong enforcement mechanisms have been argued to increase the stakes at the decision-making stage, since they limit the possibilities of escaping from an agreement by not complying. This has been argued to make states more cautious when it comes to striking far-reaching or “deep” agreements that are capable of reaping the full extent of potential benefits that an agreement can generate (Downs et al. 1996), and it also risks prolonging the time it takes to reach agreement (Fearon 1998). In essence, when it is difficult or costly to escape agreements by non-compliance, which is the case in the EU, it becomes important to only make decisions that can be complied with. When a member state risks being unable to comply, and this is apparent already at the decision-making phase, it should therefore be predicted to generally decrease cooperation at decision-making by lowering the incentives to negotiate at all, and at best lead to continued negotiations and more shallow agreements (Fearon 1998).

This predicted relation between behaviour at the implementation phase and the policy-making phase is here understood to be reciprocal. In a general sense, this means that actors behave in a way where “good is returned for good, and bad for bad” (Keohane 1986, 8). A norm of reciprocity is often seen as facilitating cooperative behaviour among individuals and is especially likely in situations of iterated encounters and a long shadow of the future (Axelrod 1984; Ostrom 1998). But reciprocal norms can also reinforce non-cooperation, which is most clearly illustrated with the tragedy of the commons and overuse of common-pool resources (Hardin 1968). The generic prediction is that such negative reciprocity leads to suboptimal outcomes. In many situations, the implication of this is that non-compliance by one actor should be likely to spread, and make other actors less willing to comply too. But as have been argued above, non-compliance is costly in the EU and the member states should therefore have an interest in securing that agreements can be complied with already when they are taken. This means that mere expectations about an actor not being able to comply with a policy that is to be decided, i.e. a non-compliance risk, should make that actor less credible as a signatory party, and therefore decrease other actors’ willingness to actually take the decision, at least without

making adjustments (Fearon 1998, 279). This prediction is in line with literature on informal governance in the EU, where it is argued that when member states have difficulties with aspects of a proposed decision, they often demand certain flexibility by evoking a norm of discretion. Such problems emanate from a risk of causing disruptive domestic conflicts (which may cause non-compliance), and the flexibility demanded often means that decisions get postponed, or include provisions for derogation and thus more flexible application of rules (Kleine 2013). Respecting the interests of recalcitrant governments is hence a way of avoiding to force them into non-compliance (Moravcsik 2018, 1657). The reason for the governments to be accommodative to such concerns is again reciprocity, and the expectation that such favours will be returned (Johansson 2015; Naurin 2010).

Even if reciprocity in this way can help to generate cooperation and agreement, the content of that cooperation will inevitably be shallower, and thus less cooperative. Cooperation should be understood as a scale rather than category. In the context of Council decision-making, non-agreement will be the least cooperative outcome of a negotiation, but even when agreements are reached, they too can vary in their level of cooperation. As one extreme, a very shallow agreement contains no obligatory provisions, and/or are imprecisely formulated to essentially give the signatory parties a *carte blanche* to decide their own behaviour. This form of soft law can hardly be regarded as more cooperative than a non-agreement, and it makes it close to meaningless to assess compliance (Abbott et al. 2000, 414). Hard laws on the other hand, here understood as being obligatory and precise (Abbott et al. 2000), will in principle, *ceteris paribus*, always be more cooperative than soft laws in that they are unambiguous in implementation to avoid arbitrariness, and hence have better opportunities to live up to the purpose of laws as generating uniform behavior. This means that the discretion that is left for interpretation to the implementers of an agreement, which varies for different parts of any piece of EU legislation (e.g. Steunenberg and Toshkov 2009), will also determine its degree of cooperation. The introduction of a non-compliance risk to EU Council negotiations should hence be expected to have a negative impact on cooperation, and it can be understood as a negative effect of reciprocity. Negative reciprocity, at least in the relation between non-cooperation at the implementation phase and cooperation at the decision-making phase, is however empirically less understood in international politics⁴. The aim of the paper is therefore

⁴ One exemption is a study by Hafner-Burton et al. (2017), who have studied this relation in an experimental setting among US foreign trade officials, but focused on how the own state's risk of not complying with agreed rules affects the own preference for cooperation. They show that it decreases their own willingness to cooperate by signing a trade deal. Their focus is thus self-regarding when it comes to non-compliance risks, whereas the focus in this paper is other-regarding.

to contribute to the literature on the relation between implementation and decision-making in international politics, by a specific focus on whether the introduction of a non-compliance risk, and its associated strategic uncertainty, affects decision-making in the Council of the EU.

Hypotheses

The general prediction outlined above is that non-compliance should negatively affect cooperation already at the decision-making phase. The reciprocal nature of cooperation implies that actors, when having iterated encounters, will engage in mutual cooperation as long as there is no free-riding. Such positive collective action outcomes can be facilitated by communication and building of trust, which has been shown among individuals in local settings (Ostrom 1998). This is likely to be important also in group decision-making among agents. The Council of the EU, and the EU itself, is widely understood as an arena for negotiations where communication is a key component (Elgström and Jönsson 2000), and has often been described as an institution of consensus, conducive to building trusting relationships (Lewis 2005). As such, the environment is both well suited for, and likely to achieve collective action. It is also a decision-making environment where it has been shown that both diffuse and specific reciprocity is used to facilitate the identification of jointly beneficial agreements (Naurin 2015). Whether the reciprocal norms are having the opposite effect, where others' non-cooperation is awarded with lower cooperation generally is less understood in this context.

Negative reciprocity is widely recognized when it comes to micro-level behaviour among individuals (Ostrom 1998), and it is an inherent part of the often used tit-for-tat strategy in Prisoner's dilemma games between states in the anarchic international system (Axelrod 1984). The hypothesis is therefore that even in the generally cooperative environment of the Council of the EU, once non-cooperation (in the form of a non-compliance risk) is introduced it may cause disturbances to the cooperative spirit, and non-cooperation is therefore expected to be reciprocated. Based on the literature on negotiations in the Council of the EU, non-cooperative behaviour is here expected to primarily take the shape of more shallow agreements, but potentially also as an unwillingness to strike agreement.

H1: Information about an actor's non-compliance risk should decrease other negotiators' willingness to cooperate.

If the introduction of a non-compliance risk is important for whether negotiators choose cooperative strategies or not, it is also likely that the level of that non-compliance risk matters. In iterated games, it is often pointed out that individual responses will change between rounds based on observations about others' behaviour, primarily in the sense that actions are reciprocated based on notions of fairness or equal treatment (Keohane 1986; Ostrom 1998). Such equality finds its basis in the tit-for-tat strategy often used in Prisoner's dilemma games (Axelrod 1984, 187), which implies that a certain degree of non-cooperation should be retaliated to an equal extent⁵. This in turn means that if an actor's non-compliance risk increases, the other actors' appetite for cooperation should be expected to decrease to an equivalent extent.

H2: An increase in an actor's non-compliance risk should decrease other negotiators' willingness to cooperate.

A central controversy in research on non-compliance in the EU is how different levels of non-compliance can be explained (for a recent overview see Fjelstul and Carrubba 2018; and also Mastenbroek 2005). Two main groups of explanations have emerged from this literature. First, non-compliance has been argued to be a consequence of too high adaptation costs, that often stems from a misfit between new EU rules and existing domestic rules. This essentially means that there are administrative or financial constraints that hinder member states from complying with the joint rules (Duina 1997; Mbaye 2001). This can also be understood as a form of involuntary non-compliance, requiring assistance to the non-complying member states for capacity building. Such problems are generally understood to be best addressed with a management approach for compliance (Downs et al. 1996; Tallberg 2002). Second, others argue that non-compliance is better explained by looking at political factors in the member states, such as the resistance from domestic veto players (Haverland 2000) or government preferences (Treib 2003). Here, it is rather political preferences and potential political consequences that hinder member states from complying with joint EU rules. This can consequently be understood as a form of voluntary non-compliance, which instead is best addressed by forceful monitoring

⁵ The meaning of equality here refers to behavior and therefore the actual implementation rather than the relation between implementation and decision-making. It has also been argued that states might retaliate to a slightly lesser extent than the provocation, a form of limited provocability, in order to not escalate conflict and adventure any stability of cooperation (Axelrod 1984, 187). This yet implies that states should be sensitive to the scale of non-cooperation and adjust their response accordingly.

and effective sanctions, which is known as the enforcement approach (Downs et al. 1996; Tallberg 2002).

These outlined reasons for non-compliance are here believed to also be important for negotiators' responses to information about non-compliance risks. Political reasons for non-compliance can be expected to be more difficult to get understanding for compared to high adjustment costs or incapacities, and therefore also to a greater extent be punished by reciprocated non-cooperation. Political unwillingness to comply might also be more difficult to address than a lack of capacity due to its voluntariness (Fjelstul and Carrubba 2018), and non-compliance for political reasons might therefore also be more long-term. It has even been argued that the ultimate sanctions in the form of fines might merely work as a kind of "infringement tax" on the member states in such cases, a cost worth taking to avoid detrimental domestic political effects (Falkner 2016). In a sense, this makes political non-compliance more credible, and should therefore be expected to negatively affect decision-making cooperation to a greater extent than if the reason is high adjustment costs.

H3: If political reasons are given for a non-compliance risk, other negotiators will be less willing to cooperate compared to if the reason for the non-compliance risk is based on high adjustment costs as a form of incapacity.

Data and Operationalisations

This paper is focusing on if and how a non-compliance risk affects the process of negotiating agreements in the Council of the EU. The study objects are therefore the member state negotiators to a number of different Council preparatory bodies. These are often *de facto* decision-makers in the Council in that they do the preparatory work with legislation for their ministers, who in turn deal with the relatively few but contested issues that cannot be agreed at lower levels, and who also make the final and formal decisions (e.g. Häge 2008). The member state representatives in preparatory bodies are mandated to negotiate based on instructions from their governments and they exchange information about positions and their foundation with each other in a collective effort of exploring similarities and differences in the zone of potential agreements, and ultimately get closer to making a decision. One type of information that is expected to be relevant for these negotiations is the prospects of making decisions that in the end can be implemented in the member states.

The empirical analyses are based on empirical data from a telephone survey conducted with member state representatives to 11 of the Council's preparatory bodies⁶. The sample covers a broad range of policy areas, and includes both senior committees, such as Coreper I and II, and more junior working parties. The sample of preparatory bodies is made purposely to get a wide coverage of senior and junior committees, as well as different policy areas dealt with in the Council. The targeted respondents range from technical experts to ambassadors, but form a civil servant elite. The data was gathered between April and July 2018 and targeted 308 member state government representatives (28 member states x 11 preparatory bodies), of which 251 respondents participated in an interview, amounting to a response rate of 81 %. The response rates vary somewhat between the covered preparatory bodies (64-96 %) and member states (64-100 %). The survey is part of (and follows the model of) a series of surveys that have been conducted every three years since 2003, and in total consists of 1343 conducted interviews and a total response rate of 81 % (Johansson et al. 2019). The results reported in this paper is based only on the 251 respondents that participated in the 2018 survey round.

Operationalizations

The survey items included in this paper are two, aiming to test the outlined hypotheses. Both survey items are designed as survey experiments and utilize short vignettes with information about a risk for non-compliance, and the hypotheses will be evaluated based on the effects generated by these treatments. For both survey items, the information given to the respondents is randomly varied to test the different effects. Two points are worth noting about non-compliance and why the risk of it can be expected to be communicated in negotiations. First, non-compliance was earlier in the paper defined as absent or incorrectly transposed and/or implemented decisions, which is sometimes an obvious and deliberate choice, but can also be unintentional if it is based on different interpretations of joint rules. The interpretation of what constitutes non-compliant behavior can therefore vary between different respondents, and no explanation of non-compliance was given in the vignettes. However, the paper is not concerned with the effect of non-compliance as defined in any objective sense, but how perceptions about non-compliance shape the strategic considerations of member state negotiators. Second, given the argument made above that non-compliance can be a way of free-riding if it goes undetected,

⁶ The preparatory bodies covered are: Coreper I, Coreper II, Political and Security Committee (PSC), Special Committee of Agriculture (SCA), Economic Policy Committee (EPC), Politico-Military Group (PMG), Working Party on Tax Questions, Coordinating Committee in the area of policy and judicial cooperation in criminal matters (CATS), Working Party on Agricultural Questions, Working Party on Competitiveness and Growth, Working Party on the Environment.

it might seem counterintuitive that a negotiator would want to reveal that it faces a risk for non-compliance. In the EU context however, where the institutions to secure compliance are relatively strong, it is likely to be more beneficial to try to change the coordination point of a decision and thereby secure compliance, compared to the short-term payoff to extract from free-riding and non-compliant behaviour. The non-compliance risk is therefore understood to form a domestic constraint, which is signalled with the purpose of changing the coordination point, and thus get a better agreement for the signalling party (cf. Johansson 2015). Open information exchanges of this kind in the Council context are also in a more general sense understood as a mean to promote efficient bargaining (Moravcsik 2018, 1657-1658).

The first treatment is used to test hypothesis 2, and includes information about different levels of non-compliance risk without specifying why there is a risk for non-compliance:

*Imagine a scenario where one of the other member states signal that there is **[a slight risk – about 20 % – / a significant risk – about 50 % –]** that it will be unable to fully comply with the decision that is to be made. You are currently satisfied with the content of the decision, and the issue is of average importance to you.*

The levels of risk chosen for the treatment groups are somewhat arbitrary, and therefore worth some brief elaboration. A 50 % non-compliance risk has in other contexts been deemed realistic, yet high (Hafner-Burton et al. 2017). It has also been accompanied in this brief description with a wording that the risk is *significant*, as compared to a 20 % risk, which is described as *slight*. In designing the experiments it was crucial to make the descriptions realistic for the respondents, and higher risks than 50 % was in light of this deemed to potentially be exceptionally certain, whereas a lower risk than 20 % in turn perhaps would have been negligible for the respondents. A larger difference between the levels could have been beneficial for testing the hypothesis, but the levels set were, based on these reasons, deemed realistic and sufficiently different.

A second treatment was used to test hypothesis 3, and includes information about the reason for the non-compliance risk, while keeping the risk level constant at 50 % in both groups:

*Imagine a scenario where one of the other member states signal that there is a significant risk – around 50 % – that it will be unable to fully comply with the decision that is to be made because of **[high adjustment costs, either in administrative or economic terms / political pressure on the government, and potential political***

costs]. You are currently satisfied with the content of the decision, and the issue is of average importance to you.

The first hypothesis is tested by making within-treatment comparisons to look for variation in the level of cooperation based on the information about the non-compliance risk. The implication of this is that there is not, strictly speaking, any control group when testing this hypothesis, which also means that it cannot be established which level of cooperation that would be present if there were no risk for non-compliance. Whether such control group would offer a relevant point of comparison is however not obvious, given that negotiators would not have anything to react to unless some new information was brought to the table. The design is therefore deemed to make it possible to evaluate whether the respondents' instinct is to react to the information about a non-compliance risk by continued cooperation or not.

The question posed to the respondents for both scenarios aims to measure the dependent variable on cooperation. The question posed was related to three possible ways of behaviour, capturing various degrees of cooperation. The phrasings used were:

Based on this information, how likely would you say it is that you would act in the following three ways?

- 1. You would work for adjusting the decision to meet this concern, and thereby make it possible for the member state to comply.*
- 2. You would not work to incorporate this concern, since compliance is a domestic problem for the member state in question.*
- 3. You would seek to avoid taking a decision on the proposal.*

The scale used for the respondents is a symmetric likert scale varying from 0-10, where 10 means 'very likely', 5 means 'neither likely nor unlikely', and 0 means 'not very likely'. The three ways of reaction corresponds to a common threefold choice in negotiations, separating between (1) choosing the available terms, (2) further bargaining, or (3) to choose non-agreement (Iklé 1964). These generic forms of action have then been slightly adapted to the particular question of non-compliance risk, and to also realistically mirror situations that the negotiators face in the Council of the EU context.

These statements can in turn be understood to represent different forms and degrees of cooperative behaviour. Cooperation should in a first step be understood as aiming to find collective agreement. Statement 3 should therefore be understood as representing the least

cooperative behaviour, by referring to a completely reciprocal behaviour where the non-compliance risk is met with unilateral action rather than collective action. Statement 1 and 2 can in this light be understood as different forms of cooperative behaviour, but holding various degrees of ambition. While statement 1 might intuitively be understood to mean the most cooperative behaviour – listening to the information and go further than necessary to accommodate another member state’s concern – this will inevitably mean more shallow cooperation, which, if taken to its extreme, will approximate a non-agreement. Statement 2 in turn – continuing cooperation while disregarding others’ potential non-cooperation – can be seen as the staunchest and most ambitious form of cooperation in that it means cooperating even if there is a risk that others will free-ride (by not complying in the end). Statement 1 is in this sense less cooperative than statement 2, in that it implies a departure from what would have been agreed in the absence of a signalled non-compliance risk, likely resulting in a more shallow agreement (Downs et al. 1996, 383). This is further indicated by the final sentence of the two survey treatments, where the information is given that the respondent is currently satisfied with the content of the decision. Statement 2 will hence be regarded as most cooperative. In terms of expectations it should however be acknowledged that statement 1 is closer to the type of cooperative behaviour that is associated with the often discussed consensus culture of the Council (e.g. Lewis 2005; Naurin 2015) and associated informal governance practices (Kleine 2013). In sum, statement 2 is regarded as most cooperative, statement 1 as second most cooperative, and statement 3 as least cooperative. While some literature would argue that statement 3 is the most likely action when there are uncertainties about compliance (Fearon 1998, 279), the literature on Council decision-making would suggest that statement 1 would be the most likely course of action in response to a non-compliance risk.

Results

The results from the survey are discussed separately for treatment 1 (Table 1) and treatment 2 (Table 2), and their implications for hypotheses 2 and 3 will be discussed first, followed by the implications for hypothesis 1.

Table 1 shows the respondents’ responses to information about another member state’s level of non-compliance risks. The treatment mentioning a slight non-compliance risk of 20 % was given randomly to in total 135 respondents, and the treatment mentioning a significant non-compliance risk of 50 % was given randomly to 116 respondents. On the 0-10 scale used for the responses on the three different types of behaviour, there are only minor differences between

the two treatments, and none of them are statistically significant. The expectation here was that higher risks of non-compliance would trigger less cooperative responses, according to a reciprocal logic of equality. This essentially implies lower mean responses on statement 2, and higher mean responses for statement 1 and 3 in the group of respondents treated with the higher non-compliance risk. What the results instead show is that the treatment did not have any such effect on the respondents' likely behaviour. The respondents are hence here shown to be insensitive to the different levels of non-compliance risks assigned in these treatments. Hypothesis 2 is therefore not given any support in the survey data.

Table 1. Negotiators' responses to the treatments on different levels of non-compliance risks

	Slight risk (20 %)		Significant risk (50 %)	
	Mean	N	Mean	N
1. You would work for adjusting the decision to meet this concern, and thereby make it possible for the member state to comply.	6,30	135	6,12	116
2. You would not work to incorporate this concern, since compliance is a domestic problem for the member state in question.	3,76	135	3,72	116
3. You would seek to avoid taking a decision on the proposal.	2,59	135	2,85	116

Note: 'Imagine a scenario where one of the other member states signal that there is [a slight risk – about 20 % – / a significant risk – about 50 % –] that it will be unable to fully comply with the decision that is to be made. You are currently satisfied with the content of the decision, and the issue is of average importance to you. Based on this information, how likely would you say it is that you would act in the following three ways?' Scale (0-10), 10: very likely; 5: neither likely nor unlikely; 0: not very likely.

Table 2 shows the respondents' responses to information about the different reasons for the other member state's non-compliance risk. The risk level is held constant at 50 % between the two treatments. The treatment using high adjustment costs was given randomly to in total 124 respondents, and the treatment mentioning potential political costs was given randomly to 127 respondents. On the 0-10 scale used for the responses on the three different types of behaviour, there are also here only minor differences between the two treatments, and neither of these are statistically significant. The expectation here was that political reasons for the non-compliance risk would be met with less cooperative behaviour compared to a non-compliance risk for reasons of bureaucratic incapacities or high administrative burdens. Here, this means an expectation for lower mean responses on statement 2 and higher mean responses for statement 1 and 3 in the group of respondents treated with political reasons for the non-compliance risk. Neither for this treatment is there any statistically significant effect on the respondents'

indicated likelihood on the three statements, and their responses are instead insensitive to the different reasons for non-compliance. Neither hypothesis 3 is therefore given any support in the survey data.

Table 2. Negotiators’ responses to the treatments on different reasons for non-compliance risks

	Adjustment costs		Political costs	
	Mean	N	Mean	N
1. You would work for adjusting the decision to meet this concern, and thereby make it possible for the member state to comply.	6,10	124	6,22	127
2. You would not work to incorporate this concern, since compliance is a domestic problem for the member state in question.	3,77	124	3,69	127
3. You would seek to avoid taking a decision on the proposal.	2,64	124	2,95	127

Note: ‘Imagine a scenario where one of the other member states signal that there is a significant risk – around 50 % – that it will be unable to fully comply with the decision that is to be made because of [high adjustment costs, either in administrative or economic terms / political pressure on the government, and potential political costs]. You are currently satisfied with the content of the decision, and the issue is of average importance to you. Based on this information, how likely would you say it is that you would act in the following three ways?’ Scale (0-10), 10: very likely; 5: neither likely nor unlikely; 0: not very likely.

To evaluate hypothesis 1, it is necessary to make within-treatment comparisons, where the variation in treatment information is kept constant, and the responses to the behavioural statements instead can be analysed irrespective of the level or reason for the non-compliance risk. This can thus test whether *any* information about a non-compliance risk yield cooperative or non-cooperative responses.

When comparing responses within the treatments there are clear and statistically significant differences ($p < 0.05$) between the three statements in all four treatment groups. The pattern is however somewhat different from what was expected. As was argued above, primarily statement 2 represent cooperative behaviour, whereas statement 1 and 3 are versions of non-cooperative behaviour. Based on this, the expectation was that information about a non-compliance risk would make the respondents indicate the highest likelihood for statement 1 and 3, but lower likelihood for statement 2. The empirical reality looks at least partly different. The pattern is the same in all treatment groups, where the highest values are given to statement 1, second highest values are given to statement 2 and third highest values are given to statement 3. The likelihood indications for statement 3 in particular diverges from the derived expectation, coming out lowest in all treatment groups. Statement 1 in turn stands out as clearly receiving

the highest likelihood indications, and is, in line with the expectation, higher than for statement 2.

The low likelihood indications for statement 3 might in turn be a consequence of the EU negotiation machinery, where controversial proposals are rarely permanently dropped from the agenda, but can instead be given lower priority during certain periods of time, e.g. during particular presidency periods (Tallberg 2003)⁷. The general practice is instead that if the member states fail to strike compromises, the proposals will continue to engage them in negotiations, through the Council's preparatory bodies over sometimes long periods of time (Häge 2008). It is possible that this made the third statement insufficiently realistic and therefore representing a strategy less likely to be pursued. The results are in sum interpreted to lend some support for hypothesis 1, in that any information about non-compliance risks is met with higher likelihood indications for the less cooperative statement 1 compared to the most cooperative statement 2, but no support for hypotheses 2 and 3.

Discussion and Conclusion

This paper deals with what effect non-compliance, or the mere risk thereof, has on cooperation in the European Union. While there is a general understanding that non-compliance is a threat to the effectiveness of international organizations in general, it is obvious that it is also threatening the legal order that the EU is built on. In addition, it has here been hypothesised that non-compliance might not only be reciprocated with non-compliance, but that it also should decrease the appetite for further collective action and joint decision-making. That is, if it cannot be trusted that decisions will be complied with, why bother making them in the first place? This reciprocal relation between cooperation in the implementation phase and cooperation in decision-making is tested in the paper. Given that previous research on the EU has focused extensively on non-compliance, and in particular what explains it, it is surprising how little we know empirically about the effects on non-compliance, and in particular when and how non-compliance affects cooperation in the EU.

The results presented above are based on survey data from telephone interviews with 251 member state representatives to EU Council preparatory bodies, and indicate that information about a non-compliance risk makes respondents continue cooperation, but in a more shallow

⁷ In some policy areas it has, however, also been observed some stagnation in policy output (e.g. Hayes-Renshaw and Wallace 2006, 311), which would be a much larger effect that is more likely to come as a consequence of e.g. widespread factual non-compliance.

way, by trying to help and accommodate the concern of the member state that risk facing compliance problems. This sides with arguments from previous studies on informal governance in the EU (Kleine 2013). Only to a lesser extent would the member state representatives opt for the most cooperative choice of disregarding non-compliance risks, and risk facing the costs of own compliance when others free-ride. The survey treatments included were used to test if the level of non-compliance risk, and the reason for the non-compliance risk, affected the choices made, but they were shown to not matter. For the overall problem of the paper, this yet means that information about a non-compliance risk is included in the considerations underlying decision-making in the Council. Member state negotiators are not as willing to make fully cooperative agreements if it comes with the cost of other member states free-riding through non-compliance. Consequently, it also means that non-compliance negatively affects cooperation in the EU, but not by complete abolishment of collective action, but instead by adapting to the concerns raised by softening decisions, leading to lower cooperative ambition.

Two aspects of the design of the survey and questions that might affect the results of the paper are worth noting: first, that the questions focus on the immediate responses to information about non-compliance risks, and second, that they focus on a future risk rather than factual non-compliance. On the first point, reciprocal norms or behaviour are often described to be diffuse and/or specific (Keohane 1986). What is tested here is whether specific reciprocity is applied by negotiators in the given situation where they receive information about a non-compliance risk. Specific reciprocity has been shown elsewhere to be important in Council of the EU negotiations, as a way to facilitate decision-making by exchange of support on issues within proposals that member states find salient and problematic to various degrees (e.g. Johansson 2015). But also diffuse reciprocity has been shown to be present in the Council for that reason. Diffuse reciprocity as a cooperative norm is associated with some more general goodwill, as compared to specific reciprocity in which exchanges are specified to specific actors. When diffuse reciprocity applies, the exchanges are not by necessity equal, and the timing of them are not specified (Naurin 2015). This in essence means that diffuse reciprocity is imprecise and long-term. The flip-side of diffuse reciprocity as a mechanism to generate cooperation is that it might also be applied to the negative stimuli of repeated non-compliance, or signals about non-compliance risks, and create “badwill” for actors in negotiations. This could thereby have effects that are not visible in the survey data presented here. Any such negative diffuse reciprocity with long-term effects on cooperation might be just as important for the sustainability of European collective action.

The second point raised above is that the survey questions only focus on risks, and not factual non-compliance. This might matter as it introduces uncertainty to the game. Member state negotiators act on delegation, and are not themselves in control of the implementation phase and hence policy compliance. This implies that there is always a risk for involuntary non-compliance that need to be considered by Council negotiators. The risk levels used in the treatments were deemed high enough (see also Hafner-Burton et al. 2017), and sufficiently different from each other to yield differences in responses. However, if the treatments included larger differences, and generally higher risk levels, it might have been possible to observe larger, and statistically significant, differences in responses. It could also matter that no factual non-compliance was included in the study. Especially when it comes to the option of working to avoid taking a decision, this might be perceived as a rather harsh type of action until any non-compliance has been factually observed, or can be expected with even greater certainty. Observed non-compliance within a policy area might instead have more substantial effects on trust within the group of negotiators, and thereby change a generally cooperative sentiment. In addition, factual non-compliance might spread, and as such effectively undermine the jointly agreed rules.

Given this, further research should focus also on long term effects of non-compliance and signals about non-compliance risks, but also to include factual non-compliance, whether it spreads, and how it affects the appetite for further decision-making and collective action within the EU.

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