An impartial guardian or a political entrepreneur?

A typological theorisation of the European Commission's toleration of noncompliance

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Abstract

This article aims to explain the under-researched phenomenon of why the European Commission (the Commission), as the 'guardian of the Treaties', tolerates member states' noncompliance with the EU law. As the theoretical basis, I assume that the Commission is an agent-trustee hybrid when enforcing the EU law. Specifically, the two institutional facets correspond to two distinct motivations of enforcement leniency: a political agent is to advance the Commission's legislative agenda and a judicial trustee is to maintain the stability of the EU legal order. As a consequence, the interactions of these two motivations lead to a typology of toleration of noncompliance (ToN), which consists of altruistic ToN, egocentric ToN, active ToN, and passive ToN. In order to illustrate the four ideal types of ToN, this article zooms in on four terminated infringement proceedings concerning matters of pharmaceutical parallel export, defence offsets, migration policy, and car toll scheme respectively. Findings of this research contribute to scholarly discussions of the nature of noncompliance and the normative quality of ToN.

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1 Introduction

The European Union (EU) is widely recognised as 'a community based on rule of law', and its legal order is 'the backbone that holds the EU together' (Kelemen *et al.* 2020). To guardian the EU order, the Commission has been entrusted by EU treaties the sole authority to launch so-called infringement proceedings against member states that fail to comply with their legal obligations (Article 258 and Article 260, Treaty on the Functioning of the EU, TFEU).

Contrary to the usually acclaimed image of a relentless and meticulous guardian of the EU law, an emerging group of literature unmasks an unfamiliar facet of the superrational enforcer that the Commission not only fails to rectify the alleged noncompliance but even deliberately gives some slack to member states in question (Hartlapp and Falkner 2009; König and Mäder 2014; Fjelstul and Carrubba 2018; Kelemen and Pavone 2021; Cheruvu 2022). This particular mode of strategic enforcement behaviours of the Commission is referred to in this research as 'toleration of noncompliance' (ToN), [1] and this article aims to explain *why does the Commission purposely tolerate noncompliance of EU law by member states?*

Despite the increasingly academic acknowledgement of ToN, it is surprisingly that we know hardly anything about how we should account for it (an notable exception, see Kelemen and Pavone 2021). To a large extent, the gap of knowledge to make of ToN boils down to empirical and theoretical obstacles. From the empirical perspective, enforcement communications and decisions are managed by the Commission with absolute confidentiality, and only in occasional cases is skeletal information on final enforcement decisions disclosed by the Commission (Prete 2016). Adding to that, Commission officials have incentives to sugar-coat their enforcement leniency or even disguise it as restored compliance. Thus, these two factors together make ToN conceptually ambiguous and empirically near invisible. Naturally, it is challenging to identify concrete cases of ToN, let along trace the actual rationale behind or distinguish them from other easily confused cases like 'amicable settlements' and 'restored compliance'.

From the theoretical aspect, the majority of the existing enforcement studies focus on factors that are national-specific or sector specific (Börzel 2021). Surprisingly, the Commission, as the central actor in the enforcement bargaining game, is largely neglected from these theoretical accounts. And for the few studies that approach ToN from the perspective of the supranational guardian, it is still explicitly or in explicitly assumed as a political agent, whose enforcement motivation is mainly to pursue its own policy agenda. In simple words, the institutional features of the Commission are not sufficiently discussed by the existing scholarship.

To overcome the empirical obstacle, this article deems it imperative to clearly define ToN, which enable scholars to empirically locate cases of ToN by capturing its defining features. In this article, ToN is recognised as *a conscious decisions of the Commission to officially terminate the enforcement procedure when the alleged noncompliance remains unrectified and is still considered by the Commission as illegal.* In this way, ToN can be legally and empirically

[1] In this article, terms such as 'enforcement leniency', 'enforcement forbearance', 'enforcement inaction', and 'nonenforcement' are used interchangeably with ToN.

differentiated from concepts such as 'deliberate delayed enforcement', 'amicable settlements', and 'restored compliance'. As the case of 'deliberate delayed enforcement', even if the Commission informally grants the noncompliant member stats with a period of grace, it would still not be qualified as a case of ToN due to its pending status.

As a preliminary attempt to overcome the theoretical obstacle, this article provides a typological theorisation of ToN. As the theoretical basis, this research assumes the supranational guardian is a hybrid institution of a political agent and a judicial trustee. For the former institutional facet, the motivation of enforcement leniency is to advance legislative agenda of the Commission; for the latter institutional facet, the motivation is to safeguard the stability and functioning of the EU legal order. While the two motivations seem to rely on incompatible logics of delegation, I argue that they are actually mingled in the day-to-day enforcement practices of the Commission. Consequently, interactions of the two motivations result in four ideal types of ToN, namely altruistic, egocentric, active, and passive ToN.

To illustrate the feasibility of the proposed typology, this research further zooms in on four terminated infringement cases respectively, which are all verified as positive cases of ToN. As a typical example of altruistic ToN, the case study of pharmaceutical parallel trade shows that the Commission tolerated export restrictive measures of the Slovak government to muddle through a litigation dilemma caused by inherent deficiencies of EU pharmaceutical regulatory framework. By contrast, the case of egocentric ToN with regard to defence offsets reveals that enforcement leniency was exploited by Brussels as a *quid pro quo* for Prague's alignment with the Commission's policy agenda of integrating the European defence market. By combing logics of altruistic and egocentric ToN, the Commission's inaction towards the degrading treatment of migrants by the Italian authorities is an example of active ToN. In this case, the enforcement inaction against Italy is shown to have been both an inevitable choice to cope with the inherent flaws of Common European Asylum System (CEAS) and a gesture of goodwill to strive for Rome's legislative support for the Commission's reform plan of the CEAS. With regard to the last variant of passive ToN, the Commission gave Berlin some enforcement slack over the controversial road charge scheme with an aim to palliate the risks of an imminent schisming of the German coalition government, albeit unsuccessfully.

Findings of this research lead to several theoretical implications. Firstly, the proposed definition and typological theorisation of ToN are proved to be effective and valid. Specifically, four types of ToN demonstrate that enforcement forbearance does not follow a singular causal logic. Consequently, the normative quality of an individual case of ToN needs to be assessed against the specific legal and political context in a case-by-case manner. Secondly, these insights also open up new research terrains of ToN concerning the exact conditions of individual variants, and their relative empirical importance in the universe of ToN.

In the reminder of this article, I firstly survey relevant studies in disciplines of IR and European studies to inform theoreisation of ToN. The theoretical section introduces the basic assumption of the supranational guardian, its enforcement motivations, and the typology of ToN in sequence. The fourth section conducts four illustrative case studies to

trace the causes of individual variants of ToN. The last section summarises the main findings, discusses the broad implications, and proposes suggestions for future research.

2 ToN: a widely acknowledged but under-researched phenomenon

ToN, or enforcement leniency, is not alien to scholars of IR or European studies. In the IR discipline, the phenomenon of purposeful nonenforcement receives increasing attention from scholars of international development and IOs (Simmons 2010; Zimmerman 2011). For instance, the theory of forbearance developed by Alisha Holland (2015; 2016) argues that enforcement forbearance entails distributive implications. By way of targeted nonenforcement as a means of hidden resource transfer, politicians in developing countries can reap electoral support from poor constituencies. Moving the research scene further towards the international stage, IO scholars posit that nonenforcement of international treaties could also be a designed feature of international institutions, albeit informally. Specifically, the moribund enforcement mechanism can keep powerful member states on board by granting them the legal privilege of 'licensed' noncompliance (Stone 2011), or enabling contracting parties to reap reputational benefits from domestic audiences (Marcoux and Urpelainen 2013).

Zooming in on the EU, enforcement forbearance is also present as a ubiquity, and has been widely recorded by the compliance literature (Mendrinou 1996; Mbaye 2001: 268; Falkner *et al.* 2005; Hartlapp and Falkner 2009: 292–293; Toshkov 2010; Börzel 2021: 22–23).

But given that ToN is a widely acknowledged property of the EU legal order, it is surprising that only a few studies directly investigate this issue and provide comprehensive explanations. By virtue of game-theoretic models, some scholars depict the Commission's enforcement action or inaction as a result of complex cost-benefit calculations (e.g., Steunenberg 2010; König and Mäder 2014; Fjelstul and Carrubba 2018). Although these studies do not provide a direct answer to ToN, they identify a group of crucial detriments of the Commission's enforcement decisions, including the likelihood of enforcement success, political attitudes of member states, and policy preference of the Commission. Based on these factors, scholars can speculate with confidence the possible reasons behind ToN. Unlike such game-theoretic models which treats ToN as discrete decisions, recent research by Kelemen and Pavone (2021) claims that enforcement forbearance represents a longitudinal strategy of the Commission leadership. Through extensive interview evidence, the authors demonstrate that enforcement forbearance had been strategically deployed by the Barroso and Juncker Commission to fend off the rising politicisation of EU politics and to rekindle political support of member states.

Outside of the above academic endeavours to offer a holistic explanation of the Commission's enforcement activities, more insights into ToN have been generated by enforcement literature focusing on specific policy areas. In the case of the rule of law saga, Closa (2018) explains that the Commission's reluctance to activate Article 7 TEU against Hungary was predominantly because it failed to obtain the support of the Council, which echoes the argument of 'the likelihood of enforcement successes'. Furthermore, Emmons and Pavone (2021) argue enforcement inaction towards the constitutional breakdowns of Poland and Hungary is the results of a 'rhetoric strategy' coordinately deployed by the

Commission and other political institutions through the mobilisation of rhetorical theses such as 'jeopardy', 'perversity', and 'futility'. When it comes to enforcing *acquis* of the Economic and Monetary Union (EMU), van de veer and Haverland (2018; 2021) find that the Commission's enforcement activities follow the logic of 'reputation-seeking'. Apart from underenforcement, the Commission is even found to over-enforce EMU's *acquis* to signal its regulatory resolve to 'frugal member states' and thus to consolidate its supervising reputation. And for the policy area of migration and asylum, Schmälter (2018) argues that the Commission is generally reluctant to launch infringement proceedings concerning migration polices. This is particularly the case when other important agendas are pending for the approval of member states.

To be fair, literature that explicitly touches upon the phenomenon of ToN is very limited, regardless of the disciplines of IR or European studies. Yet, if scholars broaden the horizon beyond enforcement of law, the underlying concerns of ToN actually resonate with several other related topics.

If one reduces ToN to mere discrepancies between legal prescriptions and actual enforcement practices, we may find that enforcement leniency shares some core features with theories of 'efficient breaches' of international law (Posner and Sykes 2011) and 'informal governance' (Helmke and Levitsky 2004; Kleine 2014). As it literally means, 'efficient breach' theory argues that compliance is not always efficient, and that deviation from legal requirements should be possible at an appropriate price. The reasons why nonenforcement can be 'efficient' are diverse: it could be that the underlying body of law is inefficient, or the hope of self-enforcing cooperation is unrealistic. Similarly, the theory of informal governance argues that political uncertainty usually generates unmanageable domestic pressure on a specific member state and forces said state to defy the formal rules. In simple words, the excessive concentration of adjustment costs necessitates accommodation by other member states through the collective departure from the formal rules.

Additionally, if ToN is even more broadly recognised as a last resort to cope with a difficult political or legal situation, then ToN may also bear on scholarly discussions of 'emergency politics' (White 2015; Kreuder-Sonnen 2019). These two themes commonly illustrate how extra-legal measures such as ToN are deployed by international authorities to fend off imminent threats.

How do findings of the rather limited literature inform the current research? From the *theoretical* perspective, institutional characteristics of the Commission are not sufficiently taken up by the existing compliance literature. Quite the opposite, the overwhelming majority of these studies focus on explanatory factors that are pertinent to member states, policy sectors, types of legal acts, etc. (for a comprehensive review, see: Treib 2014; Börzel 2021). However, if we consider that the official data on infringement proceedings is more of the Commission's reaction to perceived noncompliance rather than noncompliance *per se* (Thomson 2009: 293; Hartlapp and Falkner 2009), it is even more puzzling that the Commission, as one of the key actors in the enforcement bargaining process (Tallberg and Jönsson 2005), is largely neglected by the compliance literature (Smith 2016: 59).

More importantly, even for the rather small group of studies that explicitly theorise the Commission's enforcement forbearance, they present a common bias, which assumes the Commission as a political agent or entrepreneur. In essence, this monolithic view of the Commission, which follows the classic P-A approach, recognises enforcement leniency as a result of institutional power and preferences of member states (e.g., Closa 2018; Fjelstul and Carrubba 2018: 438), or the Commission's self-interests in reputation seeking, policy pursing, competence creeping, etc. (e.g., Steunenberg 2010; Schmälter 2018; van der Veer and Haverland 2018; Kelemen and Pavone 2021; Cheruvu 2022).

However, the monolithic view of the Commission has been increasingly challenged by some recent research which delves into the internal dynamics and position-formation of the Commission (Hartlapp *et al.* 2014; Kassim *et al.* 2013; Rauh 2016). These studies find that the Commission is better described as a multi-organisation, in which different types of internal dynamics co-exist, interact, and compete with each other. As a consequence, a multifaceted Commission and its different incentives should also be taken into account by the compliance literature.

From the *empirical* and *methodological* perspective, evidence at the case-level is much needed for the study of ToN, which is still in its theoretical infancy. This is primarily because the confidentiality of infringement procedure and the sensitive nature of ToN preclude scholars from quantitively identifying ToN, let alone attributing concrete incentives to individual cases of ToN in a large scale (Krislov *et al.* 1986: 73; Falkner *et al.* 2005: 204–205). Even for the few studies with quantitative evidence, they do not directly approach ToN, but instead utilise the declining and protracted infringements as indirect proxies of ToN(Kelemen and Pavone 2021; Cheruvu 2022). Secondly, if enforcement incentives of the Commission, as discussed above, are better assumed as multifaceted, case-based evidence also contributes to identifying concrete and diverse incentives behind ToN, which are crucial for its theory-building (George and Bennett 2005: 20–21).

To conclude, ToN, or supranational forbearance, is a bourgeoning topic of the compliance literature. Both multifaceted nature of the Commission and the theorisation gap of ToN require scholars to approach it with an inclusive manner both theoretically and empirically. In the following section, the paper presents a preliminary attempt for a comprehensive theory of ToN.

3 Theorizing ToN

In order to provide a comprehensive theory concerning ToN, this section starts by proposing a basic assumption of the institutional nature of the Commission. Based on the proposed assumption, motivations of the supranational guardian are further specified. Lastly, interplays of the different motivations lead to a typology of ToN, which forms the theoretical core of this research.

3.1 The basic assumption: the supranational guardian as an agent-trustee hybrid

As reviewed in the previous section, most of the pioneer studies of enforcement forbearance share the assumption that the Commission is *a political agent* when enforcing the EU law. According to the generic P-A model, the principals delegate certain decision-making authority to the agent, in expectation of enhancing efficiency of rulemaking,

acquiring technical expertise, or avoiding taking blame for unpopular policies (Kiewiet and McCubbins 1991; Hawkins *et al.* 2006: 7). However, due to information asymmetry and incongruence of interests, the agent might take advantage of the delegated authority to strategically pursue its own interests at the cost of the principals (Pollack 2003; Tallberg 2003: 20). To mitigate this risk, the principals usually craft a series of controlling measures, including monitoring, rewards and sanctions (McCubbins and Schwartz 1984; Moe 1984). Largely following the standard P-A model, these pioneer studies theorise Commission's enforcement leniency as response to member states' preferences ('control by the principal') or as means of advancing its self-interests at the expense of its mandate ('the agent loss').

Without intending to refute the perspective of the political agent, this research holds that the inherent requirement of the Commission's legal mandate make the supranational prosecutor a more appropriate candidate for *a judicial trustee*. In the standard trusteeship, the purpose of delegation is not efficiency-enhancing, which is the core function of an agent in the standard P-A model. Instead, the delegation of authority to a trustee is aimed to cope with the so-called 'time-inconsistency problem', namely by contracting parties' incentives to renege on their long-term commitments for short-term benefits (Majone 2001; Thatcher and Sweet 2002). To this end, trusteeship necessitates a quasi-complete autonomy of the delegated actor (the trustee) and the prohibition of political interference by the delegating parties (Alter 2008; Alter 2013; Stone Sweet and Brunell 2013). In this regard, the central preoccupation of the delegating parties, compared with that in the standard P-A model, is no longer to effectively monitor and control of the delegated actor. By contrast, the trustee needs to be independent of and unresponsive to the instructions of delegating parties and only be loyal to its official mandate (Lettanie 2019). Here, non-majoritarian institutions such as international courts or central banks provide typical examples. In essence, a trustee is distinct from an agent in three essential aspects: purpose of delegation, margin of discretion, and control mechanism (see Table 1).

Table 1 Conceptual distinction between an agent and a trustee

	An agent	**A trustee**
Purpose of delegation	Efficiency-enhancing	Credibility-enhancing
Margin of discretion	Restricted	Quasi-complete
Control by delegating parties	Strong	Weak

Viewed against the two divergent logics of delegation, especially against the three aspects above, the Commission, as 'the guardian of the Treaties', is an ideotype of a judicial trustee than a political agent. Firstly, the judicial duty of the Commission is primarily designed to battle against member state's time-inconsistent preferences. Specifically, article 17 of TEU stipulates that 'the Commission shall be completely *independent* …, [its members] shall *neither seek nor take any instructions* from any government or other institution'. In other words, institutional independence and political neutrality of the Commission are constitutionally guaranteed. Secondly, the Commission enjoys an almost unfettered enforcement discretion in deciding whether, when, and how to institute infringement proceeding against suspected member states (Prete 2016: 38). From the aspect of control by delegating parties, it also

means that member states have no formal authority over the Commission' enforcement decisions.

Even if the above has demonstrated that the supranational monitor of the EU law is akin to a judicial trustee in the *conceptual* dichotomy between agency perspective and trusteeship, this research still believes the Commission is best to be assumed as *an agent-trustee hybrid*, especially in terms of its *practical* daily operations.

The basic assumption of a hybrid institution is not groundless. The interactions between the logic of a political agent and that of a judicial trustee are fundamentally shaped by institutional features of the Commission at different levels. At the *macro* level, the Commission is a multi-organisation entrusted with diverse mandates (Hartlapp *et al.* 2014: 299). Apart from the judicial mandate to monitor the application of EU law, the Commission is also delegated other political and administrative tasks, including initiating legislative proposals, providing external representation in negotiations, and implementing the EU law, etc. (Cini 2015; Nugent and Rhinard 2015; Costa and Brack 2018). These different tasks always generate conflicting demands within the Commission. Therefore, rather than switching hats when performing different mandates, the Commission constantly mixes different behavioural logics when making decisions (Franchino 2002; Franchino 2007; Hartlapp *et al.* 2014: 300).

At the middle inter-service level, the modern policy issues are rarely confined to specific policy sectors. In most cases, a single policy issue stretches over several policy sectors. It then generates deviating policy positions among the Commission Services. Ultimately, the Commission's legislative or enforcement decisions rarely follow a single piece of sectoral logic, but are aggregations of various sectoral-based views (Hartlapp *et al.* 2014; Rauh 2016). It is at this *meso* level that political considerations permeate into the mechanistic logic of legal enforcement.

Even at the *micro* level of individual Commission Service, its organisational setup mixes enforcement logics with other political and administrative logics. Within most of the Commission Directorates-General (DGs), the same policy department that formulates a specific legislative proposal is also in charge of its monitoring and enforcement (see Appendix). Thus, different behavioural logics have been intermingled and internalised by the Commission officials at the administrative level into their day-to-day policy choices (Wille 2013).

3.2 Motivations of the supranational guardian concerning ToN

Having demonstrated that the Commission as the supranational guardian is best to be assumed as a hybrid institution, it is still necessary to specify what exact enforcement motivations will derive from the institutional facets of a judicial trustee and a political agent, respectively.

As to the facet of a judicial trustee, the predominant motivation of the Commission's enforcement leniency is expected to safeguard *the functionality and the stability of the EU legal order*. As explained by the stylised trusteeship model, a trustee is obligated to be loyal to its mandate. In the case of the Commission, it has been mandated by Article 17 of TEU to 'promote the general interests of the Union and take appropriate initiatives to that end'. If viewed from the Commission's judicial responsibility only, the 'general interests of the

Union' are best represented and served by the well-functioning of the EU legal order (Stone Sweet 2004). After all, member states' commitments to the integration project are embedded in the hierarchical EU legal order, and that legal order is the backbone that holds the EU together (Kelemen *et al.* 2020). It is through this transnational legal order that cross-border movements are catalysed and guaranteed, cooperative benefits are materialised and effectively distributed, and transnational disputes are fairly adjudicated and amicably settled (Sweet and Sandholtz 1997).

However, even if the well-functioning of the EU legal order is comprehensible as a critical consideration of the supranational guardian, it is still counter-intuitive how enforcement leniency can serve this aim? A quick answer to this puzzle is that the selective enforcement is not only practically inevitable, but even legally indispensable. To explain this inevitability, some legal scholars develop the thesis that law has *inherent limits* regarding what it can achieve (Fuller and Winston 1978; Lowe 2015: 15). For instance, scholars of international law argue that the adjudication may not be the best way to solve mega-political disputes (e.g., Hirschl 2008).[2] Echoing this view, some scholars of EU law advocate that the degree of judicial enforcement needs to be appropriate, possibly by being evaluated against the nature of interests to be enforced (Harding 1997: 15–16; Prete 2016: 349). In this regard, some even provocatively conclude that selective enforcement is a basic element of a good enforcement policy (Rawlings 2000; Rawlings and Harlow 2006).

If we accept the thesis of inherent limits of law that enforcement leniency, at certain circumstances, is inevitable and even desirable, the ensuing question is what exactly these 'circumstances' refer to in practice? In what follows, I present three concrete scenarios where the enforcement of EU law might reach its functional limits and ToN is needed to safeguard the stability of the EU legal order. It is necessary to note beforehand that the proposed scenarios are by no means intended as exhaustive, and they are essentially illustrative examples, which are expected to help researchers grasp the possible manifestations of functional limits of law in practice.

The first scenario is vertically *jurisdiction overlap* between EU law and national law. By definition, it refers to situation where legal controversies are inextricably linked to both national and EU regulatory frameworks. As a result, the exercise of national jurisdiction may infringe EU law, and what is seemingly an infringement of EU law may actually have its roots in unharmonised national policies (Andenas 2017). The second scenario is horizontally *imbalanced allocations of legal responsibility* among member states. Here, the main controversy is not due to the asynchronisation of the EU rules and national ones. Rather, it is rooted in some loopholes of the EU legal framework itself, which result in disproportionate compliance costs on a specific group of member states. A case in point is that the imbalanced EMU has imposed disproportionate adjustment costs to the Southern European States (Grauwe 2020: 237). The third scenario is *norm collision*. This occurs when political and legal actors have difficulties in deciding which policy norm should be prioritised, and how said conflicting norms should be balanced. The most prominent example is the tension between market freedom and other public goals (e.g.,

[2] By definition, 'mega-politics disputes' involve 'substantive issues that deeply divide societies such that one can predict that at least on important social group will be upset by the outcome adjudication' (Madsen and Alter 2022).

public health, the protection of environment) embedded in the EU internal market (Scharpf 2010; Garben 2017).

When it comes to the facet of a political agent, this research follows the widely accepted argument that the primary motivation of the Commission's enforcement leniency is to *advance its legislative and policy agenda*. Possessing formal competence in legislative initiation, policy implementation, and legal enforcement, the Commission is the only EU institution that actively participates in all stages of the policy circle. This comprehensive involvement provides the Commission with an unparalleled advantages to synergise dynamics of different policy stages to its benefits. For example, the Commission is known for selectively picking up case laws of CJEU to strengthen its legislative bargaining positions. Additionally, scholars in recent years also bring the strategic interplay between enforcement and legislative activities to the fore (Schmidt 2000; Kelemen and Pavone 2021). Among others, Sussanne Schmidt (2018), Moritz Weiss and Blauberger (2016) have illustrated through concrete case studies that the Commission could shift the bargaining situation in the Council to its benefits through targeted enforcement against opposing member states. In this way, the Commission imposes its preferred policy on member states by ways of supranational legislative law-making.

While agreeing with the above thesis that selective enforcement can help the Commission realise its legislative agenda that are otherwise politically disagreeable in the Council, this research further argues that the Commission could equally advance its policy agenda without recourse to supranational law-making (Seikel 2014). In other words, the Commission is expected to be able to directly force individual member state to align its national policy with policy agenda of the Commission through targeted enforcement. Taken together, no matter through supranational legislative law-making or national law-making, this research argues that enforcement leniency works as a legal *quid pro quo* to recalcitrant member states for their policy alignment with the Commission.

3.3 A typology of ToN

The previous two subsections have elaborated in sequence the basic assumption of the institutional nature of the supranational guardian and its endogenous motivations. The following illustrates how endogenous motivations of the supranational guardian generate four Weberian ideal types of ToN (see Table 2).

Table 2 Four ideal types of ToN

		To advance legislative and policy agenda (a political agent)	
		Yes	No
To safeguard the stability of the EU legal order (a judicial trustee)	Yes	*Active ToN* (Type III)	*Altruistic ToN* (Type I)
	No	*Egocentric ToN* (Type II)	*Passive ToN* (Type IV)

a) *Type I: Altruistic ToN*. It describes the situation where the Commission tolerates national noncompliance solely to safeguard the stability and functioning of the EU legal order. As elaborated in the previous subsection, inherent limits of the EU legal order render strict enforcement by the Commission undesirable or even damaging. For instance, in cases of imbalanced allocation of legal responsibility, noncompliance is just a symptom of systematic flaws in the EU legal order. In this circumstance, a single-headed enforcement against noncompliance caused by such a deficiency of the EU legal order might ultimately upload the legal controversies to the CJEU and place the Court in *a litigation dilemma*. On the one hand, if the Court disregards the deficiencies of the legal order and maintain its mechanical interpretation of the flawed legal rules, a litigation success for the Commission is highly likely to entail adverse political ramifications within the convicted member state and in turn may compromise the diffuse legitimacy of the EU legal order in general (Blauberger *et al.* 2018). On the other hand, if the Court departs from the established legal reasoning and gives slack to the recalcitrant member state, the judicial turnaround might mark an influential precedent that paves the way for further compromising the coherence and the consistency of the established legal reasoning (Schmidt 2012: 10). All in all, in the case of a litigation dilemma, it makes little political and legal sense to push the recalcitrant member state and the EU legal order beyond their limits. On the contrary, ToN is a short-term legal palliative which prevents local legal controversies from erupting into systematic political crises that shake faith in the EU legal order.

b) *Type II: Egocentric ToN*. It denotes the enforcement leniency with which the Commission only aims to promote its own legislative and policy agenda. Largely corresponding to the P-A model, the Commission in this specific case is more akin to a political entrepreneur which aims to maximise its self-interests through competence-creeping or policy-seeking. Specifically, drawing on the thesis developed by Susanne Schmidt, this research holds that the Commission can wield its enforcement authority as a legal coercion to strengthen its bargaining position against the opposing member state. In this regard, ToN is offered as a legal *quid pro quo* to the recalcitrant country for its support of the Commission's policy agenda. Moving beyond the existing thesis, the present research further argues that the Commission's policy agenda can be realised through not only supranational law-making, but also unilateral policy change of individual member states. If we leave aside the difference in the two strategies, egocentric ToN in essence represents the covertly political facet of the supranational guardian. As rightly pointed out by Pavone and Kelemen (2021: 30), the Commission in this scenario 'partially sacrifices its duty as the "guardian of the Treaties" to resuscitate the support of member governments and safeguard its political rule as the "engine of integration"'.

c) *Type III: Active ToN*. Largely integrating the logics of altruistic and egocentric ToN, active ToN represents the variant where the Commission embraces enforcement forbearance for the dual aim of safeguarding the stability of legal order and pushing through its policy agenda. Same as the case of altruistic ToN, deficiencies in a legal order put the Commission in a litigation dilemma. To alleviate, if not completely solve, the legal controversy, enforcement leniency is a 'painkiller' for the supranational

guardian. But simultaneously, inherent deficiencies of legal order might also generate a window of opportunity for the Commission to overhaul the deficient legal order. In this regard, the Commission can not only trade forbearance for the political support of the specific recalcitrant country, but also utilise the litigation dilemma to justify the necessity of its proposal to a broad political audience. In other words, enforcement leniency can also work as a 'catalyst' which advances the Commission's political agenda.

By taking the two aspects together, active ToN resonates with the 'failing forward' thesis of European integration (Jones *et al.* 2016; Jones *et al.* 2021). Firstly, if inherent flows of the legal order are theorised as the functional trigger of enforcement leniency, ToN amounts to an incomplete solution. Secondly, the incompleteness of the solution necessitates additional patches to loopholes, which thus generate new negotiated solutions, each with the potential to foster integration.

d) *Type IV: Passive ToN*. For the last type, when the Commission turns a blind eye towards noncompliance for the sake of neither the stability of legal order nor its policy agenda, the type of ToN is referred to as *passive ToN*. Given that the proposed analytical framework concentrates on institutional characteristics of the Commission, passive ToN is by logic triggered by other factor, including country-specific, sector-specific, and rule-specific factors (Treib 2014). Beyond the static explanations represented by national power or policy sectors, the present research draws scholarly attention to a context-sensitive explanation of passive ToN. Specifically, I propose that passive ToN takes place to cope with *domestic political crises*. It refers to incidents where exceptional and unmanageable pressure forces the government to break with the legal prescriptions in spite of punitive sanctions. In this way, enforcement forbearance granted by the Commission may offer an exit route for the member states under stress.

Obviously, the above theocratisation of ToN is tentative and only stand for a preliminary attempt to uncover the complex phenomenon of enforcement forbearance. As explained in the introduction, the proposed theory mainly aims to fill a theoretical gap, namely the neglect of institutional characteristics of the Commission in explaining ToN. Naturally, the theorisation that focuses on the institutional features of the Commission inevitably leads to an theoretical bias against explanatory factors that are pertinent to member states, policy sectors, etc.. As a result, the proposed theory is not intended to be the final say of ToN, but rather a supplement to the existing explanations.

More importantly, the four ideal types of ToN mainly aim to demonstrate the causal complexity of enforcement forbearance. It cannot tell the relatively empirical importance of individual types of enforcement forbearance in the universe of ToN. Neither does the typology specifies the conditions under which a specific mode of ToN occurs, which can only be addressed in a more focused comparative design.

4 Illustrative case studies of ToN

This section offers four illustrative case studies that correspond to individual types of ToN. The aim of these case studies is predominantly to show that the proposed typology of ToN empirically exits and is theoretically feasible (Blatter and Haverland 2012: 88). Then, the

four ideal types of ToN can be recognised as building blocks for new theoretical developments (George and Bennett 2005: 76–78).

The process of case selection is guided by both methodological and empirical considerations. From the *methodological* perspective, this research primarily aims to demonstrate the diverse causal configurations of ToN and to verity the feasibility of the proposed theory of ToN. To this end, the selected cases are *similar* with respect to the enforcement outcome (all positive cases of ToN), but *diverse* with regard to the potential causes (Gerring 2017: 89–92). From the *empirical* perspective, the near-invisibility of ToN makes the accessibility of data the foremost empirical obstacle. Therefore, the selected cases ensure a sufficient data accessibility to the extent that causal process tracing is possible. In this regard, empirical analysis of four cases studies makes extensive use of evidence from four sources: (1) internal infringement documents from *NIF* database; (2) legislative documents from *CIS-Net* and *Council Legislative Document Register*; (3) semi-constructed interviews with current or former Commission officials; (4) reliable secondary sources such as authoritative news media, specialised IOs, etc.

The following case studies proceed along the same analytical procedure. It starts with a brief introduction of the legal context and the infringement matter. Then, infringement decisions of the Commission are empirically verified as cases of ToN against the proposed definitions. The third step traces the specific causes of ToN in individual infringement cases. The final step summarises insights and implications drawn from cases studies.

4.1 Altruistic ToN: Pharmaceutical parallel trade

Parallel trade in medicines denotes a specific mode of arbitrage. It occurs when a disparity in price exists between markets, making it profitable to export medicines from the low-price markets to high-price markets. In the EU, medicines are usually exported from Central and Eastern European countries (especially, Slovakia, Poland, Romania) to Western and Northern European countries (especially, Germany, Denmark, the Netherlands). As an extreme case, imported medicines captured 26.2% of pharmacy sales in Denmark between 2013-2018 (EFPIA 2020: 5).

Parallel trade of medicines has created divergent economic and social consequences across EU member states. For importing countries, pharmaceutical parallel trade not only improves medicine supply for patients, but also contributes sizable budgetary savings for the national health systems. But for the exporting counties, the excessive outflow of medicines easily leads to periodic shortages of medicines in their domestic markets. This is typically the cases in Greece, Portugal, and most of Central and Eastern European countries.

To mitigate the domestic shortages, the governments of exporting countries have taken a series of regulatory measures which aim to curb the outflow of medicines by the wholesalers. The common export restrictive measures erected by EU member states range from temporary export bans to ex-ante export notification procedures, or designated export licenses.[3]

[3] For a snapshot of restrictive measures adopted by various member states between 2012 and 2013, see https://efpia.eu/media/15427/policy-proposals-to-minimise-medicine-supply-shortages-in-europe-march-2014.pdf, last accessed on 10 April 2022.

However, the Commission deems these export restrictive measures as infringements of fundamental freedoms of the internal market. Same as trading of other products, pharmaceutical parallel trade is also subject to the internal market rules. Especially, Article 35 TFEU prohibits 'quantitative restrictions on exports, and all measures having equivalent effect'. Exemptions from this general prohibition can only be justified by the overriding reasons of public interests, as the instance of public health in the present case.

Against the above factual and legal background, the Commission launched an infringement proceeding (INFR [2014] 4141) against Slovakia in 2015 for the latter's ex-ante export notification procedure, which obligated the drug exporters to notify their intentions of exports to the Slovak authority. In its infringement documents, the Commission explicitly argued that the notification procedure amounted to quantitative restrictions on exports and it could not be justified as proportionate to achieve the purported objective of the protection of public health (European Commission 2015c; European Commission 2016). Faced with the legal challenge, Bratislava replaced the accused notification procedure to a new ex-ante authorization procedure.[4] Unfortunately, the new procedure was still judged by the Commission as 'newly bottled old wine'. The enforcement official of DG GROW explicitly explained that 'the new procedure was still considered as a measure having equivalent effect to quantitative restriction…we held the opinion that it was not appropriate or necessary' (Interview 7). Despite its consistently disapproval assessment, however, the Commission official dropped this infringement case in 2016. Against the proposed definition of ToN, the closure of this infringement case is a typical instance of ToN.

Backward tracing of the Commission's enforcement forbearance in this case finds that enforcement leniency was an inevitable choice to cope with the litigation dilemma caused by the inherent deficiencies of the European regulatory system for medicines.

As the root cause, the EU regulatory framework for medicine embodies the inherent deficiencies of *jurisdiction overlap* and *norm collision*. On the one hand, member states firmly control the core elements of pharmaceutical policy. Most importantly, pharmaceutical pricing falls under the national competence and it directly results in the disparities of medicine price across the EU (European Medicines Agency 2016). On the other hand, trade and marketing of medicines are still governed by free movement law and competition law at the Union level. Thus, the pharmaceutical parallel trade is actually nurtured by the combined effects of segregated national pricing policies and the harmonized internal market rules. Additionally, the divergent welfare consequences between exporting and importing countries also manifest the collision of norms between market freedom and protection of human lives (Navarro Varona and Caballero Cabdelario 2019).

Due to the deficiencies of pharmaceutical regulatory framework, the Commission has been caught in a *litigation dilemma*. In the first and highly likely scenario, a successful litigation by the Commission in the courtroom is tantamount to judicial harmonization of segregated national health policy. It would for sure encroach national control of health policy, aggravate the existing norm collision, and even provoke 'political backlash from

[4] The Medicinal Products and Medical Devices Act of Slovakia (No. 306/2016 Coll.), https://www.zakonypreludi.sk/zz/2016-306, last accessed on 10 April 2022.

national capitals, especially the exporting countries' (Interview 11). In a second but legally less likely scenario, if the Court were to tilt the legal balance further to Slovakia, it may risk compromising the integrity of well-established internal market rules. Afterall, judicial leniency towards the quasi-ban on exports easily brings up another question—whether this deviation from the prevailing legal formula could be applied by analogy to other industries (Kingston 2009: 694)?

After evaluating both adjudicating challenges for the Court, the Commission Services concluded that this infringement case was politically too sensitive (Interview 12). Consequently, the Commission acknowledged in the press release 'the need to look for other ways than infringements to adequately solve this complex situation'.[5]

The enforcement leniency towards Slovakia demonstrates that ToN can be a necessary evil of the stability and integrity of the legal order of EU internal market. In the current case, even if ToN fails to address the root cause of the arbitrage, it can still temporarily suppress its 'symptoms', namely the shortage of medicines in exporting countries. Moreover, deliberations of the Commission Services suggest that the Commission at least theoretically can be a gatekeeper of the Court. More specifically, ToN has the potential to 'filter' politically controversial infringement cases and prevent them from reaching the Court.

4.2 Egocentric ToN: Defence offsets

Defence offset, as the crown jewel of defence procurement, is a murky but regular occurrence. Under this scheme, a successful *foreign* bidder of a defence acquisition contract is obligated to direct a share of the contract value or relevant technology to the tendering country. As an illustrative example, Kongsberg Defence Systems, one of Norway's major armament producers, agreed to subtract work locally and transfer certain forms of technology to the Polish Navy to support its bid for a NOK 1.3 billion procurement contract with the Polish Ministry of National Defence in 2014.[6]

Defence offset is widely treasured by national governments for its contributions to the local economy, especially domestic arm producers, and the access to advanced know-how (Mawdsley 2008: 60–62). Due to these implications, member states have long shielded defence procurement, especially offset programs, from the general procurement law of the EU (Directive 2004/18/EC). Instead, they extensively resort to the derogation clause of Article 346 TEU in the name of *the protection of their essential security interests* (Randazzo 2014: 1).

However, the Commission had a different understanding of the legality of defence offsets. Brussels has long deemed most offset arrangements as infringing the fundamental principles of non-discrimination of foreign contractors and the free movement of goods and services (European Commission 2010a: 1). Moreover, the Commission disputed over almost automatic recourse to Article 346 by member states. In contrast, Brussels advocated

[5] 'Parallel trade of medicines: Commission closes infringement proceedings and complaints against Poland, Romania, and Slovakia,' European Commission Press Release of 17 May 2018, http://europa.eu/rapid/press-release_IP-18-3459_en.htm, last accessed on 4 May 2022.

[6] 'Defence Offsets: From "Contractual Burden" to Competitive Weapon', *Mckinsey & Company*, 1 July 2014, https://www.mckinsey.com/industries/public-and-social-sector/our-insights/defense-offsets-from-contractual-burden-to-competitive-weapon, last accessed on 13 April 2022.

for a restrictive interpretation and application of this exception based on case-by-case assessment.

Against the above legal context, the Commission launched an infringement proceeding against the Czech government (INFR [2008] 4656) in 2009. In its infringement letter, Brussels accused Prague of directly awarding a cargo aircraft contract to a Spanish consortium EADS without tendering procedure (European Commission 2009). In its official reply, Prague defended the contested contract as necessary for the protection of the Czech security interests. However, this argument failed to convince Brussels, which still considered that there was a lack of evidence that 'the use of public procurement rules would jeopardise its essential security interests' (European Commission 2010b: 4). As a result, the Commission referred the Czech government to the CJEU in 2010. Surprisingly, however, the Berlaymont withdrew its application of litigation in 2011. In parallel, the controversial defence contract was only fulfilled after 2012 (Reuters 2012). In other words, the Commission terminated the infringement proceeding when its legal assessment remained unchanged and the alleged infringement continued. In other words, it is a typical case of ToN according to the proposed definition.

By tracing backwardly, the following analysis shows that ToN in the present case was to advance the Commission's legislative agenda in liberalising the European defence market and phasing out defence offsets.

The Commission's ambition to regulate defence offsets dates to the 1990s. In 1999, the CJEU delivered a landmark ruling, in which the Court ruled that Article 346 did not justify general and automatic exception from EU procurement rules.[7] Seizing the opportunity of the restrictive ruling by the Court, the Commission proposed a Defence Procurement Directive (Directive 2009/81/EC). However, due to mounting resistance from member state that heavily relied on offsets to support their domestic defence industries (such as Portugal and Poland), defence offsets were nowhere mentioned in the adopted text (Council of the European Union 2008a; Council of the European Union 2008b; Blauberger and Weiss 2013a). In other words, the supranational legislative lawmaking failed to clarify the legality of offsets, which was left remaining obscure.

The failure in the Council did not demoralize the Commission from pushing for outlawing defence offsets. Instead, the Commission switched to challenge offset policies of individual member states through targeted enforcement. It is necessary to note that although Defence Procurement Directive failed to prohibit offsets, it did introduce the option of subcontracting as a partial substitute for defence offsets (European Commission 2010a; Trybus 2013: 28). This legal alternative significantly strengthened the Commission bargained position vis-à-vis offset-defending countries (Trybus 2014). At this particular timing, the infringement case against the Czech government drew the attention of the Commission. In its enforcement ultimatum, the Commission threatened that Prague must either relinquished its offset policy in exchange for the termination of this case, or face a lawsuit with a slim chance of winning in the Court (Countertrade & Offset 2013: 3). In the end, Prague surrendered to Brussels's dictation by agreeing to abolish its offset policy (Countertrade & Offset 2012: 2). As promised, the Commission dropped this case in the end of 2011. Concerning the Commission's motivation behind the case closure, a

[7] C-414/97, *Commission v. Spain*, 16 September 1999.

Commission official frankly admitted that 'we indeed used the infringement proceeding as a bargaining chip……to bring the Czech policy in line with our position on defence offsets' (Interview 9).

In summary, the case of defence offsets offers a good illustration of egocentric ToN, where the enforcement leniency was strategically employed by the Commission as a *quid pro quo* in exchange for Prague relinquishing its defence offset autonomy. Additionally, the opportunity structure generated by the landmark ruling of the Court and the subcontracting as a 'protective equivalent' to defence offset all indicate that the policy influence of ToN is not unlimited but depends on some demanding preconditions (Werner 2017).

4.3 Active ToN: Common European Asylum System

Justice and home affair is believed to be the least-complied-with policy sector in the EU (Börzel 2021: 144). And as its central pillar, asylum and migration rules are naturally subject to extensive noncompliance by member states. In this case study, I focus on the Commission's benevolent enforcement against the degrading treatment of irregular migrants by the Italian government.

At the EU level, asylum and migration issues are governed by CEAS. Essentially, a communitarised European asylum policy is a functional necessity arising from the general objective of a single market without internal frontiers. This is because once internal borders between member states are removed, the decision of granting asylum to third-country nationals not only affects the granting country but also becomes a shared concern of all states within the broader system (Noll 2000: 124; Küçük 2016: 449). For this reason, since the Tampere European Council in 1999, the EU has gradually established the CEAS with the aim to harmonise existing asylum polices across member states.

Generally speaking, the legal framework of CEAS mainly consists of five legislative acts. Of them, the most important two are the Asylum Procedure Directive (Directive 2005/85/EC) and the Dublin Regulation (Regulation 604/2013/EU).[8] The former sets out common procedural standards for fair, quick, and quality asylum decisions across EU member states. The latter determines the member state responsible for the processing of each asylum application and the related transfer procedure. Most importantly, the 'default' rule of the Dublin Regulation is that the competent and responsible state is the state of first entry of an applicant, or commonly referred as 'the state of first entry rule'(Trauner 2020: 270).

Since 2012, several reports by UNHCR revealed that large number of third-country nationals potentially in need of international protection were allegedly denied access to the asylum procedure and pushed back to Greece by the Italian authorities. In addition, the worrying situation of unaccompanied minors seeking asylum in Italy also provoked a wave of criticism (UNHCR 2013; UNHCR 2012).

Alerted by the above reports, the Commission engaged Rome in an extensive dialogue through the pre-infringement platform—EU Pilot (4684/13/HOME). Failing to find a

[8] The other three directives are the Reception Conditions Directive (Directive 2003/9/EC), the Qualifications Directive (Directive 2004/83/EC), and the Eurodac Regulation (Regulation 2725/2000EC).

satisfactory resolution with Rome, the Commission formally launched two infringement cases against the Italian government in 2014 (INFR [2014] 2126 and INFR [2014] 2171). In its letters of formal notice, the Commission accused Rome of infringing the Asylum Procedure Directive and the Dublin Regulation. Specifically, the Commission emphasised that '[the alleged pushbacks] are of *a repeated and persistent nature*' (European Commission 2014b: 11). And in terms of the situation of unaccompanied minors, the Commission reminded Rome that 'it is not concerned about how the Italian law is drafted with regard to the protection of minors, but rather with how it is implemented *in practice*'(European Commission 2014a: 3). Since then, 'systemic pushbacks' by the Italian authorities and the critical issues concerning unaccompanied minors were still repeatedly exposed by NGOs[9] or even reports of the Italian government itself (The Italian Ministry of the Interior 2014b). Despite the evidence of persistent noncompliance, however, the two infringement proceedings were terminated by Brussels in 2017 and 2018 respectively. Thus, against the proposed definition of ToN, it is sufficient to conclude that the closures of two infringement cases are positive cases of ToN.

By tracing of the enforcement rationale of the Commission, I demonstrate in the following these two cases of ToN were to fulfil dual purpose. On the one hand, enforcement forbearance was an unavoidable choice for the Commission to temporarily alleviate the excessive asylum burden on the Italian government arising from the imbalance of CEAS. On the other hand, ToN was also used as a bargaining tool to acquire the political support of the Italian government for the Commission's reform package of CEAS. The parallel motives formed an integrated strategy by which of the Commission exploited the deficiencies of CEAS to promote further integration in the area of migration and asylum policy.

Firstly, the current CEAS is plagued by *imbalanced allocation of legal responsibilities* among member states. At its core, 'the state of first entry rule' leads to the inevitable consequence that the distribution of national responsibilities is exclusively terminated by the geographical location of member states and the actual configuration of refugee flows (Menéndez 2016). In reality, this means member states at the periphery are confronted with migrant flow not corresponding to their capacities, but to those of the Union as a whole. For example, during the prior enforcement period between 2009-2014, Italy and Malta were already the most affected member states by illegal border-crossing, and two countries together received 60% of all third-country nationals illegally entering the Union (Frontex 2015: 16).

As the national asylum system was clearly overstretched, the Italian government in the infringement communications explicitly pointed the finger at the flaws of CEAS (The Italian Ministry of the Interior 2014a: 2). Faced with the frustration of Rome, the

[9] 'Hotspot Italy: How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights', *Amnesty International*, 2016, https://www.statewatch.org/media/documents/news/2016/nov/ai-hotspot-Italy.pdf, last accessed on 27 April 2022; 'Hotspot, Rights Denied', *Oxfam*, 19 May 2016, https://s3.amazonaws.com/oxfam-us/www/static/media/files/Hotspot_RIGHTS_DENIED__ENG.pdf, last accessed on 26 April 2022.

responsible Commission Service—DG HOME—uncommonly 'confessed' that '[CEAS] has the potential to place disproportionate responsibility on border member state…… and may even has *exacerbated* imbalance between member states'(DG HOME 2015: 11). Same as the pharmaceutical case, the Commission was again forced to make a delicate calculation. As pointed out by an enforcement official, the disproportionate burden imposed on Italy was 'simply not sustainable'. And if the asylum rules were enforced letter-by-letter, the national system would certainly collapse sooner or later, and its 'domino effect' would be unthinkable (Interview 14).

Secondly, in parallel to the infringement negotiation, an unprecedented influx of migrant in 2015 almost pushed the whole CEAS to the brink of collapse. Perceiving it as a rare window of opportunity, the Commission took the change to table a comprehensive reform package of CEAS in 2016. As the reform of CEAS involves 'core state powers', the Commission needed to garner a broad national support, especially those from the 'front line' states (Zaun 2022). Apparently, Italy played a critical role in this regard.

Considering the political importance of this legislative package and the critical role played by Rome therein, the Commission took the political implications of its enforcement actions against Italy seriously. For instance, the Commission considered that chasing down Italy unremittingly would 'definitely hinder the cooperation in the Council' (Interview 13). And if the reform of CEAS could address the underlying causes of national noncompliance, it would make little political sense to 'sacrifice the big game that matters' just for some 'isolated instances of noncompliance' (Interview 14). Here, testimonies of the Commission officials echo findings of other scholarship that when important proposals are pending, the Commission is reluctant to purse infringements (Schmälter 2018: 1340).

In summary, ToN in this case plays the dual function of a 'painkiller' and a 'catalyst'. Additionally, the interplays between enforcement and legislative politics resonate with the thesis of 'failing forward', where the deficiencies of CEAS necessitated ToN and ToN in turns contributes to the further integration of CEAS. Simultaneously, this case study also indicates that the window of reform opportunity depends on an exogenous shock. Without the unprecedented migration crisis in 2015, which heavily exposed and exacerbated the deficiencies of CEAS, the Commission would have been less capable of justifying the necessity of its reform proposal.

4.4 Passive ToN: German Pkw-Maut act

As demonstrated by the case of defence offsets, non-discrimination constitutes one of the fundamental principles of the EU internal market. Article 18 TFEU stipulates that '*any* discrimination on grounds of nationality shall be prohibited'. In particular, the CJEU has gradually built up the thesis that non-discrimination has to be respected even when member states exercise their exclusive competence.[10] For instance, even for taxation policy which is conventionally believed to be in the firm hand of national governments, it has been constrained by the overarching principle of non-discrimination.

It is exactly over this fundamental principle that Germany and the Commission got into a twisting and turning dispute. In 2015, the German Bundestag adopted the

[10] C-451/99, *Cura Anlagen*, 21 March 2002, para.40 and C-553/16, *TTL*, 25 July 2018, para. 44.

Infrastructure Charges Act ('Pkw-Maut') in combination with the *Vehicle Tax Act*.[11] The former stipulated that the use of German federal roads was subject to an infrastructural charge in the form of an annual or a short-term vignette. At the same time, the latter offered a tax relief designated for vehicles *registered in Germany*. Most importantly, the amount of tax relief in most cases perfectly matched the corresponding amounts of the infrastructure charge.

The Commission considered the combination of the two acts to be an indirect discrimination based on nationality (European Commission 2015a; European Commission 2015b). In 2015, it launched an infringement proceeding (INFR [2015] 2122) against the German government. In reply, the German government adamantly dismissed the allegation. Specifically, it argued that *Pkw-Maut Act* primarily aimed for a gradual transition from a tax-based to a user-based financing of German infrastructure, which was in line with the Commission's guideline in this area. The German government added to this point that taxation reform is the sovereign right of Germany, for which the Commission has completely no say (Government of Federal Republic of Germany 2015). After the intensive exchanges of verbal accusations, the infringement drama between Berlin and Brussels had a surprising turnaround via an amicable agreement in 2016. And with the German Bundestag adopting some symbolic amendments according to the agreement, the Commission officially terminated its investigation in 2017.

Concerning the closure of the infringement case, Martin Selmayr, the former Secretary General of the European Commission, testified that 'the termination of infringement proceeding does not necessarily mean that the German Pkw-Maut act was compatible with EU law…the chance that this would turn out well for German toll is slim'. More importantly, the controversial Pkw-Maut scheme was later brought by the Austrian government to the CJEU, and it was bluntly overruled by the Court in 2019.[12] Combining the eyewitness account and the judicial resolution, it is safe to conclude that the closure of the present infringement case is not a case of restored compliance but an instance of ToN.

A process tracing of the development of the infringement case reveals that the Commission's primary motivation behind the case closure was to prevent an acute risk of a coalition crisis from erupting in the German government.

Initially, the policy idea of 'Ausländer-Maut' ('car toll for foreigners') was coined by the CSU and it turned out be an election hit with local conservatives during the 2013 Bavarian election. In its election manifesto, CSU pledged that 'it wants to introduce a car toll for foreign travellers on German motorways'.[13] Then, backed by a landslide election victory, the CSU continued to promote this idea from a regional election campaign slogan to a federal coalition agenda. After issuing a crystal-clear threat that 'the CSU would not sign a coalition agreement without the Ausländer-Maut', CSU eventually got the

[11] Infrastructure Charges Act, 8 June 2015, https://www.gesetze-im-internet.de/infrag/BJNR090410015.html, last accessed on 20 April 2021; Vehicle Tax Act, 8 June 8 2015, https://www.bundesfinanzministerium.de/Content/DE/Downloads/Gesetze/2015-06-18-kfz-steuer-aend_download.pdf?__blob=publicationFile&v=3, last accessed on 20 April 2022.

[12] C-591/17, *Austria v Germany*, 18 June 2019.

[13] 'Der Bayernplan 2013—2018', *CSU*, 16 July 2013, https://www.csu.de/politik/beschluesse/der-bayernplan-2013-2018/, last accessed on 27 April 2022.

concession from its coalition partners (CDU and SPD) that 'Pkw-Maut act would be introduced under certain conditions'.[14]

However, when CSU tabled its proposal of Pkw-Maut to the Federal Cabinet, the toll concept only met with massive criticism from coalition partners. From instance, CDU believed that the proposal made little economic sense and might even be a violation of the equality enshrined in the German Basic Law (Müller 2016: 104). Outraged by coalition partners' backtracking, the CSU deliberately escalated the dispute over Pkw-Maut into an issue of coalition loyalty and solidarity. The CSU boss Horst Seehofer bluntly threatened that 'if the toll did not come, the question of the coalition's legitimacy would also arise'.[15] For CDU and then Chancellor Merkel, it was the least ideal time to have an open break with the CSU. In fact, while Pkw-Maut was straining the governing coalition, a parallel dispute between the CSU and CDU over the handling of one million refugees almost brought the alliance to its knees.

In the end, the coalition gave the controversial Pkw-Maut act green light to pacify the 'rebellion' of the CSU over the migration issue (Bandau 2019: 104). To remove the legal impediment from the Commission, then Chancellor Merkel even weighted in with her personal contact with then Commission president Juncker.[16] After the direct political steering from both the Chancellery and the Berlaymont, then German Minister of Transport and then Commissioner for Transport reached a political agreement at the end of 2016. In defence of Brussels' decision of enforcement leniency, the Commission spokesman unusually cited the reason of domestic politics that '[Brussels and Berlin] have a common interest in introducing an EU-compliant toll in Germany that is in line with the requirements of *the coalition agreement*'.[17] In addition, a Commission official who was informed of the negotiation with Berlin highlighted that 'the car toll case was *domestically* very sensitive…the political stakes were high…and we took them very seriously' (Interview 10).

Putting the above threads together, the enforcement leniency against the controversial German Pkw-Maut act was to prevent the eruption of a pressing coalition crisis between the CDU and the CSU. Compared with other three case studies, the present case is the only one that was challenged by member states and then overruled by the Court. In other words, the normative quality of ToN in the current case is much more suspicious compared with other three cases.

5 Conclusion

[14] 'Merkel wirbt auf CSU-Parteitag für Zugeständnisse an SPD,' *Der Spiegel*, 23 November 2013, https://www.spiegel.de/politik/deutschland/merkel-wirbt-auf-csu-parteitag-fuer-zugestaendnisse-an-spd-a-935204.html, last accessed on 26 April 2022.

[15] 'Seehofer erhebt Pkw-Maut zur Koalitionsfrage,' *Frankfurter Allgemeine*, 26 July 2014, https://www.faz.net/aktuell/politik/inland/csu-seehofer-erhebt-pkw-maut-zur-koalitionsfrage-13065759.html, last accessed on 26 April 2022.

[16] 'Von Merkels Gnaden,' *Der Spiegel*, 2 December 2016, https://www.spiegel.de/politik/von-merkels-gnaden-a-a64260d7-0002-0001-0000-000148300365?context=issue, last accessed on 26 April 2022.

[17] 'PKW-Maut muss nicht mehr an Brüssel scheitern,' *Der Tagesspiegel*, 3 November 2016, https://www.tagesspiegel.de/politik/kompromiss-mit-eu-kommission-pkw-maut-muss-nicht-mehr-an-bruessel-scheitern/14792306.html, last accessed on 26 April 2022.

As illustrated in the introduction, the primary obstacle to systematically study ToN is its conceptual ambiguity and empirical near-invisibility. To overcome these obstacles, this article firstly offers a definition of ToN, which captures the essence of enforcement forbearance. Then from the perspective of the institutional features of the Commission, this article introduces a typological theorisation of ToN. It starts with the assumption that the supranational guardian is an agent-trustee hybrid. Correspondingly, these two institutional facets lead to divergent motivations of ToN. And the interactions of the two motivations further generates four ideal variants of ToN.

Despite the fact that the selected case studies are primarily illustrative and do not aim to demonstrate the generality of the proposed theory, the four cases at least demonstrate with high certainty that the definition and typology of ToN are feasible and effective. In addition, findings of the case studies also bring some important theoretical implications. Firstly, ToN is of causal complexity. As shown by the cases of pharmaceutical parallel trade, enforcement leniency of the Commission is reactive or a patch of loopholes of legal framework; As to the case of defence offsets, ToN is active or an exploitation of enforcement discretion to its benefits. Secondly, partially due to its causal complexity, the normative quality of ToN cannot be concluded by one sentence. At least, the cases of pharmaceutical parallel trade and CEAS show that enforcement forbearance may not be a malady of the rule of law *per se*. Instead, case studies suggest that the legitimacy of ToN shall be examined in a case-by-case manner against the specific legal and political context. Lastly, the policy impact of enforcement discretion is not unlimited. As demonstrated by the case of defence offsets, a successful annulment of offset autonomy of Prague was also conditioned on the alternative option of subcontracting. Otherwise, the bargaining position of the Commission would have been significantly compromised.

Obviously, the typological theocratisation is a preliminary probe of ToN, and the empirical findings predominantly prove the internal validity of the proposed theory. The future research should more focus on the scope and external validity of four variants of ToN. For instance, at what exact conditions altruistic ToN rather than egocentric ToN happen? What factors make a case transcend the sole logic of altruistic ToN and evolve into an case of active ToN? Answers to these questions can help researchers delineate the empirical importance of individual variants in the universe of ToN.

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Appendix

A.1 Internal management of legal enforcement of the Commission DGs

DG	A designated enforcement unit	Name of the unit	DG	A designated enforcement unit	Name of the unit
AGRI	Yes	I.3	SANTE	No	
BUDG	Yes	B.4	HR	No	
CLIMA	No		GROW	Yes	E.1, E.2
CONNECT	No		JUST	No	
COMP	Yes	H.4	MARE	No	
DEFIS	No		HOME	No	
ECFIN	No		MOVE	Yes	A.4
EAC	No		REGIO	No	
EMPL	No		TAXUD	No	
ENER	No		TRADE	Yes	F.1
ENV	Yes	E.3	FISMA	No	
NEAR	No		Total	30% (Yes)	70% (No)

Notes:
* DGs included in the survey are only those that have initiated infringement proceedings.
* Information on the designated enforcement units is drawn from the organisational charts of the Commission DGs, see https://ec.europa.eu/info/departments_en, last accessed on 31 May 2021.

A.2 List of Interviews

Number	Commission department	Date	Location/method
Interview 7	DG GROW	14-11-2019	Online
Interview 9	DG GROW (former)	27-11-2020	Online
Interview 10	DG MOVE (former)	18-03-2021	Online
Interview 11	Legal Service	26-03-2021	Online
Interview 12	Legal Service	26-03-2021	Online
Interview 13	DG HOME	24-05-2021	Online
Interview 14	DG HOME (former)	02-06-2021	Online