Where Have the Guardians Gone?

Law Enforcement and the Politics of Supranational Forbearance in the European Union

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Abstract

Why would a supranational law enforcer suddenly refrain from wielding its powers? We theorize the supranational politics of forbearance – the deliberate under-enforcement of the law – and distinguish them from domestic forbearance. We explain why an exemplary supranational enforcer – the European Commission – became reluctant to launch infringements against European Union member states. While the Commission's legislative role as "engine of integration" has been controversial, its enforcement role as "guardian of the Treaties" has been viewed as less contentious. Yet after 2004, infringements launched by the Commission plummeted. Triangulating between infringement statistics and elite interviews, we trace how the Commission grew alarmed that aggressive enforcement was jeopardizing intergovernmental support for its policy proposals. By embracing dialogue with governments over robust enforcement, the Commission sacrificed its role as guardian of the Treaties to safeguard its role as engine of integration. Our analysis holds broader implications for the study of forbearance in international organizations.

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*** This paper is a working draft. Comments and feedback are most welcome – contact us! ***

I. Introduction

More than just an international secretariat but less than a pan-European government, the European Commission is the European Union's (EU) indispensable executive. The Commission has two fundamental roles – serving as the "engine of integration" and as the "guardian of the Treaties." As engine, the Commission acts as a supranational political entrepreneur through its exclusive authority to propose new EU legislation (Pollack 2003). As guardian, the Commission is responsible for ensuring that EU law, including the EU Treaties and any legislation adopted pursuant to them, is enforced by member states (Mendrinou 1996; Tallberg 1999; Börzel 2021). Taken together, these two roles empower the Commission to serve as arguably "the world's most powerful international institution" (Nugent & Rhinard 2015: 1).

There has been considerable controversy surrounding the Commission's role as an engine of integration, with critics suggesting the far-reaching policymaking powers of an unelected Commission contribute to the EU's "democratic deficit." By contrast, the Commission's role as the guardian of the Treaties has been seen by most observers as less controversial and more resilient. While those concerned with a democratic deficit in Brussels may have questioned the Commission's policymaking powers, few questioned its role as the chief enforcer of European law. After all, the Commission is the sole EU actor capable of launching infringement actions (under Article 258 TFEU) against member states that fail to comply with their legal obligations, a process that can culminate with the Commission referring cases to the European Court of Justice (ECJ) and seeking financial sanctions (under Article 260 TFEU). From the 1970s through the early 2000s, the Commission launched a growing number of infringements. More recently, the Commission claimed to prioritize "stepping up enforcement" over proposing new legislation (ex. Commission 2016: 9), leading scholars to conclude that it is hardly "pull[ing[its punches in enforcement" (Kassim & Laffan 2019: 56; Becker et al. 2016: 1015; Lyall 2018: 1). One might thus presume that despite the anti-EU backlash and "new intergovernmentalism" that has constrained EU policymaking in recent years (Hooghe & Marks 2009; Bickerton et al. 2015), the world's leading supranational law enforcer has remained untamed.

Yet appearances can be deceiving. Something striking and puzzling has happened in the past two decades: The number of infringements launched by the Commission plummeted. Between 2004 and 2018, infringements opened by the Commission dropped by 67%, and infringements referred to the ECJ dropped by 87%. Why would a supranational law enforcer suddenly refrain from wielding its powers? Where has the EU's guardian of the Treaties gone?

Below, we consider a number of possible explanations in the existing literature for the decline in law enforcement by the Commission, demonstrating that none prove fully convincing. We then propose an alternative explanation that has been neglected by EU scholars. Specifically, we argue that the Commission dramatically decreased its use of infringement procedures through what Alisha Holland (2016) calls a politics of "forbearance" – the deliberate and revocable under-enforcement of the law. Holland notes that when law enforcement institutions are not well-insulated from political influence, policymakers may restrain them to bolster their support with a group of voters for whom enforcement is unpopular. In domestic political contexts, forbearance typically involves a public or partisan electoral exchange: Policymakers refrain from enforcing the law in ways that visibly benefit members of their targeted electoral constituency (Feierherd 2020; Dewey & Di Carlo 2021; Harding et al. 2021; Boyd et al. 2021). This domestic electoral logic, however, does not translate seamlessly to the supranational level, where the actors, motives, and scope of forbearance politics differ. For a supranational actor like the European Commission, the relevant "constituency" is not a bloc of voters whose partisan support is vital for reelection. Rather, its constituency comprises member state governments whose intergovernmental support is vital to pursue a given policy agenda.

We show that beginning in the mid-2000s, the Commission perceived a major political problem: a decline in national government support for European integration and for the Commission's agenda-setting role. The Commission's political leadership became worried that its vigorous law enforcement was antagonizing member states and jeopardizing already-precarious intergovernmental support for the EU and the Commission's agenda, so it sought to assuage national governments via forbearance: Privileging conciliatory political dialogue over rigorous law enforcement. Essentially, the Commission worked to safeguard its political role as the engine of integration by partially sacrificing its legal role as the guardian of the Treaties. Consistent with Holland's theory, this strategy was possible because bureaucrats managing law enforcement within the Commission were insufficiently insulated from pressure by the Commission's political leadership. As the Commission became increasingly politicized and centralized (Peterson 2017; Kassim et al. 2017), its presidency reined-in the bureaucrats who had handled infringements, hoping that a more relaxed enforcement approach would win plaudits from national governments.

Yet our findings also highlight that supranational forbearance differs from domestic forbearance in two crucial respects. First, supranational forbearance can be concealed more easily than domestic forbearance, because it targets a limited set of governments rather than a large population of voters. The Commission could engage in bilateral dialogues with the twenty-seven EU member

governments to make forbearance visible to them, while keeping it invisible to other stakeholders who wanted to see more vigorous enforcement. Second, supranational forbearance is less likely to be targeted to partisan constituencies than in domestic contexts. Instead of being motivated by partisan or electoral politics, supranational enforcers are more likely to be driven by their desire to maintain broad intergovernmental support: the Commission, for instance, set its sights on cultivating ties with the ascendant European Council (Fabbrini 2016: 591), wherein national governments overwhelmingly adopt decisions by consensus (Hage 2013). Hence the Commission's retreat from enforcement spanned all member states and governments of all partisan orientations.

While the timing and details of this story are specific to the EU, our analysis holds much broader implications for the study of forbearance in international organizations. Exploring forbearance in the EU – a "hard case" often taken as an exceptionally successful example of supranational law enforcement (see Börzel 2021; Cheruvu & Fjelstul 2021) – demonstrates how an adapted version of Holland's (2016)'s theory can be applied beyond domestic settings. As the legitimacy of supranational governance is increasingly contested (Hooghe and Marks 2019; Alter and Zürn 2020), supranational forbearance may become more common.

The remainder of this paper is divided as follows. In Section II, we review existing explanations for the decline in law enforcement in the EU and propose our theory of supranational forbearance. In Section III, we parse aggregate data on infringements launched by the Commission and cast doubt on existing explanations. In Section IV, we conduct an intensive case study of the Commission's retreat from enforcement to trace the causal mechanisms at work. Triangulating between two dozen elite interviews with EU officials (compiled in a Transparency Appendix (TRAX) following Moravcsik (2014)), we build an analytic narrative consistent with supranational forbearance. Finally, Section V concludes by specifying broader implications, particularly for international organizations plagued by declines in intergovernmental support.

II. Towards a Theory of Supranational Forbearance

The State of the Debate

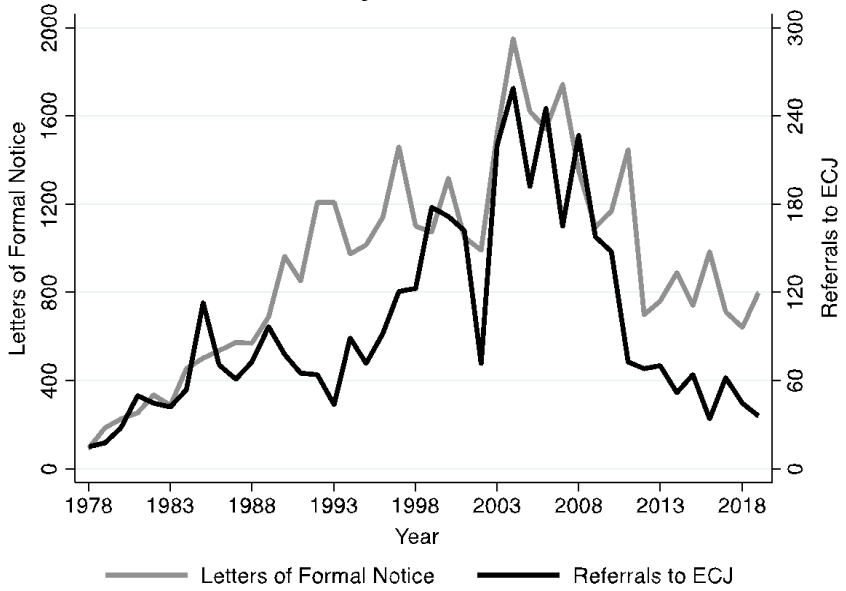
Over the past two decades, something dramatic has happened to law enforcement by the European Commission. From 1978 until 2004, the Commission's use of its primary enforcement tool – infringement proceedings – rose unencumbered. Infringements opened (via "letters of formal notice" served to allegedly noncompliant states) rose twenty-fold from 95 in 1978 to 1952 in 2004, and the number of cases referred the ECJ rose seventeen-fold from 15 in 1978 to 259 in 2004 (see Figure 1).

As would be expected, during this period the enlargement of the EU (expanding from 9 member states in 1978 to 25 by 2004) went hand-in-hand with a rising number of infringements.

Yet the swearing-in of a new Commission headed by former Portuguese Prime Minister José Manuel Barroso in 2004 coincided with a striking shift. Since 2004, the number of infringements have plummeted to lows not witnessed since the early 1980s, with as few as 643 letters of formal notice served in 2018 and only 34 referrals to the ECJ in 2016 (see Figure 1). This trend coincided with a near doubling of EU membership, and hence the infringement rate per member state cratered to a mere 5 or 6 yearly letters of formal notice and a couple of yearly referrals to the ECJ (declines of 70 to 80% vis-à-vis 2003 and 2004 respectively; see Figure 2). Furthermore, this decline in infringements is broad and cross-cutting, rather than driven by reductions against a few member states or in specific policy areas (see Appendix A and Appendix B).

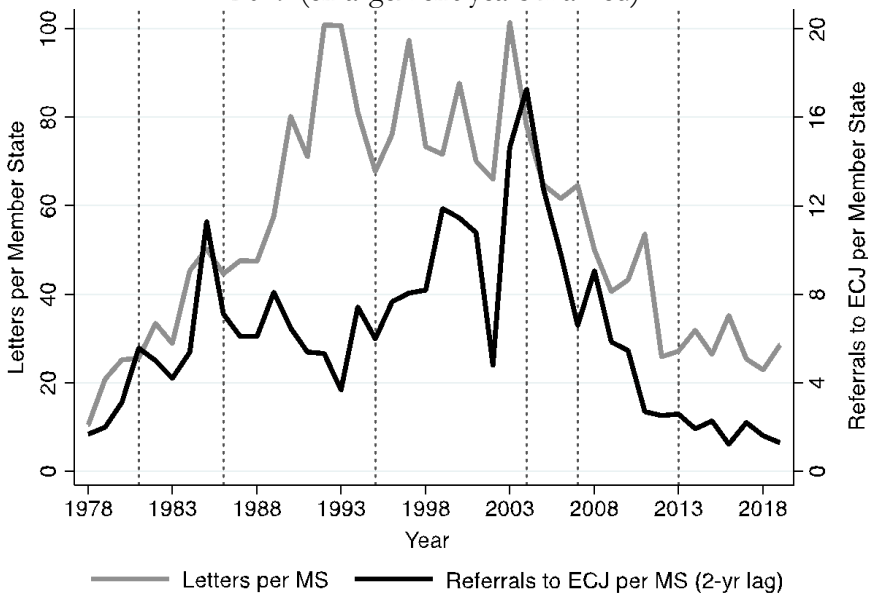
These data leave us with a major puzzle: Why would a supranational law enforcer with a history of assertively fulfilling its role as the guardian of the Treaties suddenly retreat from wielding its powers? To date, there is remarkably little research shedding light on this puzzle, with most accounts touching on this issue only indirectly or in passing (for exceptions, see Hofmann (2018) and Falkner (2018)). Nevertheless, existing accounts can be sorted into a few main perspectives.

Figure 1: Commission Infringements Opened (by Letters of Formal Notice) and Referred to the ECJ, 1978-2019



Notes: Pre-2000, data is from Börzel and Knoll (2012); for 2000 and 2001, from the Commission Annual Reports; from 2002 to 2019, data is our own, drawn from the Commission's infringement database.

Figure 2: Commission Infringements Opened and Referred to the ECJ per Member State, 1978-2019 (enlargement years marked)



Notes: Vertical lines denote enlargement years. Referrals per member state are lagged by 2 years given that it takes approximately 2 years for a letter of formal notice to result in a referral.

The simplest and most sanguine explanation is that the decline in Commission enforcement reflects a decline in noncompliance. Some scholars treat infringements as a reliable proxy for the true state of noncompliance, or as "the most systematic and comparable source of information on noncompliance available" (Börzel and Sedelmeier 2017: 201; Börzel et al 2012; Börzel 2021: 13-34). As a result, they interpret declines in infringements as indicating that states have become "more law-abiding" (Börzel and Sedelmeier (2017: 211). However, we will show that infringement rates are no longer a reliable indicator of noncompliance and that the Commission's reduced law enforcement cannot be primarily attributed to member states' compliant behavior.

A second argument stresses a tactical shift by a Commission that remains committed to vigorous law enforcement via other means. For instance, Hofmann (2018: 741) suggests that the Commission reduced its use of centralized enforcement as it encouraged private enforcement before national courts (see also Falkner 2018: 770). This account suggests that the Commission promoted the decentralized use of the preliminary reference procedure (under Article 267 TFEU), which enables private parties to sue a state before national courts and to then request that the national judge refer the case to the ECJ (Pavone and Kelemen 2019). While in principle private enforcement could substitute for centralized enforcement, we will show that historically, both have risen in tandem and been viewed by the Commission as complements rather than substitutes. And even if the Commission

did come to rely more on private enforcement, this begs the question of what politics drove this shift, and why it occurred when it did.

Third, some scholars and the Commission itself have proffered a "better governance" explanation for the decline in infringements. They suggest that that the Commission determined that breaches of EU law might be resolved more effectively by relying on alternative dispute-settlement mechanisms and prioritizing only major violations. Falkner (2018) emphasizes a shift from infringements to out-of-court mechanisms, in line with the Commission's "Better Regulation" agenda (Alemanno 2015; Golberg 2018). For instance, in 2002 the Commission and the member states created an alternative dispute resolution network called SOLVIT: an online service portal available to citizens and businesses to settle internal market conflicts through a dialogue with national administrations (Smith 2015; Falkner 2018). And in 2007, the Commission created the EU Pilot procedure – a structured dialogue with member states to address complaints to the Commission before an infringement is launched (Smith 2015: 360). By 2014, the Commission lauded that "the overall decrease in the number of formal infringement procedures…reflects the effectiveness of structured dialogue via the EU Pilot" (Commission 2014: 27). Cheruvu and Fjelstul (2021) support the Commission's interpretation, arguing that EU Pilot bolstered "pre-trial bargaining" by the Commission to address "unintentional" noncompliance. Simultaneously, the Commission claimed that it would prioritize major violations for infringements, while ignoring more minor infractions (Commission 2017; Kassim 2017: 15). Some scholars conclude that prioritization demonstrates the Commission's "maturity" as a law enforcer (Prete & Smulders 2021).

While we will show that alternative dispute-resolution mechanisms like EU Pilot contributed to the drop in infringements, the motivations and causal processes involved are not quite what the Commission's self-congratulatory "better governance" narrative would suggest. The shift in the Commission's strategy was political rather than technocratic – driven more by a desire to boost intergovernmental support than to make enforcement more efficient. The EU Pilot procedure was politically imposed against the overwhelming opposition of Commission civil servants, who lamented that it was hampering enforcement and enabling political interference. We will also show that procedures like EU Pilot reflected a broader political shift within the Commission that had a more far-reaching chilling effect than anticipated. Finally, we will show that there is little empirical evidence that the Commission came to prioritize resources for a few 'big' infringements over many 'small' infringements.

In light of the shortcomings of existing explanations, we next offer an alternative theory rooted in how shifts in EU and international politics placed new pressures on the Commission, and how political entrepreneurs within the Commission responded.

A Theory of Supranational Forbearance

The curious case of the declining infringements is embedded in structural changes in EU politics that reflect a broader cross-national backlash plaguing international institutions (Abebe & Ginsburg 2019; Voeten 2020; Alter and Zürn 2020). From the 1970s until the early 1990s, the Commission was publicly perceived as a mostly technocratic regulatory body. The Commission benefited from what EU scholars call a "permissive consensus" in which the public and national policy-makers treated EU politics as a non-salient matter and afforded Commission officials considerable enforcement discretion. However, as Hooghe and Marks (2009)'s "postfunctionalist" theory argues, since the late 1990s EU policymaking became increasingly salient and contested in domestic politics, and supranational policymaking shifted to being restrained by a "constraining dissensus." Similarly, research on "the new intergovernmentalism" (Hodson and Puetter 2019) emphasizes that the politicization of EU politics has gone hand-in-hand with a reassertion of national sovereignty by member states and a turn from the "community method" of supranational delegation to state-driven intergovernmental bargaining (Puetter 2012: 168; Bickerton et al. 2015: 4-5). Today, scholars agree that member state governments have worked to limit the power of the Commission (Schimmelfennig 2015: 724) and to transfer the reigns of political leadership to the intergovernmental European Council (Peterson 2017) – which has become the "new centre of EU politics" (Fabbrini 2016: 591).

In our view, the foregoing accounts establish the "permissive [structural] conditions" (Soifer 2012) that set the stage for supranational forbearance possible in the EU. As we will document, by the early 2000s the Commission's political leadership came to view declining member state support as a serious problem to be addressed. Yet the mechanisms and "productive conditions" (Ibid) concerning the timing and scope of forbearance cannot be explained by these "big, slow-moving" shifts (Pierson 2003). Both postfunctionalism and the new intergovernmentalism describe a gradual evolution in the Commission's political environment (Puetter 2012, 2014; Bickerton et al. 2015) rather than a "critical juncture" (Capoccia & Kelemen 2007) that would prompt a sudden decline in infringements. While a growing intergovernmental backlash may "box-in" the Commission (Becker et al. 2016), these structural shifts cannot explain why infringements continued to rise into the early 2000s and only

cratered post-2004. For that, we must theorize the Commission's own political agency (see Kassim et al. 2017) and trace the internal struggles that produced a dramatic turn in its enforcement strategy.

We argue that in an environment of declining state support for supranational governance, policymakers have an incentive to turn to what Holland (2016) calls "forbearance:" The deliberate and revocable under-enforcement of the law. Forbearance is not driven by a lack of the *capacity* to enforce the law – a problem that plagues states and international institutions with inadequate "infrastructure power" (Mann 1984). Rather, forbearance is driven by "a political choice not to enforce the law" even though the resources are available (Holland 2016: 233). That is, "politicians should make decisions to halt enforcement, even when bureaucrats and police perform their jobs" (Holland 2016: 240). The motive for forbearance in domestic politics is usually partisan and electoral: politicians selectively curtail enforcement against interest groups from their districts whose support they seek (Feierherd 2020; Dewey & Di Carlo 2021; Harding et al. 2021; Boyd et al. 2021, Chpts. 6-7).

The intuition behind forbearance is that law enforcement can be unpopular, hence interference with enforcement can boost political support. Yet, in order to explain *supranational* forbearance we need to adapt the theory to a new institutional environment. Three revisions are necessary to this end (see Table 1). First, electoral considerations are less salient to supranational policymakers who are not directly elected by individual voters. Rather, supranational actors are more likely to be policy-driven and to seek to cultivate support from the constituency decisive to this end: member state governments. In a climate of growing state resistance to supranational policymaking, political elites at the helm of institutions like the European Commission may mobilize forbearance to rekindle intergovernmental support. Second, while domestic policymakers engaging in forbearance need to appeal to the thousands of individual voters, supranational policymakers have a much more finite targeted constituency. Hence whereas domestic policymakers cannot usually strike deals with each constituent and must instead make forbearance a visible public policy, supranational forbearance can more easily take the form of private bargains with national governments concealed from public view. Finally, whereas in national electoral contexts forbearance tends to be driven by partisan politics and constituencies, in intergovernmental settings forbearance is likely to be more generalized. In "consociational" intergovernmental polities like the EU (Gabel 1996), supranational policymakers need to broker broad member state support for their proposals. The Commission, for instance, set its sights on forging compromises in the intergovernmental European Council, where 80% of decisions are adopted by consensus (Hage 2013: 484). To avoid being accused of partisanship and alienating individual governments whose support remained vital, the Commission applied forbearance to all.

Table 1: Comparing Domestic and Supranational Forbearance

	Domestic Forbearance	Supranational Forbearance
key political actors	national politicians *facing interest groups*	supranational politicians *facing member state governments*
actors' motives	increase their electoral support	increase support for their policy agenda
key mechanism	electoral incentives to not enforce law *against interest groups whose support is valuable to winning elections*	intergovernmental pressure to not enforce law *against member state governments whose support is valuable to the passage of policy*
scope of outcome	targeted *to electoral constituencies*	generalized *to all member state governments*
visibility of outcome	publicized *as public policy*	concealed *as private bargains*

Specifically, we argue that the Commission's political leadership rolled back enforcement to address declining intergovernmental support and the damage that was doing to its ability to pursue its policy agenda. A series of political events between 1999 and 2004 heightened the sense within the Commission that it needed assuage member governments, and a change in its political leadership in 2004 ushered in a new set of political entrepreneurs intent on pursuing forbearance. By 2004, the new Commission President – José Manuel Barroso – had received clear signals from member governments in the European Council that reducing infringements would attract their support. As it centralized political control over the Commission and its Secretariat General (Kassim et al. 2017), the Barroso Presidency imposed forbearance over the nearly-unanimous opposition of career civil servants, who resented political interference and feared the legal damage that would result. By pioneering internal reforms – like the EU Pilot procedure – that substituted bilateral dialogue controlled by politicians for adversarial law enforcement controlled by bureaucrats, the Commission signaled its commitment to conciliatory forbearance to national governments. In so doing, the Commission took care to avoid the perception of partisanship or bias in favor of particular governments, applying forbearance across the board. This strategy succeeded in its political aim: Governments in the Council responded as hoped, becoming broadly supportive of the Commission and its softer enforcement approach. However, forbearance was applied so broadly that it generated a pervasive chilling effect on enforcement that proved harder to revoke than anticipated. In particular forbearance discouraged Commission civil servants from laboring to build enforcement cases, given that most of these files ended up being dropped after an opaque political dialogue with national capitals.

Forbearance – and the dramatic decline in enforcement it led to – can be understood as an overlooked and partly unanticipated response to calls for international organizations and supranational regulators like the Commission to be more politically accountable and democratically legitimate. Even the European Parliament – which has consistently pushed for vigorous law enforcement – supported a more "political Commission" expecting that it would bolster its policymaking responsiveness and address the EU's alleged "democratic deficit" (Follesdal and Hix 2006). Yet the drive to create a more political Commission in the *legislative* sphere also spilled over to the *enforcement* sphere. As the Commission's political leadership asserted control over law enforcement, it pursued forbearance to rekindle intergovernmental support for its legislative agenda. This transformation in EU law enforcement was as profound as it largely flew under the radar. By implementing forbearance privately via closed-door dialogues with governments rather publicly as an announced policy, the Commission concealed it from other stakeholders – like citizens, civil society, and the Parliament – likely to criticize any retreat from supranational enforcement.

III. Quantitative Evidence

To assess our theory of supranational forbearance, we begin by identifying the limits of existing explanations using a variety of enforcement-related statistics (Larsson & Naurin 2016; Pavone & Kelemen 2019; Naurin et al. 2021). Then, using process tracing and elite interviews, in the next section we link the decline in infringements launched by the Commission to supranational forbearance.

The most sanguine explanation of the decline in infringements is that law-breaking by member states significantly improved after 2004. Börzel & Sedelmeier (2017) suggest that the need for many infringements was obviated by a decrease in the EU's legislative output and by member states becoming "more law-abiding." There are several reasons to be skeptical of this explanation. First, while EU legislative output has been declining slowly since the late 1980s, this gradual decline could not had led to a sudden drop in infringements only post-2004, as Appendices C and D elaborate. Second, opportunities for law-breaking expanded post-2004. In 2004 ten member states joined the EU, increasing its membership from 15 to 25 member states. Unsurprisingly, complaints to the Commission by citizens and civil society grew to record levels (see Figure 3). Similarly, national court referrals to the ECJ – which are largely driven by incompatibilities of national law with EU law – rose following the 2004 enlargement (see Figure 4). Additional contextual evidence also suggests that states' propensity to violate EU law grew post-2004. Several cross-national crises plagued the EU during this period – such as the refugee and Eurozone crises (Genschel & Jachtenfuchs 2018; Scicluna 2021) –

leading to highly publicized waves of member states flouting their EU legal obligations. As Commissioner Mario Monti acknowledged in a 2010 report, "the recent [Eurozone] crisis has shown that there remains a strong temptation, particularly when times are hard, to roll back the Single Market and seek refuge in forms of economic nationalism," making it more vital than ever that the Commission make "full use of its enforcement powers" (Monti 2010: 3). Second, the constitutional breakdown of some member states like Poland and Hungary exacerbated noncompliance and fostered a "rule of law crisis" that fundamentally threatened the integrity of the EU legal order (Emmons & Pavone 2021). Given the proliferation of potential law-breakers and EU-wide crises, it seems implausible to tie the cratering of infringements to the EU becoming more law-abiding.

An alternative explanation suggests that the Commission encouraged private enforcement before national courts to substitute for infringements (Hofmann 2018). Yet as Figure 4 suggests, for decades prior to 2004 national court referrals to the ECJ rose hand-in-hand with infringements lodged by the Commission. The Commission treated centralized and decentralized enforcement as *complements*, not substitutes, as Commissioner Monti emphasized in his 2010 report:

> "The hard truth is that the decentralised system in which Member States are responsible for the implementation of EU law and the Commission monitors their action presents many advantages but cannot ensure total and homogeneous compliance. Private enforcement is a complementary tool, but it has limitations…it is necessary to strengthen central enforcement through the infringement procedure and grass-root private enforcement" (Monti 2010: 96).

Figure 3: Complaints to the Commission and Infringements Opened, 1978-2019

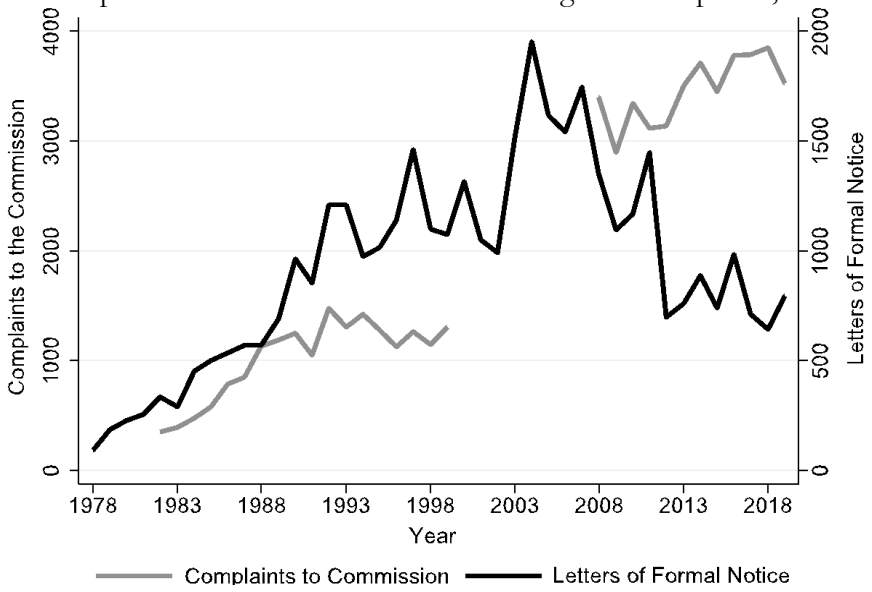
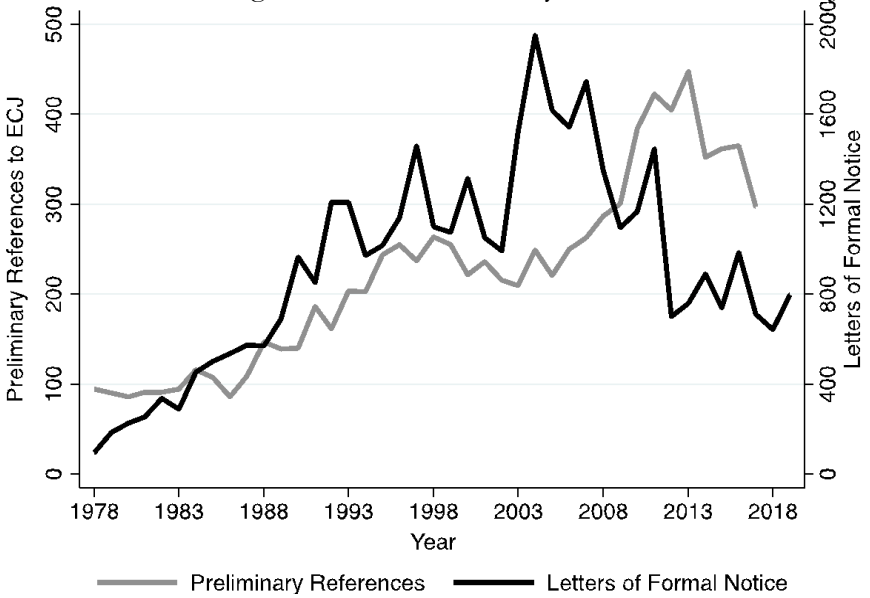


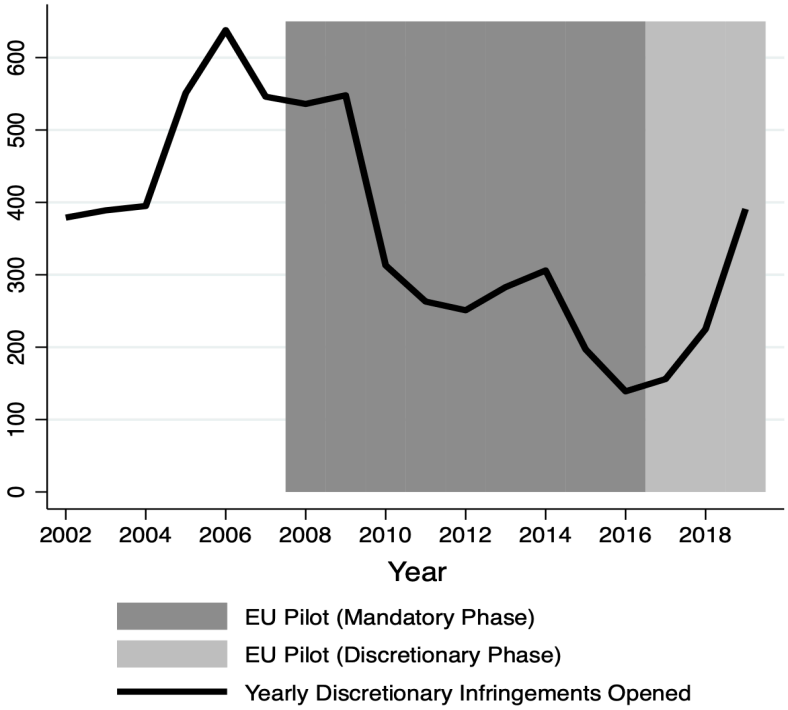
Figure 4: Commission Infringements and Preliminary References to the ECJ, 1978-2019



Notes: Preliminary reference data from 1978 to 2013 is from Pavone & Kelemen (2019); from 2013-2017 it is supplemented by Naurin et al. (2021).

To be sure, the Commission did promote alternative dispute resolution mechanisms such as SOLVIT and EU Pilot post-2004, in like with "better governance" explanations for the decline in Commission enforcement (Cheruvu and Fjelstul 2021; Falkner 2018). Yet there are three reasons why this is an insufficient explanation for the decline in infringements. First, it remains unclear *why* such a shift occurred *when* it did. What is primarily driven by *technocratic* considerations, or was it more so driven by *political* considerations? And what explains "not just what, but when" this policy shift occurred (Pierson 2000)? Second, SOLVIT was designed to deal solely with single-market issues and particularized citizen-centric disputes (Smith 2015; Falkner 2018), yet as Appendix B demonstrates, the decline in infringement spans across many Commission policy areas, such as environmental protection, falling outside the SOLVIT system. Finally, while we will show that EU Pilot played a critical part in the decline in infringements, this was only marginally due to it improving "pre-trial bargaining" to solve "unintentional noncompliance" (Cheruvu and Fjelstul 2021). EU Pilot was embedded in a broader turn to forbearance by the Commission, whose legacy hampered law enforcement even *after* EU Pilot was partially revoked in 2016. As Figure 5 shows, discretionary infringements by the Commission cratered during the period that EU Pilot was mandatory for the Commission's various DGs (2008-2016), but they recovered only partially post-2016, once using EU Pilot was made discretionary. A much deeper and unstudied political shift occurred in the Commission, of which EU Pilot was more of a symptom than a cause.

Figure 5: Discretionary Infringements Opened with EU Pilot Policy Shaded, 2002-2019

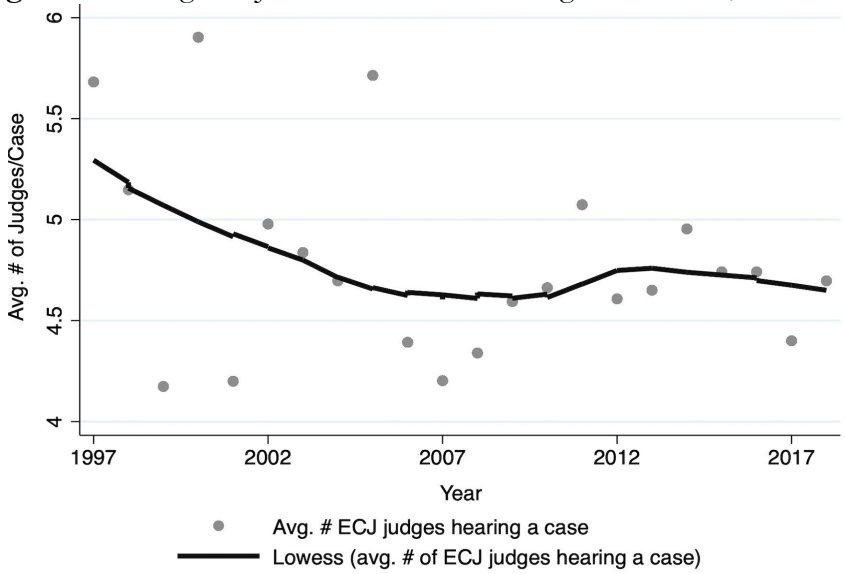


Notes: Discretionary infringements exclude infringements that the Commission launches automatically, such as cases where a member state fails to notify the Commission that they have transposed a directive.

Finally, we can find no empirical evidence to support the Commission's public mantra that the decline in infringements reflects a refocusing towards 'big' cases and away from 'small' cases. One way to first gauge this is to consider the size of the chambers of judges within the ECJ that hear infringement cases. Scholars of EU judicial politics agree that the ECJ allocates cases that reflect the most significant issues – including major EU law violations – to larger chambers of judges (Kelemen 2012; Larsson and Naurin 2016). Leveraging data from Larsson and Naurin (2016), we can see that infringement cases brought to the ECJ by the Commission after 2004 were not more likely to be heard in larger chambers (see Figure 6). Second, research on the EU's "rule of law crisis" in Hungary, Poland and a handful of other member states emphasizes that the Commission has been very reluctant to launch "systemic" infringements even against governments who violate the EU's most fundamental rule of law norms (ex. Scheppele, Kochenov, and Grabowska-Moroz 2020; Pech, Wachowiec, and Mazur 2021). Finally, there is no evidence that the Commission prioritized cases it was more likely to win. Drawing on data from Naurin et al. (2021), we can see that the Commission's win rate at the ECJ in infringement cases has remained unchanged pre- and post-2004, hovering at an impressive 90% (see Figure 7).

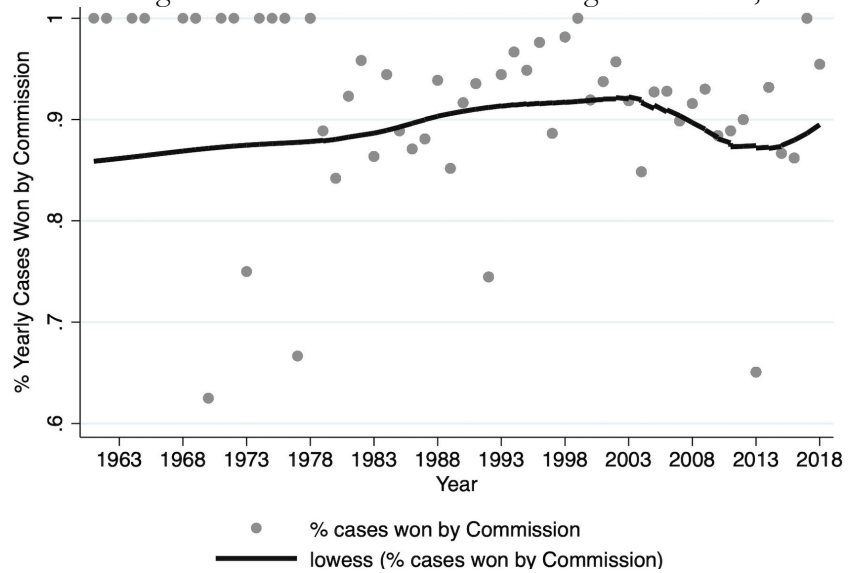
In short, explanations positing that improved compliance, alternative dispute resolution, and prioritization drove the decline in Commission enforcement are at best incomplete. We still need a better sense of why the decline in infringements occurred when it did and the politics involved. We now turn to interviews and process tracing evidence to assess if supranational forbearance provides a more compelling account.

Figure 6: Average ECJ Chamber Size in Infringement Cases, 1997-2018



Notes: Data source is from Larsson & Naurin (2016)

Figure 7: Average Commission Win Rate in Infringement Cases, 1962-2018



Notes: Data source is from Naurin et al. (2021)

IV. Interview Evidence

Methodology

The most detailed and compelling evidence that supranational forbearance drove the decline in infringements stems from in-depth interviews we conducted with EU officials. To this end, we followed in the footsteps of other pathbreaking studies of the Commission relying on elite interviews (ex. Peterson 2017; Kassim et al. 2016) and best standards for interview-centric process tracing (Tansey 2007; Mosley, 2013). First, we adopted a purposive (rather than random) sampling approach by seeking out Commission insiders with firsthand experience with the law enforcement process, in order to "identify the key political actors that have had most involvement with the processes of interest" (Tansey 2007: 766). As a result, of the 24 interviews we carried out, most (n=17, or 71%) were conducted with Commission insiders, including very senior officials in the most relevant units.

Second, we ascertained the validity of interviews by "triangulating" them with one another – something that was only possible by diversifying our interview sample (Arksey & Knight 1999: 21-32; Lynch 2013: 41); see Table 2). We spoke with members of the Commission's political leadership and senior officials with the authority to impose changes in enforcement policy, as well as lower-level officials charged with carrying out this policy. We balanced interviewees who worked at the Commission pre-2004 (n=13, when infringements were rising) and post-2004 (n=14, when infringements began declining), including 9 individuals whose experience spun both eras. Finally, to get an outside perspective from key stakeholders, we spoke to five members of the European Parliament (who monitor Commission enforcement), two members of civil society organizations (who can submit complaints that may trigger infringements), and three members of the ECJ (where infringement cases are adjudicated). Where useful, we further triangulate these materials with archival evidence from the Historical Archives of the EU and the Commission's own public communications.

Table 2: Professional experience of interviewees in interview sample (n=24)

	served in the Commission		served in the Parliament	served at the ECJ	civil society
	Pre-2004	*Post-2004*			
# interviewees	13	14	5	3	2

Note: Numbers do not sum to 25 because some interviewees occupied multiple roles.

Interviews were conducted via Zoom from late 2020 through 2021, given the impossibility of meeting in-person during the COVID-19 pandemic. In line with Institutional Review Board (IRB) guidelines

and to obtain more candid insights, we promised interviewees anonymity and only refer to them using generic labels. Importantly, we made sure to convey our interest in Commission law enforcement in general terms, so as not to prime interviewees to confirm a particular explanation for the decline in infringements. Finally, we compile these evidentiary materials into a Transparency Appendix (TRAX) that can be consulted to assess contestable evidence-based claims (Moravcsik, 2014).

The Motive: Rekindling Support from Member States

Officials who worked at the Commission in the 1990s and early 2000s told us that even as the number of infringements launched continued to grow, within the Commission there was increasing unease about its fraught relationship with national governments. This set the stage for a top-down shift in enforcement policy once the Commission's political leadership changed in 2004.

The Commission's political legitimacy had first been dealt a blow with the resignation of President Jacques Santer and the Commission College in 1999 following allegations of corruption and nepotism (Ringe 2005). Simultaneously, Commissioners were concerned about rising Euroscepticism among voters and a correlate decline in support from national governments. The Commission watched wearily as Austria's far-right Euroskeptic Freedom Party joined the governing coalition in 2000; as the anti-EU United Kingdom Independence Party (UKIP) came in 3rd in the 2004 European Parliament election; and as hopes of adopting an EU Constitution – a project vigorously supported by the Commission – were rejected by French and Dutch voters in referenda in 2005. In turn, the governments of powerful member states like the UK and Germany had grown more assertive in "peddling [their] own agenda" "because they didn't like the Commission coming after them" (TRAX 1; TRAX 2). For instance, a high-level official close to then-Commission President Romano Prodi recalls "terrible problems with Germany at one point. [Gerhard] Schroeder was then Chancellor, and he kept complaining about the Commission… micromanaging, interfering with the work of member states" (TRAX 3).

The conjunction of these events "had a devastating effect on the morale of the Commission:" It fostered what one ex-Commissioner recalls as a "kind of internalized Euroscepticism" and what one official describes as "extrem[e] reluctan[ce] to do anything that rocks the boat" (TRAX 2; TRAX 7). This motivated "a drive to examine carefully what the Commission was doing [given] diminishing public support" (TRAX 4; TRAX 22). The overwhelming sentiment of the Commission's political leadership was that governments were "pushing the Commission to be less involved… the degree of Euroscepticism and pushback against the Commission [meant] that the Commission felt… battered

and under siege for a lot of that time" (TRAX 1). The "threat of the whole process of European integration being reversed was very much in the air," motivating a "need to reconnect with member states" (TRAX 2; TRAX 22).

Nobody was more intent on reversing this decline in member state support than José Manuel Barroso, who replaced Prodi as Commission President in 2004. Existing studies have already demonstrated that Barroso's policy agenda was particularly responsive to public criticism (Giurcanu and Kostadinova 2021). Within the European Parliament, some MEPs took this as "weakness" and as an attempt to appease "member states…[in] the Council, intergovernmental Europe… they [supported] Barroso… [because] he did what was expected of him" (TRAX 5; TRAX 20). Even inside the Commission, the "accusation which [was] made against José Manuel [Barroso]" was that, "he clearly set out…to have a certain complicity between the President of the Commission and the European Council, in order to enable him to better pursue the Commission's agenda" (TRAX 3).

Yet this apparent weakness belied how Barroso proved a vigorous political entrepreneur and agent of change within the Commission. Barroso quickly came to view law enforcement as an impediment to rekindling intergovernmental support for his policy priorities. As former Foreign Minister and Prime Minister of Portugal, Barroso had been a longstanding Council member and shared national governments', "external view of how the Commission was performing…and he thought it was chaotic and disorganized" (TRAX 1). He recognized that his amicable relationship with national governments was a critical reason why the European Council pushed for him to become Commission President in the first place (TRAX 21). Yet almost "overnight," the tables flipped as he took helm of the Commission in November 2004: The "pally wally kind of relationship" Barroso had cultivated with heads of government in the Council was replaced by a sense that "suddenly" he had been thrown "in the bear pit!" (TRAX 1). More than a half a dozen officials across the Commission recounted the same exact story of what most "caught off guard" and "bothered President Barroso in the beginning" (TRAX 1; TRAX 2; TRAX 3; TRAX 4; TRAX 6; TRAX 7; TRAX 8; TRAX 12). Instead of being able to focus on rekindling government support and forging consensus for his policy proposals, Barroso was routinely harangued by government leaders upset about infringements the Commission had lodged against their state. As one of several former officials recalls,

> "there was really an ever-increasing caseload both in complaints and infringements. And, um, shall I say, a rather contentious, or not always a good relationship with the member states… Why do I say that?... [because] central governments would see a press release saying, 'The Commission has launched ten infringements against France,' or something – and then the

> central government would [confront Barroso and] say, 'What's going on? Why didn't we know about this?'' (TRAX 4)

Another senior official who would get "called to the [President's office] on the 13th floor to be shouted at" after European Council meetings confirms that:

> "at least from what I could observe… Barroso had just been to the European Council and wanted to achieve something for the Commission and our policy agenda but it got totally distracted by heads of states and government in the European Council, or even in the meetings, shouting at him, for this or that [infringement]" (TRAX 2).

As a result, during Council meetings Barroso carried "those airline pilot cases on wheels…because he had this amount of briefings on infringements [given] that Prime Ministers were going to pounce on him to kind of say, 'You're making my life miserable. Can we sort this out?'" (TRAX 1).

A further aggravator for Barroso was the realization that although "infringements were frequently an irritant with the member states," (TRAX 3) he lacked the means to politically control law enforcement. Most infringements were being launched and handled "exclusively [by] the services" without any political management by the Presidency or discussion in the College of Commissioners. So in his first confrontations with national governments lambasting infringements, Barroso "always said, "but I don't even know about that"…[and] no President likes it if you go somewhere and you must hear that your officials have done something and you don't know about that" (TRAX 2; TRAX 9). Indeed, it was well-known in the Commission that some civil servants had "a knee-jerk reaction" "every time [they saw] a breach of the law," generating accusations by member states that they were "too aggressive" and going rogue (TRAX 3; TRAX 8). These individuals were "identified as ayatollahs [of enforcement]. And there was no way… [to] control that very directly" (TRAX 6; TRAX 1; TRAX 2). Particularly some of the legal units of some departments – such as DG Environment – and some members of the Legal Service had gained a reputation as "prosecutors" (TRAX 15; TRAX 16), "[b]ut that was not the relationship that Barroso wanted to have" (TRAX 1; TRAX 2). Instead, Barroso "definitely decided, for his first term, to really try to work with the member states" through conciliatory political dialogue (TRAX 3; TRAX 22).

The Means: Politicization and Supranational Forbearance

To rekindle political support from national governments, the Commission presidency set out to pursue forbearance in law enforcement. It was able to impose this policy shift because forbearance dovetailed with the increasing presidentialization and politicization of the Commission. As existing

studies have demonstrated (Kassim et al. 2016), Barroso sought to centralize control over the Commission's policymaking process. Through some key appointments and Barroso's self-professed "Presidential style" (TRAX 21; TRAX 23), the Secretariat General (Sec Gen) increasingly served as the implementing arm of the Presidency's political priorities (Kassim et al. 2016) - including in law enforcement matters. The Commission was also becoming more politicized: as concerns from national capitals about the EU's "democratic deficit" mounted, there were increasing demands that the Commission act less like an unaccountable technocracy and more like a politically responsive executive (Wille 2012). Barroso's efforts to assert political control over the civil servants who managed law enforcement was thus consistent with a broader effort to rekindle intergovernmental support by making the Commission less technocratic and more political (TRAX 23).

Barroso asserted control over law enforcement by transforming the Sec Gen from the "guardian of collegiality" into a "personal service of the Commission Presidency" (Becker et al. 2016: 1016). Historically, the Sec Gen served as a technocratic coordinator of the activities of the Commission's various Directorates General (DGs), but left the substantive decisions on whether or not to pursue an infringement to the lawyers from the Commission Legal Service and DG officials (TRAX 9). When a prospective infringement was pursued by a civil servant, it was usually logged in a database managed by the Sec Gen, but the Sec Gen remained a passive bystander in the infringement cycle – akin to a "post office" (TRAX 1). Most decisions taken by the career officials to advance an infringement case were simply approved by the Heads of Cabinet and College of Commissioners without discussion, since they "had difficulties of reading them all" and were "lazy enough to let the legal unit[s] go" (TRAX 11). From civil servants' point of view, "this was a happy time," but it quickly "ended…[with] the beginning of the Barroso Commission" (TRAX 9).

Barroso wanted the Sec Gen "to be more like as Prime Minister's Office" "to have the control of this process of infringement procedures" (TRAX 8). Forging a truly "political" Commission meant that all its activities – including law enforcement – "should be controlled… and he wanted very much to put himself at the center of that process… [and for] the Secretary General to act as an extension of that process" (TRAX 3). Barroso began this transformation through personnel change, appointing Catherine Day as Secretary General in November 2005. Day proved an impressive agent of institutional change. Her meticulous work ethic "gave her very considerable administrative and political advantage" inside the Commission (TRAX 11). And Day shared Barroso's desire to create a political Commission capable of assuaging intergovernmental criticism of Commission overreach (TRAX 9; TRAX 22). In particular, Day was convinced that it was time to restrain officials in some

DGs and the Legal Service whose inflexible approach to law enforcement "ke[pt] going well beyond the point of reason" (TRAX 1).

Upon taking charge of the Sec Gen, Day "immediately was in touch" with her staff "and said that she had a whole range of ideas on managing infringement proceedings" (TRAX 6). First, Day and Barroso transformed the Sec Gen into a political intelligence unit over law enforcement matters. As one former senior Sec Gen official recalls, "one of the first… mandates that [Barroso] gave to [Day] was that he wanted better political intelligence… on infringements" through regular briefings (TRAX 4; TRAX 6). Secondly, with Barroso's support the Sec Gen reformed the infringement cycle to facilitate political supervision over enforcement. Infringement meetings would henceforth be held on a monthly (rather than semi-annual) basis. This increased the Presidency's capacity to scrutinize individual infringements, and it avoided antagonizing member states who got hit with an "announcement of [a sudden tide of] infringements before the August holiday and before the Christmas holiday" (TRAX 4). Next, the infringement cycle was halted the month prior to Council meetings, so that the Commission President could attend these meetings without being lambasted by government leaders stung by fresh infringements (TRAX 4; TRAX 6). Finally, Day oversaw a significant expansion of the Sec Gen's staff to create the infrastructural capacity to directly intervene in law enforcement by "set[ting[up a parallel structure inside the Secretary General for all DGs." These units functioned "practically [as] shadow offices of the different departments" (TRAX 11). The mantra became that instead of thinking legalistically, "you must think politically" in enforcement matters (TRAX 1).

The most profound transformation spearheaded by the Sec Gen was an internally controversial reform to institutionalize forbearance: the EU Pilot procedure. The procedure was proposed in a 2007 Communication with the full backing of the Barroso Presidency (Commission 2007). Touted publicly as a "problem-solving" tool, privately EU Pilot was understood to promote a shift in the Commission's enforcement approach by replacing many infringement procedures with conciliatory political dialogues with national governments. In the words of a longstanding ex-official, EU Pilot "was the administrative tool that [the Sec Gen] considered was most appropriate in order to have the control of this process of infringement procedures and to prevent these kind of difficulties arriving in the middle of a European Council" (TRAX 8).

How was EU Pilot designed to assert political control over law enforcement and implement forbearance? First, it created a database managed by the Sec Gen to monitor investigations of potential infringements, and the Sec Gen gave access to national governments via a central contact point so

they could monitor these investigations. Governments quickly realized that this "centralization in the member state[s]" (TRAX 4) would enable them to more closely monitor enforcement-related communications between their civil servants and the Commission, and to negotiate solutions with the Sec Gen and Presidency (TRAX 2; TRAX 8). No longer would national governments be blind-sighted by the Commission's pursuit of an infringement.

On the other hand, EU Pilot was anything but transparent to all other stakeholders. The actors who became dissatisfied with time were precisely those who supplied the Commission with its detected cases of noncompliance: citizens and interest groups, who were shut out of the EU Pilot procedure even after they lodged a complaint. This muted civil society's capacity to pressure member states into compliance. As the lead counsel of an environmental advocacy group told us, "the lack of transparency in the process is really not helping…we keep on telling [the Commission], that of course if members of the public and if NGOs knew [of an infringement investigation]… they could put way more pressure on the national government…[it] doesn't make sense. And so it's clearly a political position…to keep it confidential" (TRAX 13). Interviewees confirmed that complainants' dissatisfaction with EU Pilot's opacity was well known in the Commission (TRAX 9; TRAX 14). Indeed, the European Ombudsman chastised EU Pilot's "lack of transparency".[1] From a legal perspective, failing to publicize noncompliance cases and leaving complainants in the dark made little sense; but politically, shielding national governments from public scrutiny was sure to boost their support for the Commission.

Second, EU Pilot created a mandatory pre-infringement procedure that would serve as a political filter for all complaints and marginalize the Legal Service – the unit within the Commission that was most supportive of law enforcement.[2] The Sec Gen knew that "the Legal Service felt very strongly that all infringements had to be pursued" (TRAX 6). But under the Pilot system, a complaint submitted to the Commission was no longer registered automatically as a "detected infringement." Through this procedural shift, "there was no need for the Legal Service to give its advice in closing [an investigation of a complaint]… [it] broke that automatic link" (TRAX 6). A complaint could be the basis of opening an EU Pilot file only if the relevant DG's political Commissioner explicitly approved it. Even then, initiating EU Pilot only initiated a political dialogue with national

[1] "Decision of the European Ombudsman setting out suggestions following her strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission's handling of infringement complaints," at 19. https://www.ombudsman.europa.eu/en/decision/en/83646

[2] The only prospective infringement cases not fed through EU pilot concerned cases of failure to notify the Commission of the transposition of directives; see TRAX 6.

governments, and did not require consulting the Legal Service. And if the Legal Service was consulted by a DG over a Pilot file, it was increasingly constrained from providing advice. As one former Legal Service official recalls: "Each time there was a reform in this EU Pilot system, they tried to reduce the number of days allowed to the Legal Service to give its position" (TRAX 8). Indeed, in handling EU Pilot cases, the instructions given to DGs by the Sec Gen "were not to go ahead with infringement proceedings and to try to find a friendly solution with member state administrations" (TRAX 9). This transformation frustrated domestic complainants who grew accustomed to their complaints being "put in the trash bin" (TRAX 11; TRAX 13). And it obviously angered the Legal Service, since its lawyers "liked the more formalistic approach" and would "never accept" saying "let's just drop it" when faced with a credible infringement of EU law (TRAX 12).

To be sure, in some instances "unintentional noncompliance" could be revealed and resolved via the EU Pilot's bilateral political dialogue (Cheruvu and Fjelstul 2021). "Misunderstandings" could sometimes be cleared up (TRAX 15; TRAX 9). However, the fact that the Legal Service played no role in the decision to close a Pilot file (and thus foreclose the possibility of an infringement) meant that claims by national governments to be in compliance were assessed on political as opposed to legal grounds. In practice, this meant "outsourcing [enforcement] to the very body that commits [law-breaking]."(TRAX 14). According to one ex-official in the Legal Service, "this is completely useless and counterproductive. Why? Because if you are a public prosecutor and you ask the indicted person the evidence of his misconduct, obviously the indicted personal will reply: "I am innocent! I plead not guilty!""(TRAX 9). As a law enforcement tool, EU Pilot's side-stepping of the Legal Service for national governments amounted to the Commission blinding itself to evidence that its lawyers could have readily pursued and flagged as noncompliance.

Indeeed, EU Pilot did not unintentionally lead to some noncompliance cases falling through the cracks. Rather, multiple Commission lawyers emphasized their view that EU Pilot "was the beginning of the end" of legalized enforcement and quite intentionally signaled "the very heavy [political] interference/pressure of Secretariat General, Commissioners and President's cabinet" to avoid acknowledging and prosecuting infringements (TRAX 2; TRAX 9). The "the hidden goal of the reform was therefore to 'kill' or at least slowdown such an efficiency of Commission Services in pursuing infringements" (TRAX 9) so as "to remain on good terms with the member [states]" (TRAX 11). As a result, the "mood changed quite substantially" as a "Stockholm syndrome" and "self-censorship" diffused amongst officials who would "run into the wall" of forbearance politics, creating "a big demotivation of all the European Commission civil servants who were responsible for

infringement proceedings" (TRAX 8; TRAX 9). As one former Legal Service official recalls, "I think you ask yourself if this deserves the effort. Because if at the end, once you have a fantastic file, [the Sec Gen] tell[s] you, "Well, for political reasons, we consider that you have to put that on hold…"" (TRAX 8; TRAX 9). In the words of one interviewee:

> "Suppos[e] that an individual civil servant works six months on an infringement proceeding…and they go to the infringement meeting, and the General Secretary says 'no, this infringement is not appropriate, not politically appropriate. We cannot bother in this moment Germany, France, Spain, or another member state. We are in a very delicate negotiation of a directive, or a regulation'… that was another huge shift… infringement proceedings were used by the General Secretariat and DGs…as a bargaining chip… in most cases the administrations of member states replied that there was no infringement at all. That the complaint was unfounded. They denied any evidence to the Commission services, they lied!... In many cases, on the basis of the reply of the member states, the complaint was dismissed" (TRAX 9).

Even those interviewees who were more sanguine about the EU Pilot reforms concede that it created a lengthy and sometimes Kafka-esque "machinery" (TRAX 2) wherein prospective infringements tended to languish (TRAX 6; TRAX 4). Drawing on the descriptions provided by interviewees personally involved in law enforcement, we reconstructed these reforms step-by-step (see Appendix E). These changes not only increased the steps that officials needed to fulfill, but they also multiplied the political veto players whose explicit approval was needed to proceed.

While forbearance facilitated "a bit of horse trading" (TRAX 14; TRAX 7) with national governments and signaled the politicization of Commission enforcement, its scope was crucially different from domestic electoral settings. Supranational forbearance was designed to rekindle intergovernmental support for the policy agenda of the Commission presidency. Given the European Council's reliance on consensus decision-making (Hage 2013), upsetting even a few member states could spoil the applecart. Interviewees thus agreed that forbearance was applied across-the-board rather than in a partisan or selective fashion, as tends to occur in domestic electoral politics. For instance, although post-2004 the College of Commissioners was dominated by members of the center-right EPP party who were increasingly active in national electoral politics (TRAX 23), interviewees emphasized that reforms like EU Pilot were neither an EPP project nor did they exclusively benefit center-right member governments. Barroso recognized that the Commission needed to "[bring] the Socialists and the Liberals as well" (TRAX 1) to assuage "a general sense that [infringements were] something that is irritating for the member states and we should use [them] sparingly" (TRAX 3).

In short, even officials who lambasted forbearance rejected the notion that it was driven by party politics (TRAX 9; TRAX 4; TRAX 8; TRAX 15), for it was a "much more general accepted approach" within the Commission (TRAX 17). Barroso may have thought that law should not be applied "very mechanically [or] in a harsh way," but he was still "on the side of rules" and their impartial application (TRAX 7). Day, too, believed that only if the Commission appeared a "neutral player" could it rekindle member state support (TRAX 22). Appendix A supports this inference: The decline in infringements benefitted almost all member states rather than a select few. In line with previous research on Commission enforcement (Börzel et al 2012; Börzel 2021: 13-34), we uncovered no evidence that forbearance was implemented in a way biased against particular member states.

The Effect: "Of Course They Are Supportive, Because they Get off the Hook!"

As we have seen, tying up civil servants and lawyers handling infringements would make little sense if the goal of reforms like EU Pilot was to boost enforcement. But the insiders we spoke to suggested that the primary function of EU Pilot was not legal, but political. And as a political project designed to cultivate intergovernmental support for the Commission's policy agenda, forbearance was a success.

To be sure, the Commission never publicly announced its embrace of forbearance. It did not have to, given that it could demonstrate this privately to member governments via EU Pilot's bilateral dialogue mechanisms. Yet tellingly, the Commission did begin to devalue infringements even in its public communications. Instead of the Commission using vigorous enforcement to prove its commitment as "Guardian of the Treaties," infringements were recast as an "irritant" (TRAX 3), a failure, and a "symptom of the disease" (TRAX 4). For instance, opening an infringement was officially tallied as hampering the "success rate" of EU Pilot – a statistic that the Commission proudly hailed in its annual EU Pilot reports. Infringements were also implicitly tallied as failures of the Commission's "Better Regulation" agenda: In the words of the former director of the Sec Gen's Better Regulation unit, if the Commission succeeded in proposing quality legislation anticipating compliance challenges, "there should be fewer instances in which the Commission needs to launch a legal case against a Member State" (Golberg 2018: 45).

Furthermore, the onerous requirements that both the Sec Gen (in close consultation with the Presidency) and political Commissioners had to explicitly approve transitioning from EU Pilot's political dialogue to opening a formal infringement proceeding tipped the scales against law enforcement. For although taking states to the ECJ was the métier of the Legal Service and career officials, at the political level it was clear that "infringement proceedings are…for a Commissioner, a

great disaster," and that "everybody loves law-making [and] nobody loves law enforcement" (TRAX 2; TRAX 15). "See you in court!" was replaced with "we sit down at the table, we find a way, eh?" (TRAX 14). As interviewees emphasized, for the Presidency, the Commissioners, and their cabinets, "the moment of glory was not when an infringement procedure was launched… but when a new directive" or regulation was proposed (TRAX 8). EU Pilot thus exacerbated a "pathology" amongst the Commission's political leadership who "didn't want to hear about infringements and even pilot [files]" for fear of that member states "will call [them]" to complain (TRAX 15).

On the other hand, EU Pilot enabled the Presidency and the Sec Gen to send a clear message to national governments:

> "We would say, 'look, there is an issue on this. We're going to talk about it… we're not looking to score high case numbers in the Court of Justice'… they would see that we're not just blind lawyers, but that we would have had a chance to sort something out… I think the Commission has rebuilt itself and positioned itself to work completely differently with the member states, much more cooperatively" (TRAX 1).

Member states' enthusiastic response to EU Pilot confirm that forbearance achieved its desired political effect. The infringement-related lambasting that President Barroso faced in Council meetings during his first term ceased. "All the Presidents of the Commission had to deal with [governments] raising problems about ongoing infringement proceedings," one senior official recalls; yet "the changes that we made through the 2007 Communication [creating EU Pilot], later in his [Barroso's] second period of office, we got confirmation back from Catherine Day that that was practically not happening anymore, and he was very happy about that" (TRAX 6). Other interviewees confirmed that, "member states liked the Pilot system very much because it allowed them to politically deal with the issue, informally," and by "avoid[ing] any formal proceedings" (TRAX 11; TRAX 16). Indeed, while only 15 member states initially agreed to participate in the EU Pilot procedure, participation quickly grew to all 27 member states by 2012 (Smith 2015: 359-360) as government leaders hailed its advantages to one another (TRAX 6).

National governments also privately communicated their enthusiasm to the Commission. As a senior official recalls, "everyone had gotten a call by [member state] Ambassadors… everyone was told, "this is a great thing, of dialogue with member states!"" (TRAX 2). As a result, Barroso's "bigger" political concern – that infringements might derail his policy ambitions and second term as Commission President – faded (TRAX 3). Instead, in late 2016 or early 2017 member states sent a co-signed letter to the Commission through their permanent representatives in Brussels that emphatically

praised EU Pilot (TRAX 2; TRAX 14; TRAX 6). One official who read the message describes it as a veritable "Valentine's letter" praising the Commission (TRAX 6). When we asked one ex-official in the Secretariat General why national governments became so supportive of the EU Pilot reforms, the official chuckled: "Well, of course they are supportive, because they get off the hook!" (TRAX 12).

That forbearance would be well-received by member governments is evident. But crucially, what tipped the scales in favor of the Commission pursuing forbearance was that there was no powerful political constituency pressing for more vigorous law enforcement. For instance, several members of the European Parliament conceded that most MEPs "find infringements awfully boring" and focus their efforts on "putting more and more legislation on the table" (TRAX 17; TRAX 18). Not unlike the Commission's political leadership, MEPs saw little glory in focusing on monitoring Commission law enforcement, and the concealed nature of how supranational forbearance was implemented also enabled it to fly under the Parliament's radar for some time (TRAX 5). While civil society organizations and citizens complained about EU Pilot to the European Ombudsman, they resigned themselves to the fact that a critical ombudsman report[3] would have little impact (TRAX 13). Finally, ECJ judges might have voiced concerns about the decline in infringements, but as one ex-ECJ judge acknowledged, "we frankly didn't feel that bad about this development" (TRAX 19) because fewer infringements would assuage the Court's rising workload (see also Kelemen & Pavone 2019).

Legacies: Entrenching Forbearance or Buyer's Remorse?

Holland (2016: 234) emphasizes that a "core definitional element" of forbearance is that it must be revocable. Law enforcers must "reserve the right to enforce the law" in order to sustain the implicit bargain of decreased enforcement for political support. While the Commission's embrace of forbearance was revocable in principle, in practice the new Jean-Claude Juncker Commission which took office from November 2014 found that even a partial revocation of forbearance proved difficult and contentious. Though the Juncker Commission did manage to restore the use of infringements to some extent, the politicization of enforcement spearheaded by the Barroso Commission continued to provoke a chilling effect.

By the time that Juncker took helm of the Commission in 2014, heads of government in the European Council were no longer lambasting the Commission about excessive infringements. While

[3] See: "Decision of the European Ombudsman setting out suggestions following her strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission's handling of infringement complaints." https://www.ombudsman.europa.eu/en/decision/en/83646

Juncker appreciated this, he nonetheless regretted some of the "overreaction" and unintended political consequences of indiscriminate forbearance (TRAX 2). Both Juncker and his ambitious head of cabinet, Martin Selmayr, realized that the Pilot reforms made it impossible for the Commission to expedite and publicize an infringement when it did suit their policy agenda. "The Juncker Commission discovered" that EU Pilot could also be "an obstacle! Once they decided to launch an infringement against Czechia or against Poland, someone would say: "No, no! We have to launch the EU Pilot before this happened"" (TRAX 8). By always stalling law enforcement, "they [had] noticed how the pathology [had] developed" that always pushed against infringements, such that "EU Pilot could be used against [their] political ambitions and [their] political intentions" (TRAX 15; TRAX 8; TRAX 10). In other words, although EU Pilot was designed to centralize political control over law enforcement, its flaw was that it lacked a reverse gear. According to one ex-senior official, Selmayr in particular "understood the game quite well:" The threat of revoking forbearance and launching infringements could serve as a "a stick behind the door in the discussions with the member states…to get something [legislative] done in another area" (TRAX 12).

In other words, the Juncker Commission did not desire to return to the pre-2004 status-quo of unsupervised law enforcement by civil servants. Rather, it wanted to enhance the Presidency's political discretion to wield forbearance more selectively. As a result, during one of the very first meetings of the Heads of Cabinet, the President's cabinet successfully proposed revising a single paragraph in a forthcoming public communication on law enforcement announcing that the EU Pilot procedure would henceforth become the exception rather than the rule: "EU Pilot," the new Communication text read, "is not intended to add another lengthy step in the infringement process... Therefore, the Commission will launch infringement procedures without relying on the EU Pilot… unless recourse to EU Pilot is seen as useful in a given case" (Commission 2017: 13; TRAX 2).

Although the Communication was only made public in December of 2016, rumors that the Juncker cabinet was partially revoking the forbearance politics undergirding EU Pilot sent shockwaves from the first days of the Juncker Commission. The "people in the Secretary General were devastated," and national "Ambassadors tried to mobilize Commissioners" to reverse the decision, since national capitals "got addicted" to forbearance (TRAX 2; TRAX 14). The intensity of this blowback was not anticipated by President Juncker's cabinet. One senior official recalls how "surprising" it was that "nobody wants to abolish [EU]Pilot," since

> "so many people, lawyers in the Commission […] said it doesn't work. but everyone had gotten called by the Ambassadors before, and everybody was told, 'this is a great thing!'… those who

> were pleading to keep EU Pilot were also countries like the Netherlands […that] always says, 'you have to do more to enforce EU law,' I remember the Dutch Ambassador…"but you have to keep it, it's a very good thing! Because [Dutch Prime Minister] Mark Rutte doesn't like to read in the newspapers that he has violated EU law" (TRAX 2).

Because of this pushback, the Commission continues to selectively wield EU Pilot's political, pre-infringement dialogue and to forbear from law enforcement. Its use is always "validated by the top, by the political level, by the cabinet of each Commissioner" alongside the Sec Gen (in coordination with the Presidency) (TRAX 15). Some interviewees suggest that a more blanket forbearance may be making a comeback under Juncker's successor, current Commission President, Ursula von der Leyen. For after "the member states met and they told the Commission, 'please put it back, we like it, etc,' …now the Von der Leyen Commission has a sort of reversal, 'ok, we are going to use it a bit more'" (TRAX 14; TRAX 15). Regardless, career civil servants are now deeply wary to push for law enforcement. As one interviewee puts it, lawyers and career officials "are still living this second era, this second [politicized] stage of the Commission's infringement policy… and this very negative mood lasts still now… this is what I have seen and it's based on long talks with colleagues in different DGs, who were deeply frustrated, and still are, unfortunately" (TRAX 11). This frustration reflects a fundamental tension: as one of our interviewees put it, when it comes to law enforcement "you cannot be a political Commission in the morning and a technocratic Commission in the afternoon" (TRAX 8). There is no question about which of these two faces of the Commission is now firmly in control of (not) enforcing European law.

V. Conclusion

For decades, one of the distinctive features of the EU as a quasi-federal international organization has been the strength with which its executive – the European Commission – enforced EU law (Vauchez 2015). With the authority and willingness to regularly sue member state governments for noncompliance, the power of the Commission as "the guardian of the Treaties" was unparalleled among international organizations, and more akin to what one might expect from the executive of a federal state. But as the EU's policymaking powers grew, they also became more salient and politically contested. Since the 1990s member state governments have progressively reasserted their control over European integration to limit the power of supranational bodies like the Commission (Hodson and Puetter 2019; Schimmelfennig 2015: 724; Peterson 2017). As the Commission faced this mounting intergovernmental pressure, an underlying tension between its roles as "engine of integration" and

"guardian of the Treaties" emerged in stark relief. To serve effectively as the engine and pursue its policy agenda, the Commission needed to win more support from member state governments who were increasingly resistant to supranational power. But to fulfil its role as guardian, the Commission needed to take legal action against those very governments, who were increasingly aggrieved at being the targets of law enforcement.

Against this charged political backdrop, the Commission turned to supranational forbearance, partly sacrificing its duty as the "guardian of the Treaties" to resuscitate the support of member governments and safeguard its political role as the "engine of integration." While this process bears parallels to how domestic law enforcement can be manipulated by political actors, we have argued that *supranational* forbearance differs from its domestic variant in crucial ways. Since supranational forbearance arises amidst the trudge of intergovernmental politics rather than the jousting of national elections, it tends to be more generalized than partisan, more policy-driven than electorally-driven, and more concealed than publicized.

Our story holds important implications beyond the theoretical study of forbearance: it also serves as a cautionary tale for the eight international organizations other than the EU in which a supranational commission is tasked with enforcing international norms against member states (Alter 2014: 92-93). These organizations – such as the European Free Trade Area, the East African Community, and the Andean Community – also face calls for greater political accountability (Alter and Zürn 2020). Whatever the merits of heeding these calls for reform, the EU's experience underscores the tradeoffs and costs of further politicization. For the rise of supranational forbearance in Europe highlights how politicizing international institutions risks undermining the enforcement of the law.

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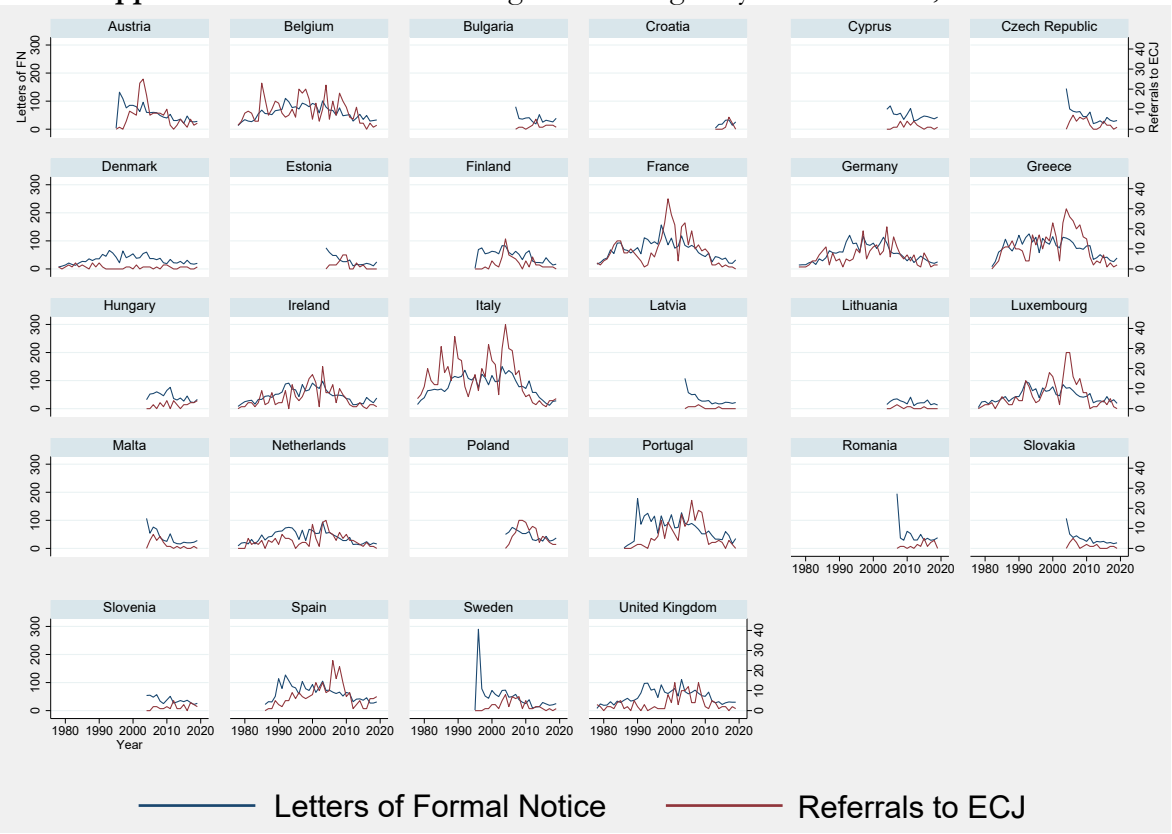
Part I: Data Appendix for "Where Have the Guardians Gone?"

Appendix A and Appendix B

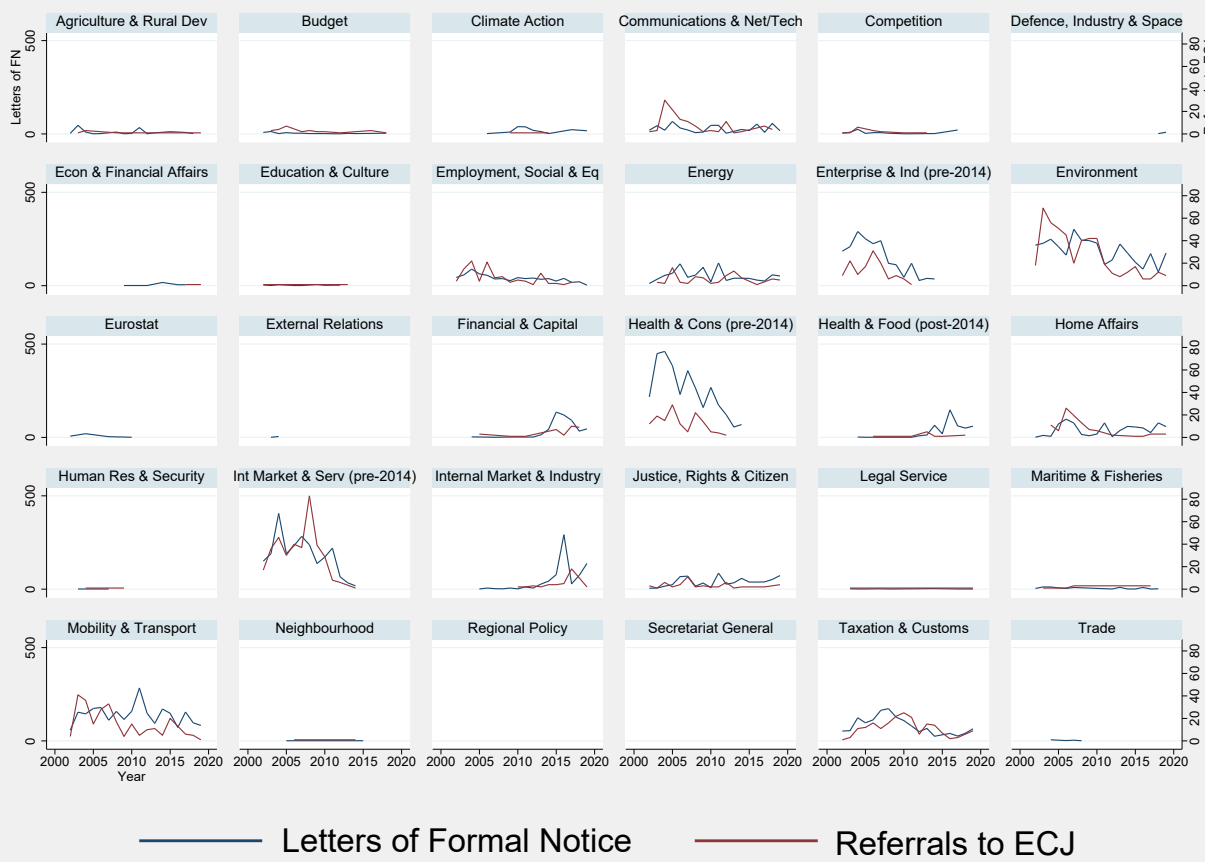
Appendix A shows that not a single EU member state has been the subject of a growing number of infringement actions over the past two decades, while most states have witnessed a decline – from founding members like Italy and France to late accession states as diverse as Sweden and the Czech Republic. And as Appendix B confirms, the decline in infringements also spans most policy areas covered by the Commission's Directorates General (DGs). Out of 30 policy domains, only three have witnessed a rise in infringements in the past two decades (internal market and industry, financial and capital, and health and food), but this a mere byproduct of the Commission's 2014 reorganization and consolidation of its DGs.[4] The disappearing infringements are neither compartmentalized to a few policy domains nor are they being driven by a few states.

Appendix A: Commission Infringements Lodged by Member State, 1978-2019



[4] The DG for Health and Consumers became the DG for Health and Food Safety in 2014, which explains the emergence of health and food-related infringements. The DG for Enterprise and Industry was disbanded in 2014, and its portfolio was reallocated to the DG for Internal Market and Industry and the DG for Financial Stability, Financial Services and Capital Markets, thus the growth of their infringement portfolio since 2014.

Appendix B: Commission Infringements Lodged by Policy Area, 2002-2019



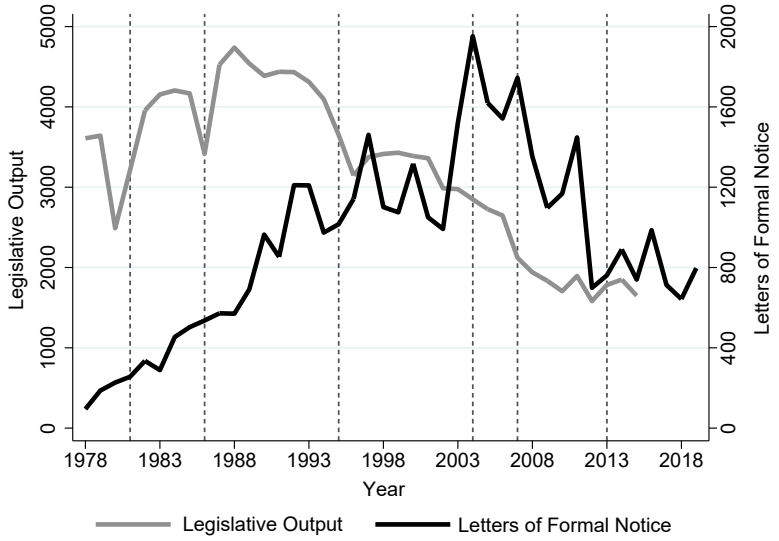
Appendix C and Appendix D

Some observers might point to the fact that the EU's legislative output has been in decline to explain the sharp drop in Commission enforcement post-2004. After all, if the EU's legislative output declined, then opportunities for member state law-breaking would have also declined. Indeed, in Appendix B below we show that EU legislative output (comprised of EU regulations, directives, and decisions) has been declining since the late 1980s.

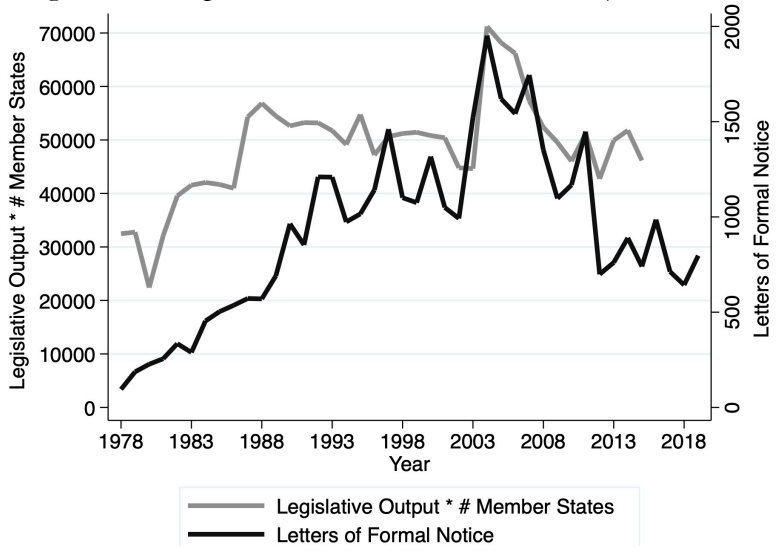
It is certainly possible that a decline in EU legislation accounts for part of the reason why EU infringement actions did not continue to rise unabated after the 1990s. Yet there are four reasons why this explanation is insufficient for explaining the trends post-2004. First, the EU's legislative output has been declining (a) gradually and (b) since the late 1980s, yet infringements launched by the Commission declined (a) suddenly and (b) since 2004, suggesting that enforcement is not derivative of legislative output. Second, opportunities for law-breaking are not just a function of the number of laws in the books, but also of the number of potential offenders. Since the 1990s, the EU has almost doubled in membership. If we graph a simple function of EU legislative output multiplied by the

number of EU member states – as in Appendix D below – we see that the decline in legislative output has been offset by the increase in EU member states, such that opportunities for law-breaking have remained essentially unchanged since the late 1980s.

Appendix C: Commission Infringements Opened and EU Legislative Output, 1978-2019



Appendix D: Commission Infringements Opened and Opportunities for EU Law-Breaking (EU Legislative Output * Number of Member States), 1978-2019



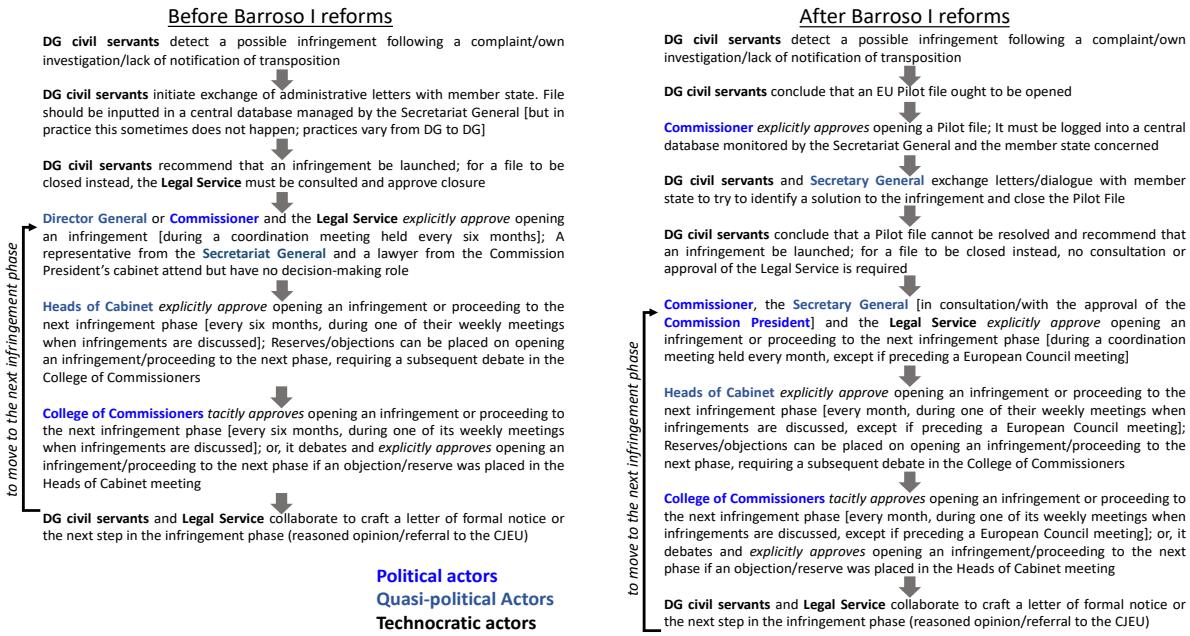
In truth, even Appendix D is overly sanguine, for it presumes that the propensity of a given member state to violate EU law remains stable over time. However, several of these new member states (like Hungary, Bulgaria, and Poland) have often committed repeated or systemic violations of EU law, and

as we mentioned in the main text of the paper, a number of economic and political crises plaguing the entire EU post-2004 led to waves of law-breaking even in longstanding EU member states.

A third reason to be skeptical that a decline in legislative output explains the decrease in Commission enforcement is linked to Figure 5 in the main text. Figure 5 demonstrates that even if we set aside infringement actions that are automatically linked to legislative output (EU directives passed in year *n* that fail to be transposed in year *n+1* automatically trigger an infringement), the there remains a stark decline in Commission enforcement when it comes to "discretionary" cases (arising from complaints or the Commission's own investigations).

Finally, while the EU's legislative output has been gradually declining, the EU's cumulative legislative stock has been steadily growing. Obviously, noncompliance by member states is not limited to violating new EU laws: National governments often also infringe upon older EU laws.

Appendix E: Reforms to the Commission's law enforcement procedure during the Barroso I Commission



Part II: Transparency Appendix for "Where Have the Guardians Gone?"

Transparency appendix (TRAX) entries are provided for interview evidence and quotes cited in the article. Following Moravcsik (2014), for each entry we include an extended excerpt of the interview treated as evidence, annotations which specify our interpretation of the evidence and explain its relevance for our analysis, and a citation to the interview itself. See: Moravcsik, A. (2014). "Transparency." *PS: Political Science and Politics* 47 (1), 48-53.

TRAX 1 - Interview with ex-Commission official 3, January 22, 2020

This former senior-level official worked in the cabinets of several Commissioners as well as in the Secretariat General. Their experience spans both the years prior and subsequent to a shift in law enforcement policy by the first Barroso Commission. They emphasized how by the early 2000s some member state governments had become more assertive in protecting their own national sovereignty and in trying to interfere with the Commission's inner workings. They emphasize how this put the Commission on the defensive and impacted morale:

> *…'these stupid bureaucrats in Brussels don't understand!' So it was all part of the mood at the time, and that has changed enormously now since Brexit because people have realized what you could lose, you know. But in those early years, it was also the time of pushing the Commission to be less involved, to have fewer priorities and just deliver them, the whole Better Regulation agenda as well. And of course the UK was in there, peddling its own agenda as well. So the degree of Euroscepticism and pushback against the Commission – and I think it's very funny because the Commission felt, I think, battered and under siege for a lot of that time. But the member states were afraid of how strong the Commission was! So let's say our perception of our organization was very different from how the member states perceived it. So all of those things were in the mix…"*

The official then described Commission President José Manuel Barroso's perspective on the Commission – forged through his experience as ex-member of the European Council – how the Commission's law enforcement immediately hampered his relationship with the Council upon his assuming the Commission presidency, and how member states began haranguing him over infringements during Council meetings:

> *"Barroso had been a foreign minister, and he had been at the European Council when the prime minister was accompanied by the foreign minister, and so he had seen it for quite a while. So he had an external view of how the Commission was performing, as viewed from the European Council, and he thought it was chaotic and disorganized…*
>
> *Barroso and Juncker felt that because they had been members of the European Council, they'd both been Prime Ministers, so they thought they'd both have the same kind of, you know, camaraderie and good relationship that they had had when they'd been members of the European Council. But it changes overnight! And suddenly, the President of the Commission is in the bear pit! And is regarded, I mean not as the enemy, I'm exaggerating, but you're in a different camp, and it's not the same pally wally kind of relationship you might have had three months ago or six months ago. And I think they've both had to adjust to that as well, and decide, "ok, how am I going to play this? And how am I going to be effective on behalf of all the Commission wants?"…*
>
> *I make a joke out of it, but going back to the European Council: I remember we had one nearly every month in the Eurocrisis days. Most Prime Ministers would have either three little cards in their inside pocket or a very slim briefcase. Barroso had you know those airline pilot cases on wheels? He had to drag that in because*

he had this amount of briefings on infringements that Prime Ministers were going to pounce on him to kind of say, "You're making my life miserable. Can we sort this out?" That just shows you, they had one little thing, and he had to cover 28 member states and anything that they might have been briefed by whoever to raise with him…"

The official then spoke about how some civil servants and lawyers within the Commission took law enforcement so seriously that they gained a reputation as "ayatollahs" of enforcement, how this caused them to resist the EU Pilot reforms, and how President Barroso wanted to change their approach to enforcement:

"I mean, there was resistance to it [EU Pilot]. A, because, you know, most departments don't like being coordinated. They always regard it as a nuisance, these people from the center who don't see things the same way they do. And, even Commissioners, some of them felt that it was undercutting their power base. You know, that they were strong because they could take legal action against member states. But that was not the relationship Barroso wanted to have with the member states. He wanted to have the Commission to be a partner, up to the point where, "ok, you had tried all the nice stuff, and you had to go down the legal road." So yes, DG-environment. And, having also been in that DG, you do get some fanatics, you know, who keep going well beyond the point of reason….My colleague, the Director General of the Legal Service, was very much on board also because we worked very closely with Barroso. But some of his more Ayatollah-ish officials hated this [EU pilot reforms] as well!…"

The official then described how the Secretariat General under Catherine Day worked to move away from a legalistic approach to enforcement, and how the substitution of conciliatory political dialogue for legalistic enforcement was bilaterally communicated to member states via EU Pilot:

"Because obviously, if you could wait a month to do something and not spoil the atmosphere of the European Council where the Commission needed to get certain things, where was the cost at the end of the day? And also maybe on some delicate things, if he was meeting Prime Ministers, he could say, "come here a moment, I want to talk to you about this, if you don't sort this out I will have to.

So there was much more of, I would characterize the shift as a move away from a purely legal, "you have sinned therefore we must do," to "look, we have a problem"…

What [Day and the Secretariat General under Barroso were] trying to get at is, I suppose a higher level of understanding, really. That we would alert a central contact point in each member state, and then we would say, "look, there is an issue on this. We're going to talk about it… we're not looking to score high case numbers in the Court of Justice. We want Community law to run smoothly. But if we talk about it and if you persist in your wrong behavior as we see it… well then we will have an understanding between us that the Commission has to do its job. And you wouldn't get as much negative press in the media in that country." But also they would see that we are not just blind lawyers, but that we would have had a chance to sort something out."

The official then described how the Secretariat General under Catherine Day hired staff to create units to shadow the Commission's Directorates General and instill a more political and less legal approach to enforcement across the Commission:

"In the Secretariat General [Day] tried hard to organize [her] units to shadow DGs, so that [she] would actually have a couple of people who were following environment who would be able to engage substantively with the infringement team, or in you know, telecoms, or shipping, or whatever it was. To have people who could

understand the substance and work out solutions, approaches, in that way, so that it wasn't just a legalistic numbers game…

[The goal was] to get this more political awareness in the civil service. Which doesn't mean playing political games; some people have difficulty understanding, they did at the time, when [Day] tried to explain this to them. When [Day] would say, "you must think politically," they would think, "oh, she wants to do deals with the member states"…

The official then concluded that through the Barroso Commission's reforms to law enforcement, the Commission managed to boost political support in the Council and amongst member states, even if it meant upsetting some of the lawyers and civil servants within the Commission:

"If I was a lawyer, I might well say, "well, you have to deal with all the cases. And if people don't give you the staff or resources then they have to accept that it has to take you seven years to get to the end of the cue." And for them it doesn't – I'm again caricaturing – that didn't matter for them politically in the way that it mattered to us at the center. The perception and the image of the Commission was very important. And it was, as you say, it was the image of a technocratic machine that never stopped to ask, you know, into what kind of pool am I throwing this rock, but also that, had an accumulation of death by a thousand cuts, and didn't realize that the ultimate outcome was death, even if it was by a thousand cuts. And we had to just remake all of that. And I think that the image of the Commission now… I think the Commission has rebuilt itself and positioned itself to work completely differently with the member states, much more cooperatively… I think we're back to the days when the Commission was seen as a kind of trusted partner, most of the time, and we had come very close to losing that, I think."

To conclude, we asked this ex-official whether party politics had any role to play with enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance. The official discounted this possibility, emphasizing that the Commission needs support from socialists and liberals in order to promote its policy agenda:

"I never really felt that it was a party political thing. It was – I mean, to a very large extent the UK, which had left the EPP by the time of the Cameron years, you know – and a German thing, coming from a slightly different direction. But I firmly believe if the Brits hadn't at every meeting attacked the Commissioner over Better Regulation, we would never have turned the Commission inside-out the way we did… so yes, you could say it was more of a right-wing agenda, but that is very marginal. I never felt it as a party political thing. Barroso and Juncker were very, you know, coming from the biggest party both of them, they recognized that you could never carry the Parliament with you unless you brought at least the Socialists and the Liberals as well… and they needed them for all the legislation to get that through."

TRAX 2 - Interview with Commission official 13, April 20, 2021

This senior-level official worked in the cabinets of a Commissioner as well as the cabinet of the Commission Presidency and the Secretariat General. Their experience spans the years during and subsequent to a shift in law enforcement policy by the first Barroso Commission. They noted how by the early 2000s some member state governments had become more assertive in protecting their own national sovereignty, including member states that publicly affirmed their commitment to vigorous law enforcement by the Commission. These states, such as the UK, were amongst the most vigorous proponents of the EU Pilot reforms spearheaded by the Barroso Commission. They also noted how,

for Commissioners and the Commission's political leadership, infringement proceedings were a political and public relations disaster, but how the EU Pilot procedure was a disaster from the perspective of civil servants in the Commission, since it significantly increased the number of steps it took to open an infringement while keeping the process concealed from public view:

> *"When I started at the Commission…what I realized after some time [was] that infringement proceedings are …for a Commissioner, a great disaster…[reforming law enforcement a private, bilateral dialogue] was to be generous to the member states, eh? That was the intention, and I can say I thought it was counterproductive to the purpose of the Commission to enforce EU law…*
>
> *During the Barroso I Commission, if I remember well, the Pilot was introduced as part of the overall approach to Better Regulation… I think we [officials in the DG where this interviewee served] were all against that. Because, well, we have already the first step [the letter, which] is kept secret, and now we introduce before that another step, because there is usually before that, normally the Pre-226 letter [the letter of formal notice preceding a reasoned opinion under ex-Article 226 TEC, now Article 258 TFEU], you all know that… there are so many pre-steps, and now we add another pre-step, and all of this is kept confidential, so this will have no impact! It will rather prolong the procedure without bringing about any results.*
>
> *But the Pilot was very deeply entrenched in the system. Member states wanted it, notably, interestingly enough, member states that you would normally think are on the side of those who publicly say they want the enforcement of EU law. One country that was particularly vigorous in wanting for that, under the heading of better regulation, was the United Kingdom. Because they didn't like the Commission coming after them, and therefore they preferred to say, at a later stage, "ah, we have never been informed about this…"*

The official then describes how by the early to mid 2000s, the Commission felt increasingly "pressured" by member states and plagued by political setbacks and declining political support. The first Barroso Commission thus took on a more defensive posture to try to avoid anything that "rocks the boat" too much, motivating a shift in approach to law enforcement:

> *"When the Barroso Commission was started, we had the defeat of the Constitutional Treaty in France and the Netherlands. And what happened afterwards, and I was a young official at that stage but I saw that, there was a lot of, the Commission was on the defense, and I think President Barroso and his team were very much under pressure in this period, which was the period of reflection, to lead to hopefully at some point to consolidate this into the Lisbon Treaty. I think they were extremely reluctant to do anything that rocks the boat too much. And I'm not criticizing it, I think it was a very difficult time… on infringement proceedings, I remember I was regularly called to the office of the Secretary General, of the President's head of cabinet at the time, notably when it was infringements vis-à-vis the United Kingdom. The United Kingdom had a very special protection at the time…*
>
> *I wanted infringement proceedings. But I understood, of course, the whole referendum [defeats in France and the Netherlands] had devastating effects on the morale of the Commission at the time. I think the threat of the whole process of European integration being reversed was very much in the air, the need to reconnect with member states, with national parliaments, the mood within the member states was very much, eh, I think everybody felt that, that it was necessary… the Commission had a bit lost touch with what was happening on the ground… I think there was a lot of, a growing awareness, at least at the political level in the Commission, and also the new generation of Commissioners, that you could not just go on with what we had done, and not only with infringements, also with lawmaking…"*

The official then recalls, alongside several other interviewees, how President Barroso was blind-sighted by being taken aside at European Council meetings by heads of government lambasting infringements lodged against their states by the Commission – and how embarrassed he felt that he did not have any political oversight and control over the law enforcement process within the Commission, and how this lead to more "ayatollah-ish" officials advocating for enforcement being "shouted at" by the President's Cabinet, who advocated that they restrain themselves:

> *Barroso had been a Prime Minister before, a young Minister. He came to the Commission, and the first experience that he made, at least from what I could observe, and that was whenever I got called to the 13th floor to be shouted at, that I should not be so Ayatollah-ish myself… Barroso always said, "but I don't even know about that." Because at the time, the President of the Commission… was not even aware what kind of infringement proceedings had been launched, it had been left exclusively to the services. There was no – officially it went to the agenda of the Commission meeting, but it was an A-point, it was never discussed… the fiches were not read by Commissioners, not by cabinets, only by those super-legally interested in that. So Barroso was caught off guard, and no Prime Minister, no President likes it if you go somewhere and you must hear that your officials have done something and you don't know about that. That led to… the centralization and the presidentialization… Barroso used his Secretary General [Catherine Day], who was extremely hardworking and able, to say, "When I go to the European Council… I want to know," and the next stage was that Catherine Day, who was very diligent, went with Barroso to the European Council, and she had always a thick file with her, asked by [Barroso], "tell me, tell me what is going on." When the President is suddenly sidelined by the Italian or French or Portuguese Prime Minister, that I at least know what it's about…"*
>
> *So in summary, two reasons for becoming more cautious, prudent, and some would say political, about this [law enforcement] is: (a) we have to look at things as the mood has been changing… and secondly, the experience of Barroso in the European Council, that was the result of the weakness of the EU at the time as a result of the negative referenda, everybody was hitting at the Commission, Barroso didn't want to be the last person who got slapped…at least from what I could observe… Barroso had just been to the European Council and wanted to achieve something for the Commission and our policy agenda but it got totally distracted by heads of states and government in the European Council, or even in the meetings, shouting at him, for this or that [infringement]."*

The official then emphasizes that to the extent that reforms – like EU Pilot – increase the private, concealed nature of law enforcement and substitute political dialogue for infringements, they end up being counterproductive to enforcement – something that particularly Martin Selmayr, Jean-Claude Jucker's head of cabinet, recognized:

> *"[Martin Selmayr] made no secret that [he] was not a fan of the EU Pilot [reforms]…[because he] thought they would prolong the procedures, because they would lead to a situation that in the member states, only people at the administrative level would be aware of infringements, but not at the political level… If you don't read about it in the press, nobody will do something about it… there is so much dialogue already…because the first two stages of infringement proceedings are dialogues. Why to introduce something else? There was an additional element there which I think was wrong with the conception… sending a letter of formal notice was considered by many to be a declaration of war… [yet] the letter of formal notice was just the warning to start the dialogue, and in any case it can be that the Commission finds out that we're wrong, so then we withdraw!...*
>
> *[EU Pilot] was again an overreaction to the Ayatollah-esque behavior earlier. Of course we had people in the Commission that once we sent a reasoned opinion or formal notice, they were seeing it like, "ah, finally we get them!"… and as a result of that, this confrontation approach in infringement procedures led the Barroso Commission to see the need for more dialogue… [but] we have a dialogue between deaf people in EU Pilot,*

that's why in many, many cases, according to my experience, the Pilot didn't lead to a resolution of the issue, but two three or four months later we were exactly in the same position…

I remember a long HeCa meeting, the meeting of the Heads of Cabinet, where they said, "But nothing prevents you from doing an infringement procedure. If you want to do an infringement procedure, you bring it up to the College [of Commissioners], this is only the rule, there's the exception to the rule" – of course you know how it is: The exception to the rule was almost never applied… very, very rarely, and you had to get through the whole machinery, so when you had a good case, [there was] almost no way not to go through the EU Pilot, so it became not only the rule, it was the law."

The official also describes how the Juncker Commission partially revoked the EU Pilot procedure and the resistance this provoked from member states:

"[during the Juncker Commission] the Pilot was still there! It was not gone, because people in the Secretariat General believed in it, and others didn't like it, but the wording is still it's there… so I asked [an official in DG Justice and Consumers]…he said, "well, nobody wants to abolish the Pilot…" I said "that's surprising, because I know so many people, lawyers in the Commission, who said it doesn't work," but everyone had gotten called by the Ambassadors before, and everybody was told, "this is a great thing! Of dialogue with the member states," so the school of thought that initially was the minority in the Barroso Commission had become the majority…

… at the meeting of HeCa [Heads of Cabinet]… [President Juncker's cabinet successfully] made the proposal to change one paragraph…I think people in the Secretary General were devastated!...several Ambassadors tried to mobilize Commissioners [to bring it back]… [but] it says [in the 2016 Communication on law enforcement] as you know that the Commission will launch infringement proceedings without relying on the EU Pilot problem-solving mechanism only, unless recourse to the EU Pilot is seen as useful in a given case, which needed the approval of the President's cabinet that it was useful."

In light of pushback from member states on revoking EU Pilot, the official concludes by recalling what other interviewees described as the "Valentine's letter" that member states sent the Commission either in late 2016 or early 2017 praising the EU Pilot reforms, once again including, somewhat surprisingly, member states that were publicly committed to vigorous law enforcement by the Commission:

"So this Valentine's letter, which I don't recall that it was called like that, I remember this letter, I know that it was written by the Ambassadors in Brussels, not by all of them, but by a larger group of them, who said "this is actually good because it gives us an advantage in information before this hits our capital…" I remember for those who were pleading to keep EU Pilot were also countries like the Netherlands! Even though the Netherlands always says, "you have to do more to enforce EU law." I remember the Dutch Ambassador [saying], "but you have to keep it, it's a very good thing! Because Mark Rutte doesn't like to read in the newspapers that he has violated EU law… So there was pushback."

TRAX 3 - Interview with Commission official 1, April 20, 2021

This senior-level official worked in the cabinets of several Commissioners as well as in the Secretariat General. Their experience spans both the years prior and subsequent to a shift in law enforcement policy by the first Barroso Commission. The official corroborated the fact that in the late 1990s and early 2000s, member states had grown increasingly assertive in criticizing the Commission and attacking it for interfering too much in domestic affairs. This exacerbated a crisis mentality in the

Commission, an increasing tension between its political leadership and career officials, and a sense that greater top-down political control and oversight was necessary over civil servants tasked with handling law enforcement:

> *"…coming up to the period you describe [post-2004], one of the things that was the fallout of the Santer Commission resignation. It's quite interesting psychologically. The feeling of the staff, particularly the senior management, was that they had been let down by the Commissioners. The feeling of many Commissioners was that they had been let down by the senior staff. And I think one of the things that emerged was a growing degree of distrust between Commissioners and senior Commission staff. A sense on the part of the Commissioners that somehow the staff were running things, and they were, they were not properly informed and not properly allowed to play their role of oversight… basically, a certain degree of tension between senior officials and the political level…And infringements became a little bit the battleground of that. Because there was a feeling that infringements was the kind of playground of officials, and not even senior officials, even sometimes relatively junior officials who were responsible for looking after bits and pieces of legislation and who would take it into their head that this or that behavior by one or another member state was outrageous and needed to be sanctioned by an infringement. And there was a feeling that perhaps there wasn't enough political oversight by, say the Director General, or by the Commissioner responsible…*
>
> *So that's the background, and I think that's the context. And we had certainly with Prodi, I remember we had terrible problems with Germany at one point. Schroeder was then the Chancellor, and he kept complaining about the Commission interfering, you know, being too involved, micromanaging, interfering with the work of member states… So I think the tendency was… increasingly to have more control over this, to have a more political view about how often, whether and when to take infringement cases, and not just, you know, to do it every time you see a breach of the law, which was the knee-jerk reaction, sometimes the case, with fairly junior officials in different parts of the administration."*

In particular, the official recalls how law enforcement was primarily handled by career officials before the Barroso I commission, and how this was a source of growing irritation to the member states:

> *"…[pre-Barroso] it was more or less automatic that if you could prove that there was a breach of the spirit of the, or the letter, of the directive, then you would proceed with an infringement. This didn't have to go very up the hierarchical ladder, you know. Probably a head of unit would be… sufficient to trigger it, and probably a director general wouldn't pay too much attention, particularly if the Legal Service and the Sec Gen said, "yes, we agree." So it was, it was fairly decentralized and it happened, yes, at a fairly junior level in the system. And I think over time, this then became a source of irritation with the member states, who felt they were being harassed unfairly, and this then reflected itself at the political level, you know, of Commissioners and President of the Commission saying "we need to take a more restrictive and more political view of this.""*

In this context, the senior official recalls how Commission President José Manuel Barroso was perceived within the Commission as being motivated to work collaboratively with the member states, in as conciliatory manner as possible, in order to further his political and policy ambitions within the European Council. This motivated his support for implementing a politics of forbearance as part of his efforts to Presidentialize and centralize political control over the Commission, in order not to irritate member states and rekindle their sense of "buy in" to the Commission agenda:

> *Now of course [laughs], it was also true that the second element was by the nature of President Barroso himself. Who was, you know – I mean, I think he was a good President of the Commission, but he clearly had a very clear, you know, he came from a Maoist background, he he, he had a very clear: Things should be controlled,*

and things should be managed, and nothing should be left to chance… and he wanted very much to put himself at the center of that process. So the growing role of the President, his chef de cabinet, and then he also wanted the Secretary General to act as an extension of that process, and of course this played into the infringements. The other [reason] was, as I said, that the sense that infringements were a source of irritation for the member states, and perhaps a, um, an unnecessary irritations, and something that could disrupt good relations with the member states, and that, I think, President Barroso particularly – I mean, there are different views on this – he saw himself very much as trying to be cooperative with the member states, particularly in the European Council and so on. Now there are those who criticize and say he went too far! That he too accommodating, and you can have that debate…and the infringements was all part of that same package, if you'd like…

I think the feeling was that infringements were frequently an irritant with the member states, and the question is, was it worth the candle? Was it worth pissing off the Germans about their bottle disposal plan if indeed you were looking to them to adopt a new merger regulation, or something. And, I mean, there was no direct relationship between these two things. I mean, people didn't say, "if you back off on infringements I'll be helpful," but it was about the general dynamic and the extent to which the Commission might be seen as technocratic… it was a nice story that they could sometimes spin, "oh, dear me! I have a really particular situation here and you're really going to upset the political balance in this region and then they'll go all anti-European and then it'll be really difficult, you know…" it was part of a general question of how do we ensure that the member states feel some buy-in the European process and is not simply something to jump up and bite them unexpectedly…

…to be honest with you, I think that might have played a bigger role than his past as a member of the European Council. I think that is the accusation which is made against José Manuel – he's a very good friend, by the way…but yes, he clearly set out to make himself useful to the member states and to have a certain complicity between the President of the Commission and the European Council. I would say, and he would say, in order to enable him to better pursue the Commission's agenda, the less charitable would say that it was also linked to his political ambitions to have a second term, and therefore not to be seen as someone who was too confrontational with the member states…you have to have a lot of courage as President of the Commission to say "sorry, this is the law! This is what we have to do in the European interest and I'm going to do it. If I'm pissing you off I'm sorry but that's what we need to do!" It takes a lot of courage. And I can understand when there are times that Commission Presidents have to choose their battle… and you can't be in endless confrontation with your main stakeholders…and yet the role of the Commission is necessarily, yes you have to work with the member states but you also have to lead and you have to take, you have to show courage… José Manuel definitely decided to, for his first term, to really try to work with the member states and build a certain complicity, which certainly involved him in more compromises than might have been the position of some Presidents…"

To conclude, we asked this ex-official whether party politics had any role to play with enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance. The official rejected this claim and noted that the shift in enforcement policy was more related, if only indirectly, to the Commission's Better Regulation agenda than party politics or partisan coddling of EPP-led member states:

"Well, I mean, you know, the EPP, you know, had a certain influence particularly in the choice of Presidents from Barroso through to Juncker through now to Von der Leyen, but – and there were probably a majority of Commissioners who were EPP, but there were Socialists, there were Greens, and so – I don't think it was that. The whole issue of Better Regulation was a big issue. I mean, god knows, I honestly lost track… how many exercises of Better Regulation we went through… it was always the same debate! It was, "Oh, we're

overregulation…" we need more impact assessments, and more upstream consultation with stakeholders…I mean, some of it was worthy… but there was also a sense that some of this was about box ticking, and not really about addressing the substantive legitimate issues that there might be there… this was a running agenda, I don't think that the reduction in infringements was directly related to the Better Regulation legislation, but it was related, as I said, to a general sense that this was something that is irritating for the member states and we should use it sparingly."

TRAX 4 - Interview with Commission official 2, February 18, 2021

This official worked in the several Directorates General as well as in the Secretariat General during the Barroso Commission. Their experience spans both the years prior and subsequent to a shift in law enforcement policy by the first Barroso Commission. The official recalls, alongside several other interviewees, how President Barroso was blind-sighted by being taken aside by heads of governments and during European Council meetings as these government heads lambasted infringements lodged against their states by the Commission. This was particularly an issue regarding some DGs – like DG environment – where some officials and lawyers had gained a reputation as vigorous law enforcers. This motivated Barroso's attempts to convert the Secretariat General into a political intelligence unit for the Commission Presidency, so as to better monitor and control law enforcement:

"…certainly Barroso was very interested and always wanted to have information on infringements and what the caseload was vis-à-vis the member states. So that became a component of the briefing materials that were always provided to the President…

But certainly for infringements … the first real exposure to the infringement process was in DG environment. And there you saw that there was really an ever-increasing caseload, both in complaints and infringements. And, um, shall I say, a rather contentious, or not always a good relationship with the member states. Why do I say that? Because complaints were coming in from all corners of the member states and often, the complaint went directly into launching of an infringement…And at the time there was no process by which you would inform a member state that you were going to launch an infringement, so, so they were taken by surprise. They would see a press release saying, "The Commission has launched ten infringements against France," or something – and then the central government would say, "What's going on? Why didn't we know about this? What's the issue?"

… it was something that bothered President Barroso a lot in the beginning, that he would go into a European Council, and a member state – a Prime Minister, [a] Head of State – would come up and say, "Well, What's this case about? Why are you pursuing this?" and so on, and he [Barroso] would be blindsighted. So one of the first, if you like, instructions or mandates that he gave to the Secretary General was that he wanted better political intelligence, in terms of knowing what the services were doing and how it was impacting the member states specifically. So infringements are an area that are really a Commission-member state relationship. It's not Commission-Council, it's not Commission-[Parliament], it's Commission-member state. And when you have the actual realization of that in person is when you have the European Council and the President was facing the Prime Ministers and so on. So yes, it was one of the very first things that he instructed the Secretary General… He wanted better political intelligence and knowing about the infringement, what was going on in the infringement world was certainly an important part of that. And as a result of that, that's when I mentioned that we developed the system where he would be briefed, or his cabinet would be briefed, on the infringements on a regular basis."

Next, the official recalls a reform of the infringement cycle to preclude member states from being irritated by a barrage of fresh infringements before the summer and Christmas holidays – and to increase the political capacity to scrutinize and intervene in each infringement:

> *"…the situation before 2006 is that: The Legal Service had two meetings a year, basically, huge package meetings where they would decide on all the infringements. Now these big meetings were usually held in July and December, and there was nothing more irritating for the member states than getting an announcement of infringements before the August holiday and before the Christmas holiday. I mean, that was just a practical irritation… So one of the reforms in 2006 was to go into a monthly decision-making cycle. Now, this sounds pretty elementary but it was a huge shift at the time.*
>
> *[Question: Did shifting to monthly cycles increased the political monitoring of infringements?] It was really – you're right! No one had the capacity to absorb these huge packages. And also it didn't make any sense, the infringements happen over the course of time, they don't happen twice a year…"*

The official then describes the intricacies of the EU Pilot procedure reforms spearheaded by Secretary General Catherine Day, with Barroso's political backing. The official first describes the IT system it developed and how it centralized dialogue both within the Commission and within member states, in order to bolster political control over civil servants in both quarters, and to signal a shift to a more cooperative, less confrontational approach:

> *"…what [the Secretariat General] did with EU Pilot is you had a procedure. It was mandatory. It was for all the DGs, and it was backed up by an IT system. And an IT system but also an IT system with performance benchmarks, if you'd like. The member states had 10 weeks to reply, the services should reply within 10 weeks. So it, it took some time, and… not all member states were involved at the beginning, but over the course of time, I think, you could see that there was an… improvement in the administrative procedure, relative to when administrative letters were being sent. So I think it was a question of having everyone following the same procedures, but also changing the approach so you weren't confrontational from the beginning…*
>
> *I do not believe that there was central oversight of administrative letters before EU Pilot… the Secretariat General's role was essentially procedural…so what happened with EU Pilot is yes, it became a centralized, a centralized tool, if you'd like, both for the Commission and the member states. Because administrative letters could be sent to ministries, or, to my knowledge… but there was no central point in the member state that knew about all the administrative letters being sent. So part of the Pilot process was to get a central contact point within the member state that was responsible for receiving the notification of Pilot Cases, making sure the responsible ministry in the member state was aware of it, and making sure the response was provided within 10 weeks. And that function – that centralization in the member state – was absent prior to Pilot as well. So I think both on the Commission side and the Member State side, it provided… a pivotal point, a point of contact, that facilitated a more common approach across the bureaucracy… And yes, yes, of course, the Secretary General did play a role, because (1) in initiating it, but also just getting the IT systems, consulting with the member states, getting the Pilot working group set up where we brought the people who were responsible in the member states to Brussels to get the system working, so yes it was a major, major exercise for the Secretariat General… [that] increased the role of the Secretariat General overall in the infringement area.*
>
> *One final thing about having a more Presidential system. Yes, I think you see the Secretariat General doing much more in terms of policy coordination, now than it has done previously. It's become much more like a cabinet office, if you'd like, over the course of time. Certainly that was one of the objectives of Catherine [Day],*

to make it more of a political steering entity, a policy steering entity, sorry, rather than simply a procedural – a secretary."

Although this official was supportive of EU Pilot and its reforms, they do acknowledge that there was significant resistance to the reform within the Commission civil services, and that there were some issues with EU Pilot's operation, in the sense that it was an inefficient process that tended to cause delays:

"There were a lot of opponents [to the EU Pilot reforms]. I mean, for different reasons, about changing the system. I mean, change is difficult, and when you want to make a major shift in the system, you do run into resistance.

… there's always issues, the time to solve the cases was increasing, there were more cases going in, so there were issues."

But the official adds that member states grew very supportive of EU Pilot:

"we gave the member states the option, you can join or not, and we'll see how it works, and so up until finally in 2012 everyone was on board, but it was incremental over time and it was a demonstration of the fact that it had worked to bring more member states in… the member states were not complaining about EU Pilot."

Finally, the official notes that during the Barroso Commission, there was a broader re-framing of infringements. The vigorous law enforcement by prior Commissions – and particularly by civil servants – was framed as a problem, given that infringements were now viewed as a failure to reach cooperative solutions with member states rather than evidence of the Commission's success as a law enforcer:

"Was there a change in strategy? No, it wasn't really a change of strategy. It was developing a strategy with the aim of better application of the law. Infringements were a symptom of the law having failed, they're a symptom of the disease, if you'd like. They're not addressing the problem…

…there was a certain attitude, I think, in the 1990s that the law was the only way to achieve your aim… and then the rude awakening, at the turn of the century, was the member states saying, "Hey, what have we signed up to? What do we have to do?"… and this prompted this look at infringements, and both questioning whether we always have to have a law to achieve our aims, and do we always have to go to court to achieve application of the law? So I think those two questions were fundamental questions… and I think as well, if you look at the culture of the Commission, I think the Legal Service was extremely strong, in those days, it was sort of, above all other services, if you'd like. And the lawyers… had a special status as well. So I think all those things played into the infringement process sort of becoming an aim in itself. And the pursuit of cases was something that was seen positively rather than seen as something reflecting the failure of the system. And I think that turned around, somewhat, in the Barroso years…"

To conclude, we asked this ex-official whether party politics had any role to play with enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance, particularly given the EPP's support of the Better Regulation agenda. The official rejects this possibility and notes that while the EPP pushed for Better Regulation, there was no partisan pressure for forbearing from law enforcement:

"I think there I would separate the Better Regulation Agenda from infringement management… practically every European Council conclusion, practically, between 2012 and 2017 or 2016, when the [UK EU membership] referendum was held, had Better Regulation in it because it was seen as a way to try and appease the UK, to tell them that Brussels was doing something…they could always agree on Better Regulation…

But the EPP, I don't… in my view there was not the same political involvement in the infringement – in the application of law. As an element, perhaps, of Better Regulation, but certainly by no means to press for pursuing fewer infringements…"

TRAX 5 - Interview with Member of the European Parliament 1, December 2, 2020

This Member of the European Parliament (MEP) has been serving in the Parliament since the first Barroso Commission. The MEP has taken a particular interest in the Commission's increasingly hesitate approach to law enforcement, although they admit that this issue has only become salient for the Parliament as a whole in more recent years – after the Barroso Commission reformed law enforcement:

"*I've seen that in the last, at least six years, that the whole issue of compliance with European standards when it comes to democracy, the rule of law, fundamental rights is suddenly and very very rapidly rising on the political agenda… One of the things I'm feeling increasingly… is that enforcement is extremely weak and in some cases non-existent… I, you know, I witnessed with my own eyes. And yes, I've been going around for the last few years ringing the alarm bells about this topic. I also want to make this a topic…"*

The MEP then describes the Commission as increasingly intergovernmental and tending to the interests of member states – and how this shift occurred with the first Barroso Commission, since President Barroso was intent on partnering with member states in the Council, in order to pursue his policy agenda and secure a second term:

"*And my explanation is that the European Commission is increasingly intergovernmental… the Commission is very intergovernmental, and that has been progressively the case since – certainly since Barroso. And that means that if they're intergovernmental, they don't want to bother the member states. You know, they don't want to get into a fight…and the other thing is that in this whole atmosphere of, "Brussels is too centralized…" then everything had to be decentralized. So supervision and enforcement has also been decentralized. And it doesn't work! It doesn't work. We see that in Dieselgate: I mean, leave the supervision of environmental standards to a German supervisor close to the industry – it won't work! Leave supervision of the data protection rules to the Irish supervisor where Facebook is established – it won't work! And on and on and on…*

I do think that the member states are, let's say the Council, intergovernmental Europe, they have at some point decided that the Commission was becoming too powerful and had to be brought to heel. And you could see that when Barroso I was appointed, because there were other candidates first! And all of them – there was Guy Verhofstadt, there was… Chris Patten – you know, there were a couple of names of very very powerful characters. And they were all dismissed. Why? Because the member states did not want a strong Commission leader. So then they worked their way down the list until they came to Barroso, who was sufficiently weak to be harmless, and then he became Commission President. And then for five years he did what was expected of him, not being in the way of the Member States, and then he got a second term…

The fight here, and it's becoming more and more to the fore – is the fight between two visions of Europe: One is intergovernmental, the other is political in the sense of parliamentary democracy, being a political unit. And it is unavoidable…"

The MEP concludes by discussing a "pressure" campaign by member states and the Council on the Commission, and the impact it had on enforcement since the first Barroso Commission, an impact that persists to this day:

"The national governments in the Council [are pressuring the Commission], clearly, as I said from Barroso I onwards, they have very deliberately sought to weaken the Commission…the member states are strengthening their grip on the Commission. Of course, the choice of Commission president is a key competence of the member states… and that means that Ursula Von Der Leyen who had a very narrow majority in the vote, but she feels like she has a mandate not from Parliament, but from the Member States! In her mind, and then the Member States – the Prime Minister of the Netherlands has repeatedly said in speeches that yeah… The Commission serves the Member States. I go "no no, look at the Treaty! It's actually forbidden for the Commission to serve the Member States!" But in their minds, this is the way…[in the 1990s] it was Parliament and the Commission, they were the two institutions communautaires, so the community, the federal institutions. And that is, and that shift has been made, and I think it started with Barroso I."

TRAX 6 - Interview with ex-Commission official 4, March 3, 2021

This ex-EU official served in the Commission and its Secretariat General before the Barroso I Commission and was intimately involved in the reform of the infringement process and the creation of the EU Pilot Procedure during the first Barroso Commission. The official continued to serve in the Commission during Juncker's Presidency before retiring. The official begins by confirming the recollections of several other Commission officials that President Barroso was immediately taken aback by member state government leaders confronting him over law enforcement actions targeting their states – and how he was intent on changing this dynamic. As a result, the Secretariat General began by first creating a database on infringements and a regular series of briefings for the President so he could more carefully supervise and manage infringement actions and investigations. The official then mentions that the various reforms of law enforcement made during Barroso's first term as President (especially the creation of EU Pilot announced in a 2007 Communication) proved successful, in that member states stopped harassing Barroso during Council meetings:

"President Barroso, um, was some earlier on in his period in office, certainly had concerns about member state heads of state and government frequently raising with him at European Council, in the margins of European Council meetings, raising infringements with him at that level, with problematic issues. And that was how the [infringement] database… was developed and increased information was provided to the President's cabinet prior to European Council so he was well-informed. I mean, he would bring the Legal Service and others in for any meeting there… so they were alerted to and they had access to information if anything was likely to come up. But the changes that we made through the 2007 Communication, later in his second period of office, we got confirmation back from Catherine Day that that was practically not happening anymore, and he was very happy about that."

In an e-mail communication preceding our interview, the official expanded upon the foregoing recollection:

"At the political level, all Presidents of the Commission had to deal with Heads of State and Government raising problems about ongoing infringement proceedings and therefore increasing attention over the period in

question was paid to briefings in preparation for European Council meetings… President Barroso complained about having to get into such matters and how they appeared a bit to colour some aspects of the European Council meetings… by the time of President Juncker, the actions taken in the 2007 Communication had also reduced the frequency of such issues arising in contacts around European Councils..."

In particular, the official recalls how clear it was that member states were supportive of EU Pilot. In particular, they recall how member states joined the EU Pilot procedure after they recognized its benefits, and how they collectively sent a "valentine's letter" to the Commission praising its new, dialogue-centric and more conciliatory enforcement approach – while in particular officials in the Legal Service were opposed to the EU Pilot reforms. Part of this response was communicated in an e-mail before the interview:

"The system began to operate among some volunteer Member States and proved very successful and so others joined. France was the last to join and Germany had initial concerns at the way we launched it, but quickly came around and finally found it very positive. Early figures started to show how successful the process could be."

During the interview, the official then discussed the "valentine's letter" and the opposition of the Legal Service to the EU Pilot procedure:

"And in fact [around 2017] the member states actually sent a valentine's letter collectively to the Commission on EU Pilot! Ha ha! Which I guess is a fairly unique thing for them to do, but they liked it! Just… Yup, yup! Which would probably have caused a huge amount of consternation in the Commission that we had done something fundamentally wrong! [laughter].

The main cautious, if not negative feeling, was from the Legal Service. And they would be the people committed to legal process feeling that things had to be done that way."

One crucial reform of the EU Pilot procedure was to side-line or limit the role of the Legal Service which – as the official acknowledged – was intent on pursuing all cases of noncompliance rather than a policy of forbearance. This was achieved through the EU Pilot procedure by reforming the registration of complaints, in order for the Legal Service to not have to agree to the closure of an investigation. The official first hinted at this reform in an e-mail communication:

"[EU Pilot] had arguably broken the direct connection between the receipt of a letter by the Commission on an issue of EU law and the pursuit of an infringement proceeding."

The official then expanded on this reform during our interview:

"The policy on complaints and infringement management at that time was that we did not have a discretion. If someone wrote to us and the letter gave rise, on its first reading, to the possibility of involving an infringement of EU law, it had to be registered separately from other correspondence. And that also meant that the Legal Service had to be consulted before you closed that file. So we – and we were committed to this because of wanting to help individuals, wanting to be a support, wanting to make EU law real for individual people on the ground… It would only be registered if the official, the individual official, in the Commission department when they read it felt that it could raise an infringement…

The EU Pilot stopped, changed the process of registration of a complaint. A complaint was no longer automatically a prospective infringement proceeding, it was just an issue which linked to EU Law… which we just needed to clarify and clear. And therefore, there was no need for the Legal Service to give its advice on closing it, and whenever there was a complaint we had to inform the complainant and complete that process as before, but the process was much simpler. The Legal Service could keep an eye on what was going on, they could look, had access to the database… but it was no longer a formal requirement, so it broke that automatic link…"

The official describes the background context – the fact that pre-Barroso, infringements were primarily managed with wide discretion by Commission civil servants in the various DGs and the Legal Service, some of whom had developed a reputation as "ayatollahs" of enforcement – for being eager to bring infringements against member states. President Barroso soon realized that he would not be able to control these officials without major reforms:

"[Question: On lawyers/civil servants in the DGs favoring infringements in the 1990s and an atmosphere of the Commission having been too litigious] You're absolutely right that there were some individuals who were clearly and across the whole Commission identified as ayatollahs. And there was no way that the Secretariat General or the Legal Service could control that very directly, certainly not the in the early stages of still identifying whether there was, there is ground for an infringement. You had to let the thing get to a stage where it became clearer and then, mainly the Legal Service would start saying, "there's nothing here, this doesn't look like an infringement," although the Legal Service felt very strongly that all infringements had to be pursued and they wanted to do that…"

The official then describes the impressive and crucial role that Barroso's new Secretary General – Catherine Day – played in upending and reforming the Commission's approach to law enforcement, and in spearheading the EU Pilot reforms – including modifying the infringement cycle so that it would be easier to scrutinize and politically supervise infringements, and in order to strike a more cooperative stance with member states:

"The reason how EU Pilot came on the agenda with the 2007 Communication was because in 2005, Catherine Day become Secretary General of the Commission. And she immediately was in touch with me and said that she had a whole range of ideas on managing infringement proceedings. I mean, she had come from [DG] Environment which was responsible for a huge number and had a lot of experience in that over many years independently as well. And we'd actually prepared a comprehensive review of everything that we did, and so it was very easy for us to put together. She said, "Show me what you're working on, and I'll tell you." And so we just had to add to every aspect which we'd been reviewing, how we might change it, Ha! So we she could see what you would suggest to change. And we covered everything that we did, including this very curious process of just having infringement proceedings coming twice a year to the College… a massive process that those two three day meetings would involve. And we gave her that document and, a few days later, she came back and said, "I want all of it!" And she was an enormously powerful person in the Commission as Secretary General, and enormously active. And it was only really with her authority behind it that we changed almost everything in the way things operated… those massive meetings preparing for the two main infringement meetings of the Commission each year were before the holidays of the member states. And member states had been on to Catherine as soon as she became Secretary General saying, "that's a heavy process, and it hits us at just the worst time," and so on, "can't you do something about that."…on EU Pilot it was something we wanted to take forward in order to find easier, more cooperative solutions earlier with the member states…"

The official confirmed that as part of these reforms, the infringement cycle would be halted or paused the month before a European Council meeting, to avoid irritating member states:

> *"You could get quite strong reactions at that time. So it was [halting the infringement process before European Council meetings] something that was done to avoid that kind of situation, and to allow the normal process, the time for the normal processes to operate as well. But you're quite right…and it was something which was done to avoid I think that there could be sort of sort of small explosions around a European Council meeting."*

The official expanded on this reform in a follow-up e-mail communication:

> *The second point concerns the issue we discussed of decisions on infringement proceedings being delayed before European Council meetings to avoid negative reactions. Such actions were started during the Barroso Commission, but it then became the regular practice for the calendar of European Council meetings to be checked against infringement meeting planning and for the latter to be organised around the former."*

The official then expanded on what it meant to signal a more cooperative, less adversarial approach vis-à-vis the member states, and how EU Pilot communicated this shift:

> *"[Before EU Pilot] very often the first contact with the member state was a letter of formal notice on that issue, and the volume of those which were closed in the first stage, and quite a lot still in the second stage. So we were thinking, "well, that's already start of a legal proceeding," I mean, a lawyer would say the reasoned opinion is the real start of the legal proceeding, but that was the formal Commission, the formal step, was the letter of formal notice. And that was… a legal challenge which you create. And what we wanted to do was a system where we would cooperate. Say, "let's get together. We'll send you whatever information has been sent to us, or what we have analyzed or discovered ourselves, and see if you think it's a non-issue, because the information is inaccurate, or it's an issue that can be sorted very easily, and let's do it together."*

Relatedly, the official mentioned how one of the goals of EU Pilot was to decrease the number of infringements – and how they personally disagreed with the view that fewer law enforcement actions meant that the "system" was working better:

> *"…people thought that a reduction in the number of infringement proceedings would mean that everything was working better. I didn't! There were a lot of other possible reasons why you might get a reduction in the number of infringement proceedings.*
>
> *… certainly when we introduced the EU Pilot system, which really, really began in 2008/2009 and was gradually taken up by more member states, we certainly have expected, we expected and we identified that that did reduce – I mean, 85% of issues opened with member states in EU Pilot, as I'm sure you know, were resolved before going to an infringement procedure."*

The official, who was overall fairly sympathetic to the EU Pilot procedure, did acknowledge that it tended to be a lengthy and inefficient process, which could slow down enforcement actions. This issue was especially raised by the new Juncker Commission that succeeded Barroso:

> *"There is a risk in EU Pilot of course, and that is the length of time that a DG and the member state work on it, and that can delay any progress… and if these things dragged on… our statistics on the first report show that 60% of their [member state replies] were in the deadline, of the member state responses, and only 40% of*

our follow-ups in the Commission respected the deadline. So we were out of order…the thing would have lost its value if things just drifted in EU Pilot."

Finally, the official noted in a follow-up e-mail that only discretionary infringements stemming from complaints or the Commission's own investigations were fed through the EU Pilot Procedure. Automatic infringements – such as failure to notify the transposition of a new directive – were not fed through EU Pilot, given the automaticity of those enforcement actions:

"Non-communication cases were not fed into EU Pilot as there was nothing to discuss with the Member State on them. The absence of the communication of transposition measures was a fact and the Commission had a duty and interest to follow-up quickly and consistently on that."

TRAX 7 - Interview with ex-Commissioner, February 3, 2021

This former member of the College of Commissioners within the Commission under the second Barroso Commission and was able to view the reforms of the Commission's law enforcement approach as they were being implemented. They begin by explaining how the Commission's reduction in infringement actions during the Barroso Commission is tied to growing intergovernmental pressure and a decline in member state support for the Commission as a supranational actor. This bred an "internalized Euroskepticism" within the Commission – which this ex-Commissioner tied to a deregulatory agenda spearheaded, among others, by Barroso's new Secretary General, Catherine Day:

"So look, I would connect this trend [of fewer infringements] with the phenomenon which I think unfolded since the 90s, post-Delors, which is: A deliberate suppression of the Commission as an autonomous as opposed to national interests. And the fact that, you know, since the 90s, it always had to be a former Prime Minister as Commission President – there is no such rule but it became a pattern, and this pattern was not there before…

… slowly, what afterwards unfolded was a kind of implicit criticism, or even sometimes a kind of bad consciousness of some Commission officials, suggesting that look, "maybe we overdid this regulation. Maybe it's too much, so let's start, first of all, selectivity, but also selectivity on the grounds of not enforcing, right?"…

So, there is an internal politicization, and indeed probably these issues are also used in some kind of horse trading. I mean, there are certain general sensitivities. The general sensitivity is: If there is a big controversy linked to, you know, some infringement case that matters a lot for a country, you don't want to come with an infringement news… but this is also an alibi for, you know, postponing again, and postponing again, and not pursuing and not pursuing again and again… you say: "Ok, the dossier is la la la, under consideration" – so in a way, it's an internalization of Euroscepticism, if you want…

… so for Barroso… the application of the rules, maybe not very mechanically, not in a harsh way, but he himself, in my view, was on the side of the rules, but he was he was also on the side, as a Portuguese, of being a negotiator… I would not rule out, and that's why also my experience with the British may impact my own thinking, that British influence, Dutch influence, there was this trauma of the two referenda, the French and the Dutch. I think the trauma of the French and the Dutch referenda probably left a mark… and then also in 2014, again, when the Netherlands and the UK the so-called populist forces became much stronger. And then the assessment, in my view, falsely was, "ok, this is a legitimate repercussion against the European Commission for being too active, doing too much, the EU interfering in too many things…

So it was also a part of the everyday discourse in the Commission, that you know, we shouldn't aim to regulate everything… since this kind of internalized Euroscepticism, or this internalized deregulatory… attitude, yes. I

mean, if Catherine Day you know for something, it was indeed with being wedded with this Better Regulation, if possible deregulatory agenda. But, it wasn't necessarily implemented in a way of non-infringements, but this might have been one of the consequences."

The ex-Commissioner also discussed how the presidentialization and politicization of the Commission impacted enforcement and increased the amount of political interference in the infringement process:

"I'm there to testify that it's true that the President's cabinet is involved in the preparation of the infringement procedures, national – Commissioners, members of the Commissioner – keep an eye on dossiers and they're prepared to interfere if there is something in preparation, right?...

…I would assume that the presidentialization and the politiciazation doesn't help. In my case it was true that the President's cabinet wanted to be in the loop…"

To conclude, we asked this ex-Commissioner whether party politics had any role to play with enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance. The Commissioner notes that despite their criticisms of the EPP, they do not think there is evidence that forbearance was driven by party politics. In particular, the Commissioner notes that while Barroso did not want a "harsh" enforcement of EU law and wanted to be a "negotiator" with member states, he nonetheless wanted the rules to be applied equitably:

"You know well, I don't particularly like the EPP, but I don't want to implicate them if it's not, if it's not necessarily justified. I would say there might be a connection, so I couldn't immediately prove the connection…even after the British left the EPP, the EPP remained quite a diverse group. So there are the [Viktor] Orban types, which of course do not want to obey with any kind of group… the autocrats … but there are also the lovely Christian democrats from the Rheinland, and the moderates from the north, and I think, and the types of Barroso. You know Barroso is an international lawyer, and then for him, the whole concept of the EU was that this is a set of rules which have been developed on the back of some, you know, internationalist passion in Europe. And then the EU works well if the rules are applied, that was explained his whole attitude to Greece and the Eurozone problem… so for Barroso… the application of the rules, maybe not very mechanically, not in a harsh way, but he himself, in my view, was on the side of the rules, but he was he was also on the side, as a Portuguese, of being a negotiator…"

TRAX 8 - Interview with ex-Commission official 6, January 26, 2021

This senior official served on the Commission since the 1990s and was active in its Legal Service during and after the Barroso Commission and its reforms to law enforcement. Although this official was rather sympathetic to these reform attempts spearheaded through the Secretariat General, they also endorsed the legitimate grievances of civil servants in the Legal Service and the ways that the Barroso Commission's policy of forbearance hampered the Commission's capacity to enforce the law. The official begins by confirming that the immediate motive to reform law enforcement and create the EU Pilot procedure was to protect President Barroso during European Council meetings, so that his agenda would not get derailed and he would not be harassed by member state government leaders complaining about infringements launched against their state by civil servants that Barroso lacked the capacity to manage directly. In other words, EU Pilot was less an enforcement tool and more of a tool to assert political control over law enforcement:

"I have to recognize that my turnover in terms of infringements is declining every year… Why is this trend? Why is the number of infringements reducing? I think there are different, we can consider very different reasons. Some of them are purely technical. For instance, an infringement procedure is very time consuming, resource consuming…

But I cannot tell you that there were not political reasons. For instance, I remember very well that for President Barroso – President Barroso was a very serious man, but also a very formalistic person, a very formalistic politician. And for him to go the European Council and to come back from the European Council with three letters of formal notice, or three administrative letters, sent by, I don't know, a head of unit in DG environment, or DG employment, with a tone, a very aggressive tone, and to be confronted with this letter in the European Council because the French President or the Spanish President shows him a letter that he considers badly drafted and too aggressive for a member state, et cetera, this created also, this created also a kind of uncomfort [sic] for the President of the Commission. This immediately had consequences in the services. And for me, this is the main reason for the creation by the Sec Gen of this famous EU Pilot. The EU Pilot was the way that Catherine Day, that was a fantastic Secretary General of the Commission, it was the administrative tool that Catherine Day considered was most appropriate in order to have the control of this process of infringement procedures and to prevent these kind of difficulties arriving in the middle of a European Council…

… And I remember myself working – charged by Barroso – to discuss with the French authorities in the margins of the European Council, a particular infringement because people coming from Paris were really furious against the Commission because there was not an infringement…

… I always consider that this [EU Pilot] was the way that Catherine [Day] invented, or developed… she developed this procedure in order to prevent accidents for the President and in order to allow her to have the administrative control of the Process … I always got the impression that she was very comfortable with this procedure because this procedure allowed her to control the infringement procedures."

The official recalls how EU Pilot was implemented hand-in-hand with a reform of the infringement cycle to preclude member states from being stung by fresh infringements before a European Council:

"There was a policy established – you know that in the last years, infringements are, in principle – because there are exceptions – are sent to the College by cycles. And in principle these cycles are monthly cycles. Before a European Council, there was never a cycle. The cycle was always foreseen after the European Council meeting, in order to avoid that Barroso, or later on Juncker, were confronted with these kinds of tensions with the heads of state or government…"

The official then recalls how the EU Pilot reforms were perceived by the legal service – namely, as a means to marginalize its role or to "oppose" its more vigorous, technocratic approach to law enforcement. The official also notes the inefficiencies of the procedure:

"And, it was, but it was, it is presented – for some of my colleagues in the Legal Service, it was something against the Legal Service – it was not something against the Legal Service…But of course, it was a lot of administrative tension between the colleagues in the Sec Gen and the colleagues in the Legal Service, because for instance – very stupid issue – each time that there was a reform in this EU Pilot system, they tried to reduce the number of days allowed to the Legal Service to give its position on an infringement case, each time…

What was a little bit more – and the source of the complaints of the colleagues in the Legal Service – was that when EU Pilot was put in place, there was not – the infringement procedures were no longer an issue between

two – the DG and the Legal Service – but we had also the Secretary General in the meeting room. And we had the Secretary General in the meeting room with criteria that for us were not legal criteria, were political criteria.

…in fact, from a legal perspective for us, a little bit of work, because of course if you have additional steps in the procedure you have to intervene in additional steps… it was an intiative to have additional control… because I remember in some DGs, there were, there were real masters of the infringement procedure!"

Part of the problem – this official notes – is that while lawyers and civil servants were very invested in law enforcement, the political leadership of the Commission was not – its focus was squarely on proposing policies, not on law enforcement. And by centralizing political control of infringement cases via the Secretariat General, EU Pilot excacerbated this reluctance and a tendency towards forbearance. This created a "Stockholm syndrome" amongst civil servants, who would no longer finding it worthwhile to pursue infringements given that they would be shut down at the political level:

"The problem is, and maybe it's a sad conclusion, but it's very difficult to create a political interest in law enforcement. Of course, in DG environment, and maybe this was the reason for the success of the infringement proceedings at the very beginning, because once, when you have very committed officials in DG environment, and you have very competent and committed officials in the Legal Service, it's, I don't say easy, but it's easier to have a good infringement procedure before the Court of Justice. Once you are obliged to pass this work through the filter of the EU Pilot, or the Coordination established by the Secretary General, I think you ask yourself if this deserves the effort. Because if at the end, once you have a fantastic file, and they tell you "Well, for political reasons, we consider that you have to put that on hold for months," all the previous investment… there was some kind of Stockholm syndrome…

…very often in our weekly [cabinet] meetings, it was crystal clear that – of course the cabinet was not opposed to law enforcement – but the moment of glory of [cabinet heads] was not when an infringement procedure was launched against Italy or against France, but when a new directive or environmental liability was presented to the European Parliament, and there was an important debate."

On the other hand, the official notes that member states were strongly supportive of EU Pilot, especially given how it enhanced their control over communications with the Commission and the Commission's law enforcement activities (and, sometimes, their capacity to monitor their own subnational units in more federal states):

"[Question: On EU Pilot's popularity with the member states and whether it increased their ability to monitor potential infringements and the Commission's investigations:] Absolutely correct. In any case, it is my impression. Because we have had a lot discussions with the member states concerning infringement procedures. For instance, in the federal states, it's very difficult… for instance in Spain… for the central government in Madrid to know how these directives is being applied in Murcia or how this directive is being applied in Catalonia. And this EU Pilot allowed them to also have this kind of control, because regularly the Secretary General had bilateral meetings with the member states…"

The official notes that the Juncker Commission that succeeded the Barroso Commission turned partly against EU Pilot and sought to partially revoke it – not because the President's cabinet wanted to return to a system of technocratic and vigorous law enforcement, but because they wanted to assert

even greater political control and discretion over law enforcement in order to be able to wield forbearance more selectively:

> *"But someone in the Juncker Commission discovered that the EU Pilot was an obstacle! Once they decided to launch an infringement against Czechia or against Poland, someone would say: "No, no! We have to launch the EU Pilot before this happened! Because we have published in our communications that we have EU Pilot, and because we communicated the existence of that, we cannot avoid this element in the procedure!" And someone in the Juncker Commission that in fact EU Pilot could be used against his political ambitions and his political intentions, and they decided to change things. But this didn't change the global management of infringements: The only consequence was that… this allowed them to go faster in launching some infringement procedures."*

The official notes how the politicization and presidentialization of the Commission began under the Barroso Commission is inherently incompatible – or intension – with its capacity to serve as an independent law enforcer:

> *"If for political reasons you are obliged to occupy your resources in some part, some priority part, of your DG… of course, by the inertia of the administration you will be less rigorous in the law enforcement for the non-priority part…*
>
> *There is a tension. There is a tension, I think there is no doubt… You cannot be a political Commission in the morning and a technocratic Commission in the afternoon, I think."*

To conclude, we asked this ex-official whether party politics had any role to play with enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance, particularly due to the EPP's support of a Better Regulation agenda. The official rejected this possibility:

> *"Not at all. I know quite well the European Parliament…Better Regulation means better regulation. I cannot deduct from better that better means less. And from my experience, every time we have tried to do less, the exercise finishes very quickly... Better is better, but I've not been convinced that it means less…"*

TRAX 9 - Interview with ex-Commission official 9, November 23, 2020

This senior-level official served on the Commission for many years before and after the Barroso Commission reformed law enforcement and established the EU Pilot Procedure – serving most of their time in the Legal Service. As such, this individual was especially detailed and informed about how law enforcement worked before and after the EU Pilot reforms. Channeling the Legal Service's perspective on the reforms, the official was adamant that the EU Pilot procedure was an attempt to politicize and greatly reduce law enforcement actions capable of irritating member states and negatively impacting the Commission President's role in the intergovernmental European Council. The official begins by describing how law enforcement worked before the Barroso reforms – and how it all ended when Barroso took over the Commission Presidency:

> *"So I can divide my [x] years experience into two periods, two long periods. The first period… in the 80s and 90s and the beginning of the first decade of this century, the infringement proceedings were a matter for civil servants. It was a very technical and legal area of activity of the Commission, and the decisions were taken at the level of civil servants. And there were obviously meetings of the cabinet of the Commissioners, devoted to*

infringement decisions, but if a case was not… recalled by a Commissioner, the decision to go ahead – letter of formal notice, reasoned opinion, and application to the Court – was adopted by the College of the Commissioners by implicit decision, with no objections decision… in infringement meetings, there were 2 or 4 meetings per year… the legal service had to approve every single decision in the area of infringements… this was a happy time, that ended, if I may put a date on the beginning of the second period, I would put 2004 which is the beginning of the Barroso Commission."

In a follow-up communication via e-mail, the ex-official elaborated on the discretion and autonomy that civil servants had before the Barroso Commission, and how it irritated member states:

"Before the reform, infringement proceedings were dealt in practice by DGs civil servants in agreement with the responsible (for that branch of EU law) Legal Service lawyer. The assessment of the case was purely legal and the Heads of cabinet approved 90% of the Commission Services proposals. The Commission acted therefore as an impartial EU Public Prosecutor in respect of alleged breaches of EU law committed by Member States Parliaments, governments or administrations. Such Commission efficiency disturbed many MSs ministers and even more many MSs high civil servants…"

The official then describes how the infringement process was reformed during the first Barroso Commission – and the significant role played by the new Secretary General, Catherine Day. In particular, the shift was towards a more intergovernmental, conciliatory, political approach with member states, rather than an approach emphasizing the Commission's independent role as supranational law enforcer:

"[Barroso] chose the new Secretary General of the Commission, and that was his personal choice... Catherine Day…Catherine Day was Irish, she had an Irish passport, but her heart was in London. She had a very British approach to European Community, which means a very intergovernmental, classic international organization. She did not believe at all in European law, she believed in negotiations, she believed in political compromises. And so, she changed. She was in my opinion, that's a very personal opinion and experience, but it's a feeling, I feel, I felt at the time, that the atmosphere of infringement meetings within the Commission had changed. The instructions given to the services by Miss Catherine Day were not to go ahead with infringement proceedings and to try to find a friendly solution with member state administrations. So the services, the 34 DGs of the Commission, were no longer supported by the General Secretary of the Commission! Which is quite substantial because the Secretary General is the General Coordinator, the general coordination service, of the whole Commission."

The official then expands on the EU Pilot procedure and how it functioned in practice as a break on law enforcement – demotivating civil servants from even pursuing potential noncompliance cases:

"[Catherine Day] invented the EU pilot procedure. So before sending letters of formal notice… the Commission services were under an obligation to ask for clarifications and explanations to the national administrations. Now, in certain cases it can be useful and appropriate, but in other cases this is completely useless and counterproductive. Why? Because if you are a public prosecutor and you ask the indicted person the evidence of his misconduct, obviously the indicted personal will reply: I am innocent! I plead not guilty! So in most cases the administrations of member states replied that there was no infringement at all. That the complaint was unfounded. They denied any evidence to the Commission services, they lied! I can, for many cases that I followed personally, in the reply of the member state administrations there were lies!... In many cases this EU pilot procedure was a complete loss of time. In many cases, on the basis of the reply of the member states, the complaint was dismissed.

And this was the beginning of the end. This was, with the appointment of Miss Catherine Day, the compulsory passage through the EU pilot procedure, the loss of time that these procedures entailed, the lack of support of the handling civil servants handling the cases in the different departments, well, the mood changed quite substantially, and these turned out to be a big demotivation of all the European commission civil servants who were responsible for infringement proceeds. And this very negative mood lasts still now. The Commission continues to receive thousands of complaints…and most of the cases, most of the complaints, are dismissed…

… I had a very busy time from [the 1990s] until 2007-2008, and then the number of courts cases dropped dramatically, of my cases before the Court… the general trend is quite justified by quite opposite instructions given by the Secretary General of the Commission and, well, a personal alone cannot do everything, I must admit that all the other Commissioners implicitly agreed with this policy, to find a compromise, a friendly solution, at any cost, even by denying – that was very unfair – even by denying the very existence of the infringement! … That was quite irritating, and so, well, this is my experience. And my junior colleagues are still living this second era of, this second stage of the Commission's infringement policy..."

The official elaborated on the above reforms and how EU Pilot provided member states with greater leverage to seek the dismissal of law enforcement actions via a bilateral dialogue with the Commission – and, increasingly, with the Commission's political leadership:

"[Catherine] Day was persuaded - or pretended to believe - that in many cases the opening of infringement proceedings was the result of misunderstandings between Commission services and MSs administrations…The reply of MSs administrations to Commission EU pilot letters was obviously a complete refutation of any existence of a breach of EU law since any admission of such a breach would have led to a kind of "self incrimination" of the concerned Member State…Nevertheless the negative reply of a MS [Member State] administration provided the Secretary general, and frequently also the responsible Commissioner and the President's Cabinet, with a strong argument for opposing the proposal of DG civil servants and LS [Legal Service] lawyers to launch infringement proceedings against the concerned Member State."

The official emphasized once more how EU Pilot tipped the scales towards forbearance and politicization and away from independent enforcement:

"So the instruction to slow down all infringement proceedings was executed at the stage of cabinets, so before 2004… unless there was an objection of one or more Commissioners, the decision to launch infringement proceedings was tacitly adopted, approved, by the College. After that date, it was the opposite! The services, after the EU pilot eternal procedure, had to put forward a very strong argument in order to go ahead with infringement proceedings. So they had to justify why they had to go ahead despite all the exchange of letters, contacts, meetings, with the member states' civil servants. And that caused, and still now, a deep demotivation in handling officials in the different DGs…"

This policy of forbearance was articulated even more precisely in a follow-up communication via e-mail:

"Soon after the reform it appeared then clear to DGs civil servants that the very heavy interference/pressure of Secretariat general, Commissioners and President's cabinet resulted in a very high number of DGs requests for launching infringement proceedings, to be turned into draft decisions to close the case for "lack of sufficient evidence" of the existence of a breach of EU law or on grounds of "opportunity reasons" (= not to disturb the MS minister or not to "frighten" the concerned MS public opinion)…

[Civil servants] were then more and more demotivated for carrying out properly their work and many of them started to practice a kind of "self-censorship" in pursuing infringement cases since they knew in advance that in many cases they would "run into the wall" of SG [Secretariat General] or Commissioner's refusal to agree on a possible proposal of launching infringement proceedings against a given MS [Member State]."

In elaborating on the "demotivation" felt by Commission civil servants, the ex-official underscores how part of this shift was due to civil servants' realization that law enforcement would be more so driven by political exigencies in brokering bargains in the European Council than on their own technocratic evaluation of a case:

"…because they [civil servants], supposing that an individual civil servant works 6 months on an infringement proceeding to find the evidence, to build a legal reasoning, this legal analysis is strengthened by the responsible lawyer in the legal service, and they go to the infringement meeting, and the General Secretary says no, this infringement is not appropriate, not politically appropriate. We cannot bother in this moment Germany, France, Spain, or another member state. We are in a very delicate negotiation of a directive, or a regulation…

well, that was another huge shift in the Commission's policy. The infringement policy was associated with the legislative policy, which was a huge mistake! Because, because they are two different things. One thing is to create new law, and quite a different thing is to enforce directives and regulations that are already in force. They are two different world. But infringement proceedings were used by the General Secretariat and DGs as...a bargaining chip. Like in gambling, exactly. And in old times, the two policies were quite separate, quite distinct, and dealt by different persons…"

The official emphasizes that, unsurprisingly, the EU Pilot reforms were opposed by the civil services of almost all DGs and by the Legal Service, and tied it to a broader political centralization of the Commission that constituted the "end of infringement policy:"

"all the units, of all DGs, were opposed to that EU pilot procedure… for all the Commission civil servants, was a pure loss of time…what was extremely disappointing is that no Commissioner opposed that proposal of the Secretary General of the Commission. I mean, [President] Barroso relied very much on [Secretary General Catherine] Day…

that was the beginning of a centralization process in the Commission, that made sense insofar as the legislative work of the Commission was concerned. But it makes no sense when we are speaking of infringement, or enforcement of present legislation… and this centralization process… had some perverse consequences on infringement policy. Because infringement policy… was pulled into this general coordination exercise, and that was the beginning of the end. That was the beginning of the end of infringement policy in the Commission…"

In conclusion, we asked this former official whether party politics had any role to play with enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance. The official, despite being critical of the Commission's enforcement approach, rejected this hypothesis wholeheartedly:

"I have never, never felt a, how could I say, a difference in approach to European integration process between EPP commissioners and presidents and social democrats or liberal Commissioners. The real dividing line in Europe has always been between pro-European and anti-European Prime Ministers, Commissioners, and Presidents of the Commission…"

TRAX 10 - Interview with ex-Commission official 12, January 6, 2021
This official served on the Commission before and after the Barroso Commission reformed law enforcement and established the EU Pilot Procedure, including within the Legal Service. The official is largely agnostic about the merits of the reform. The official notes how EU Pilot led to a centralization in the management of law enforcement and a reduction in infringement procedures, all while noting that EU Pilot served as a "promise" to member states who wanted to avoid formal legal proceedings at "all costs:"

> *"Then the EU Pilot system was invented…this led to a drop also of formal infringement procedures. Because for the member states, the letter of formal notice, although it is just a letter of formal notice, something that is not even explicitly mentioned in the Treaty – for the Treaty, the real instrument is the reasoned opinion, and the step before is just to give the member state the right to be heard before adopting a reasoned opinion – but for them, the letter of formal notice is already a stigma, and they want to avoid this at all costs. And that's why they prefer so much that we – in the pre-infringement phase – issues are sorted out. And even before EU pilot there were of course possibilities to do so, via the so-called administrative letters, but those administrative letters, no one knows how many are being sent and there is no central overview, that's why the Secretariat General, another central service, didn't like this at all, and set up the EU Pilot system. Which has this twofold objective: First of all, internally to allow the central services to have an overview, and secondly to give a forum which promises to the member states that things are being dealt with in this pre-litigation forum."*

The official confirmed how lawyers in the Commission's Legal Service opposed the EU Pilot Procedure and saw it as mostly creating "red tape" – and because the Legal Service was not formally involved in the EU Pilot procedure:

> *"When [the EU Pilot] was introduced, I remember discussions…[with lawyers] in the Legal Service who thought that this was yet another red tape that was invented… The Legal Service did not necessarily have to be involved in the EU Pilot phase, yeah? They could if they were unsure. Or, the instructions were: If there are, something like, if there are new legal issues popping up, then the Legal Service must be consulted. This is of course open to interpretation, new legal issue or not, yeah? So de facto it was not mandatory for the Service to consult the Legal Service."*

The official then confirmed that the cabinet of President Jean-Claude Juncker – who succeeded Barroso – recognized that the EU Pilot procedure did not go far enough in centralizing political control and discretion over law enforcement – and might actually obstruct the Presidency's management over enforcement. In other words, instead of returning to the Pre-Barroso era of vigorous enforcement by civil servants, the Juncker Commission did not think that Barroso's politicizing and centralizing reforms went far enough:

> *"Until the adoption of the Communication [on enforcing EU law] under the Juncker Commission, which was in January 2017 if I'm not mistaken – until then, the use of EU Pilot was mandatory! And the Sec Gen was very very very adamant on this, to the extent that even when the President's cabinet, Juncker's cabinet, a really strong player, the president of the cabinet wanted to quickly launch an infringement, the Sec Gen told them, "no, you cannot do so. You have to go through the EU Pilot phase." Which is something the strong political players do not like so much…*
>
> *That the political level felt that it didn't have enough control over what the services where doing. And there was a very very politically sensitive EU Pilot that was launched without the relevant political players knowing, and*

that was probably the straw that broke the camel's back. That was number one. And number two, this mandatory application by Sec Gen, telling the political players, "oh no sorry, you can't, something urgent, something politically relevant very important to solve… the Sec Gen telling the political players, oh no, now you have to wait, you have to go through the EU Pilot system" – that wasn't really beneficial for the system."

The official notes that the Juncker Commission's attempts to partially revoke the EU Pilot procedure generated a strong negative reaction from member states, who were very supportive of the reforms:

"The reaction after that Communication with respect to EU Pilot… the member states were very unhappy as well, because not only did they invest in the IT, but also they had organized their internal system around that IT tool. And it was very useful for them because it went, it came immediately on the desk of those who had to coordinate and had to answer the questions. And with the disappearance of EU Pilot…All of a sudden they were out of the picture! And they didn't like it at all. And that's why already at the end of the Juncker Commission we tried to revive a bit the EU Pilot, I think this evolution has increased, it's being used a bit more…"

TRAX 11 - Interview with ex-Commission official 7, January 22, 2021

This ex-Commission official served in various DGs within the Commission before the first Barroso Commission, but they kept in touch with numerous colleagues within the Commission. The official is adamant that the reform over law enforcement under the first Barroso Commission was triggered to politicize and roll back law enforcement. First, the official describes the substantial discretion and autonomy that civil servants and lawyers had in pursuing infringements before the Barroso reforms - largely because the six-month infringement cycle made it impossible to politically scrutinize every infringement:

"…as soon as an official found that… there was a suspicion that a directive had not been transposed properly into national legislation… he had to inform… as the basis of discussion inside the legal unit… the head of unit…then, it went to the level of the Director General…but you should be aware that the Commission decided to have these kinds of proceedings twice a year, so every six months…so the Director General had difficulties of reading them all, and most Director Generals were lazy enough to let the legal unit go. And that's what happened all too often."

The ex-official then describes the important role played by the new Secretary General in the Barroso Commission – Catherine Day, confirming how she had a relatively British perspective on how the Commission should be run (and on the need to decrease infringements – including by creating "shadow offices" to better manage the various DGs):

"Catherine Day – this is not a secret, as it was in the European Press at least at that time – had the nickname inside the Commission: "Catherine Night and Day." She was a woman not married, not having children, not having family, and worked night and day and weekends on the files. So this gave her very considerable administrative and political advantage…

… She's an Irish official but she was brought up in the British cabinets and made career under the British cabinets… the Secretary General over practically shadow offices of the different departments of the different director generals, and yeah. It led to the Commission adopting communication [announcing the creation of EU Pilot] in 2007 or so, I think… I'm firmly convinced that the attempt of reducing the infringement proceedings…was a United Kingdom policy…which played a prominent role in promoting Catherine Day to the position which she held…"

The official then describes the motivation for adopting law enforcement reforms as a means to safeguard the Commission's role in the European Council:

> *"the problem which we were all aware of [in] the Legal Service and DG Environment was that, you see, when you take action against France, in ten environmental cases, and at the same time you wanted the support of France in the Council discussions in an environmental new legislation, there was inevitably some sort of policy dimension by saying, "well listen. On the one hand you want us to [support this legislation]… but on the other hand you sue us with too many infringement proceedings." That, everybody was aware, and the question is how should one balance these things. DG environment thought it was not up to DG environment to balance that, and the Legal Service probably thought the same… but there was no prior pushback or attempt before Catherine Day or before the Barroso Commission to change these issues."*

The official then describes some of the EU pilot reforms, their intent of remaining on good terms with member states by decreasing enforcement, and how member states were very supportive of this approach:

> *"At that time the Commission set up the [EU] Pilot, it was not really anything new because you see, when [a DG] started an infringement proceeding under Article 258 of the Treaty, the first thing was of course we went into contact with the member state, sending a letter, and just asking for information… but the difference was that the Pilot system was decided by Secretary General, no longer by the department. And so the matter went over, [the DG] could give its opinion on the Pilot thing, and often enough it did and so on, but formally this was a matter for the Secretariat General… and the third thing is perhaps staff policy… [were] interested in not having too many cases and infringement proceedings and so on. So this brought the figures down…*
>
> *The Pilot system introduced a much more political issue. The idea was that the Commission should avoid trying to make infringement proceedings…and so it was rather to remain on good terms with the member [states]…*
>
> *Member states liked the Pilot system very much because it gave them the possibility to politically deal with the issue, informally, and without raising too many concerns… without much public awareness. As the Pilot procedure is completely non-official, non-public… in EU Pilot…member states could, at random, bring their case and say it's not that serious."*

The official finally mentions how the politicization of law enforcement introduces serious tensions within the Commission – and can threaten the career of officials who are too committed to enforcement:

> *"I remember that I had reflected myself, whether I should go on with this line of strict enforcement, or rather think of my career… And this is the past of having been [talks about past positions], I thought I'd do the job…*
>
> *Of course I see this tension, and it is even growing... so this tension, people are aware of. For the moment, and since quite some time, the policy of the Commission is at the expense of the prosecutor's office… no, there are no serious attempts of redressing the balance…"*

TRAX 12 - Interview with ex-Commission official 8, April 16, 2021

This longstanding, ex-senior official at the Commission served before and after the Barroso Commission reformed the law enforcement process, and also served within the Secretariat General.

The official begins by recounting how President Barroso, having come from the European Council, was irritated and taken aback when he became President of the Commission and had to routinely deal with member state government leaders criticizing infringements lodged against their state during Council meetings. This prompted Barroso to seek to rekindle intergovernmental support:

> *"when Barroso joined the Commission, he of course came straight, or almost straight out of the European Council. So he still had a kind of attitude from a member state, and I think he was pretty, pretty much annoyed when – I think he felt he had to build up, or regain, somewhat stronger foothold for the Commission in its role as member of the European Council…President Prodi, I think he felt had been pushed sort of more on the side by the European Council… he was annoyed that that strategy got derailed or disrupted by these infringement cases, that of course did not render him more popular with the member states, so that's why he said, "Ok, as a lawyer I accept that there is an infringement case but we have a certain leeway in when to send letters to member states, and let's do that the day after the European Council and not the day before." So I think that he was certainly annoyed by that, yes."*

The official next describes the EU Pilot reforms – how they were spearheaded by the new Secretary General under Barroso, Catherine Day, and how they provoked resistance from civil servants and lawyers in the Commission, who believed that all noncompliance cases should be pursued:

> "I think Catherine Day was an economist like me, and she didn't like, she was much more *practical, so. And our experience at the time was that the relationships [member states] were extremely formalistic. You know, it was writing letters and so on. And I think what she was trying to do was to put in place somewhat more pragmatic approach and simply trying to discuss with the member states on a kind of informal basis, or to encourage the services to do that. To move things forward without having all these formalistic steps.*
>
> *And that's also at the origins of the EU Pilot system. Of course, the lawyers and in particular the Legal Service, they didn't like that so much. They liked more the formalistic approach… saying "ok, this is not a very important case, let's just drop it," I mean, the Legal Service would never accept that, if there's an infringement however small it may be, for them, it's an infringement, right?...*

The official elaborates on civil servants' resistance to EU Pilot – noting that instead of making enforcement more efficient, it proved to be a substantial amount of extra work:

> *"I would say that [EU Pilot] was mainly pushed by the Secretariat General, the Legal Service didn't like it because it was not Legalistic in terms of steps that are foreseen in the Treaty, so I don't think they were very happy with it. The services were… it means more work for them, if you're a case handler, or you're responsible for some kind of directive, it's easy to have a pile of paper and you send a formal step, and then you wait a couple of months and it goes further, I mean, in terms of your workload, it's much better to be in the legalistic approach than having to go to the member state, having to have meetings and try to talk to them… it's simply a lot of work."*

The official also confirmed that member states like the dialogue-centric, conciliatory EU Pilot Procedure. When asked why, they could not help but chuckle and note that it helped member states "get off the hook" – an acknowledgement that EU Pilot meant to entrench a policy of forbearance. But the official also notes how EU Pilot came to be supported by member states because it centralized

control over infringement-related matters not only within the Commission's political leadership, but also within member state governments:

> *"[Question: On whether the member states liked EU pilot and sent what another interviewee described as a valentine's letter:] Well, of course they are supportive, because they get off the hook, ah! [laughter] I can understand that. Maybe initially they didn't like the centralization that was in EU Pilot, because in a certain way it meant that internally they had to get organized in the same way as the Commission was organizing, so maybe initially they didn't like it too much. But once they understood the advantages of the system, they probably have started to like the system rather well, because it avoids all these legal steps and the possibility have to go to court and all that…"*

The official also underscores how the EU Pilot reforms were part of a political centralization of the Commission under the Presidency – such that from Barroso onwards, it was the Presidency – through the Secretariat General – that controlled and managed enforcement matters:

> *"So the powers of the President have developed through the course of time… to a more policy-setting and agenda-setting role. And so, since the Secretariat General is the service of the President, the powers of the Secretariat General had to evolve with those of the President. And that meant, on the one hand, yeah, stronger coordination powers, like for infringement policy, but also for most other policies. And also, some stronger powers for policies that actually were under the direct control of the President. So the policy approach to infringements, that was typically under the responsibility of the President.... And then there was, yeah, I think there was also the willingness for either the President and the Secretary General to strengthen that role, eh?"*

The official concludes by noting that the centralization process continued after Barroso. In particular, the cabinet of President Juncker – particularly its chief, Martin Selmayr – was dexterous in tying together enforcement-related matters with intergovernmental negotiations in the Council – which aligns with other interviewees' recollections that the Juncker Commission sought to be more selective and discretionary in wielding forbearance and enforcement as carrots and sticks:

> *"And yes, I do not exclude that for some particular files, as sort of this broader approach to the interactions with the member states, to use the infringement case as one particular stick to get something done in another area. But that's not so easy, eh? If you have infringement in area A, and you have a legislative proposal in area B, someone has to pull the knots together, eh? That's why in particular under [President] Juncker, the head of cabinet understood that game quite well, but it's not so easy to play in practice…*
>
> *If we were preparing the various Presidents that I served for meetings with heads of state or government… we would go there, and expected the President to have a nice discussion about investment and growth and jobs and that. And the first thing the interlocutor comes up with is some kind of stupid infringement procedure that we overlooked! That is very difficult…"*

TRAX 13 - Interview with lead counsel of an environmental NGO, March 18, 2021

This lawyer in a leading environmental NGO in Europe has been involved in monitoring the enforcement of EU law by the Commission and submitting complaints/evidence of noncompliance by member states since the first Barroso Commission – when the Commission reformed its approach to law enforcement. The lawyer begins by noting a generalized frustration on the part of complainants regarding the reformed approach to law enforcement and EU Pilot – and how opaque it is to everyone besides member states. In particular, the official emphasizes that if the process were more transparent, civil society organizations might be better able to partner with the Commission and create bottom-up

pressure for compliance. The lawyer concludes that this confidentiality is ultimately a political decision to insulate member states. In particular, the lawyer emphasizes their frustration that the Commission seems more intent in adopting a conciliatory stance with member states than cooperating with complainants:

> *"…of course the issue with that [complaints] process is that it's completely opaque. So, no transparency at all throughout the whole process except the press release that is issued when they send the letter of formal notice or the reasoned opinion. But otherwise, everything is confidential, even more… when there's an EU Pilot open, including from the complainant! So you made a complaint and then you simply don't hear almost anything evert again from the European Commission, so that's demotivating as well!...*
>
> *The lack of transparency in [the infringement] process is really not helping…And in the way that we keep on telling them, that of course is members of the public, and if NGOs, knew that their national government were not complying with environmental legislation and had access to the argument of the European Commission, specific arguments and the specific reasons… they could support the European Commission at the national level! They could put way more pressure on the national government. They could go to national courts as well, bringing cases relating, or challenging exactly these violations, if they were informed… their position doesn't make sense. And so it's clearly a political decision, and that can only make us believe that unfortunately, contrary to what they say… it's supposed to speed up the process to keep it confidential…*
>
> *… it's difficult to understand. I mean we do understand it, unfortunately, it means that there are some – they even use that word, without realizing that they shouldn't use that word –"negotiating." "We are negotiating with the member states." But you shouldn't be negotiating with the member states if they are in violation of the law. What are you negotiating about? So, and they don't even realize that they shouldn't say that!... I mean, confidentiality makes the process suspicious… and we don't know what they're discussing… keeping that information away from citizens is really… infantilizing… I mean, like treating citizens like children, as if we're not allowed to know that our governments are not implementing this and this and that provision in the law… they wouldn't [even] tell us against what member states they had opened EU Pilot."*

The lawyer underscores that although complainants have repeatedly turned to the European Ombudsman to protest the Commission's opaque law enforcement approach, a critical Ombudsman report has almost no impact or influence on the Commission:

> *"It's really an issue because there are really no efficient remedies against the European Commission for doing that [not pursuing complaints and not being transparent in enforcement matters]… we can only challenge the lack of motivation. We've never done it… and also in relation to the European Ombudsman, there's a real issue about that, is that the European Commission doesn't really feel threatened from the European Ombudsman. That's a real issue because we win cases before the European Ombudsman… against the Council as well, and unfortunately the European institutions sometimes just ignore the recommendations of the European Ombudsman…of course, it's going to demotivate the people. And that's what happened with the European Ombudsman."*

Finally, the lawyer emphasizes that EU law cannot be enforced solely in a decentralized way via private enforcement – centralized enforcement by the Commission also has an important role to play, especially given the interviewee's sense that more and more member states are violating EU law:

"[Question: Are national remedies enough to enforce EU law, without the Commission enforcing centrally?] No, absolutely not. Absolutely not. Without a doubt. First of all, there isn't access to justice everywhere. So it's just simply wrong that members of the public can go before national courts everywhere. I mean that's why we made complaints to the Commission, because we don't have access to justice in every state to challenge certain decisions even in complete violation of the caselaw of the [European] Court… so there are simply lots of jurisdictions in front of which citizens cannot go to. And, and that's why we need the European Commission, to complain about that as well. When we do have access to justice, actually, it's a kind of requirement now that we exhaust national remedies before making a complaint… we are asked to try at national level before going to them… and in the countries where we do have access to justice, making a reference for preliminary ruling is far from easy…Lots of national courts are completely hostile to put questions to the [European] Court… so no! And then again, when, either we don't have any remedies at the national level or we have exhausted all national remedies and that we've lost, then if we cannot resort to the Commission, then that's it. It's over. And so the lack of compliance remains…

[Question: Might the decline of infringements be due to better compliance, thanks to programs like EU Pilot or Solvit?] Again, I mean… but, what we see every day, in our work, we could make so many more complaints! I mean, about lack of compliance with environmental legislation. My impression is quite the contrary, that even the states that are supposed to be more inclined to comply with environment legislation and to understand the importance of protecting the environment are still not complying with some of the eldest pieces of environmental legislation, just like the environmental impact assessment directive!... No, so my impression is that no… definitely public authorities at the national level, there are still lots and lots and lots of occurrences of violations of environmental legislation, way too many… "

TRAX 14 - Interview with Commission official 11, December 14, 2020

This official within the Commission worked in a DG and in the Legal Service from before the Barroso Commission took office to the years during and subsequent to President Barroso's tenure. They witnessed the reforms of law enforcement during the first Barroso Commission and how it impacted the work of civil servants. They were more knowledgeable about the Barroso and post-Barroso period than with how law enforcement proceeded before the Barroso reforms. The official first characterized the negative impact of the EU Pilot procedure – including the fact that it made the law enforcement process more inefficient and opaque, that it outsourced enforcement to the very political actors (member state governments) that committed noncompliance, and that it upset complainants:

"So we already have a very lengthy procedure… so then people complained that this is, you know, additional delay, and also the criticism was that you're sort of outsourcing it to the very, to the very body that commits [the infringement]. I mean, the member state has a problem, and you tell them, "well, can you please solve it?"… it was a general feeling… the complainants weren't happy… so whereas before everything was fed into the system, you know, you receive a case – boom, into the system, then we'll see later on!"

The official then speaks to how the EU Pilot procedure tipped the scales towards forbearance and to infringement investigations being put in "the trash bin," which could demotivate officials (particularly in the Legal Service, who could get side-lined by the Secretariat General), even though this particular interviewee understood the political reasons justifying a turn to forbearance (that of bolstering intergovernmental support for the Commission by centralizing political control over enforcement and decreasing the number of infringements):

"The Sec Gen and the Legal Service, they are under the chapeau, the responsibility of the President. But in reality they are horizontal services, so in a way they are there in the service of the whole Commission. But if you

start considering them as more integrated, vertically with the President, then they become – I have to say that I'm speaking more for the Sec Gen; the Legal Service was always very proud of being sort of independent. But the Sec Gen, some people thought that it was becoming a sort of emanation or a manifestation or a prolongment of the cabinet of the President. So instead of acting horizontally for all services, it was sort of implementing the guidelines of the President. And so, indeed, it gained progressively power, especially in this field. So if the directive of the President is, "well, you know, let's not be too aggressive. After all we have to negotiate this and that, and we have to, you know, it's a bit of horse trading at times…"

[Question regarding what was the impact of a more political Commission and the President setting policy priorities with regards to infringements?] The numbers are a pure reflection of that! "Anything that in principle can be solved by some other means"…

But it is clear that at a certain moment the Commission, wants to have a certain coalition, wants to have a certain support in certain areas and it might be willing then to buy that by dropping a few cases, or by delaying it. I mean the Commission has even said it openly at times that it has delayed or not pursued cases for political reasons, because they were sensitive, because they thought they were counterproductive… so the Commission also openly admits it…it's sort of an open secret…"

The official continued specifically by elaborating on how the EU Pilot reforms impacted the role played by the Legal Service – mostly by marginalizing its role, and by moving away from its more vigorous, legalistic approach to enforcement to a more politically conciliatory approach:

"So, at the same time, of course certain issues which contributed to this decrease [in the number of infringements]…better regulation, EU Pilot, all of these initiatives that somehow led to a certain decrease, of course they were discussed. I mean, first, the Legal Service is tendentially, probably, I would say, if you ask people in the Legal Service, most of them would agree that the Commission should perhaps bring more cases…[they] have a certain bias in a way. If there is a problem or disagreement, it's for a court, "see you in court!" A sort of natural reaction of lawyers. If you speak to the politicians, in the cabinets etc: "The Court - why should we go to someone else? We sit down at the table, we find a way, eh? We find some diplomatic answer." So if you ask the lawyer the answer is relatively clear, but it might not be the view of other parts of the Commission…

The EU Pilot [is handled by] the Commission central administration and the national administrations. So the Commission puts it in the system, it appears in the screens in the capitals, they try to handle it, they give information, etc etc and at a certain moment, the Commission – I mean, it's handled by the Sec Gen…I think that if at a certain point the Commission says, "problem solved!" it probably never ends up on the desk of the Legal Service…

[Question: On whether the EU Pilot reforms and a more political enforcement approach demotivated lawyers managing infringement files] It can happen. Certainly it happened, it does happen. But it's part of the game, we are paid for that… Of course there will be resistance [to the EU Pilot reforms], because…you invested so much time, so much energy, and then suddenly it's put in the trash bin, or perhaps in a cabinet, therefore it's annoying. It's frustrating… [the EU Pilot procedure] happens without us [at the Legal Service] looking at it. So a sort of, a solution will be found, politically, lawful or unlawful, we don't know! And at the Legal Service, it's also [their] perspective that if there is a problem, we want to solve it once and for all, and for all citizens…"

The official notes how the Juncker Commission's partial revocation of the EU Pilot procedure drew a sharp backlash from member states, who were very supportive of the reforms of law enforcement

put in place by the Barroso Commission – leading to a partial comeback of the EU Pilot procedure under the Von der Leyen Commission that succeeded the Juncker Commission:

> *"There was I think a Communication in November 2016, from Juncker who said, well, on second thought, yes this system works, has been successful, at least that's what the Commission claims…but, it's also true that this delays the procedure… And then the Commission started to basically say, "let's look at every case and see whether it would be worth it or not." And so the numbers decreased, but the member states complained. The Member States: "No, we really like EU Pilot! Because it allows us to solve it informally, directly with the complainant, it gave a little bit more time, coordinating the administration…" so it was useful to have this sort of pre-procedure… and so they asked, formally, to have the procedure back… the member states met and they told the Commission – "please put it back, we like it, etc." So now the Von der Leyen Commission has a sort of reversal, "ok, we are going to use it a bit more…""*

Finally, we asked the official whether they perceived a partisan dynamic behind enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance. The official did not support this claim and noted that even socialist members of the Commission's political leadership had an interest in forbearance:

> *"… if you think that, on cutting red tape, not in this Commission but the previous one, it was Timmermans, the Socialist. So I don't know how much something that's a sort of political party manifesto at the European level translated itself into something concrete. I mean the EPP is so heterogeneous, so maybe yes, maybe not. I don't know. I don't want to speculate…"*

TRAX 15 - Interview with Commission official 10, February 25, 2021

This senior official join the Commission during the first Barroso Commission, after serving in the administration of a member state. They served in various DGs and had experience mediating between the technocratic staff of the Commission (the civil servants) and the political leadership of the Commission, from Commissioners to the Presidency. They are intimately familiar with the management of infringements and how law enforcement was reshaped by the EU Pilot Procedure. In particular, the official recalls how given their experience working in a national administration, they knew that the EU Pilot procedure being spearheaded by the new Secretary General under President Barroso – Catherine Day – was counterproductive to law enforcement:

> *"[in 2007/2008, when EU Pilot was introduced] I was not working for the Commission, but for the [X member state] government, I was the agent of the government to the Court of Justice of the European Union before joining the European Commission, and I got the proposal from Catherine Day as the senior [government] official in charge of these issues, and I refused to adhere… it was a little bit puzzling. Why in particular [do you] refus[e] to deal with something which is supposed to alleviate the burden for the member states… the loaf of bread that we are offering you. Because my perspective was that I want to, I knew my administrative system and my political system, and I knew that shooting with paper at the beginning will create no impact in [x member state's] political and administrative reality. So you needed real bullets in order to wake up people and trigger some change, eh, and even this is sometimes not sufficient."*

The official then describes in very critical terms how EU Pilot hampered law enforcement by slowing things down and tipping the scales against enforcement actions. First, the official describes the origins of EU Pilot – as a tool alleviate being "abrasive" vis-à-vis member states:

"There has been a decrease in enforcement, but some people, older Secretaries Generals of the Commission, like Catherine Day, who was also a previous Director General in DG Environment, have said, "why, ok, so we need, to do something about compliance, but not to be so abrasive with enforcement…"

In elaborating on not being "so abrasive with enforcement," we mentioned some of the civil servants that other interviewees had told us had developed a reputation for being vigorous in their management of law enforcement prior to the Barroso reforms, and the official confirmed this vis-à-vis one civil servant in particular:

"Oh, you heard about… Ah, yes! Absolutely, but I, it's natural that I hear about this, but I see that you heard about them, um!...[x person], yes, Prosecutor for the environment!"

Next, the official describes how EU Pilot became part of a new ideology within the Commission vis-à-vis enforcement:

"I came to the European Commission, and at the beginning of my work at the Commission Pilot was not the antichambre, the entry gate, to the infringement room. It was not obligatory, but it was strongly recommended… it was in a Communication from 2012 if I remember, it was made binding, and it became like, how to say, in some religions, you need before entering the church, you need to do a sort of ritual, ritual before having access into the church. And of course everybody perceived this as a difficulty, because it slowed down [enforcement]."

In particular, the official perceives the EU Pilot procedure as a "curse" and a "pathology" that risked being the "death" of law enforcement. They made these remarks in the context of recall how the Juncker Commission that succeeded the Barroso Commission sought to partially "deliver" officials from the EU Pilot procedure by making it voluntary, rather than compulsory, for DGs:

"I also am critical about some aspects of the enforcement philosophy of the Juncker Commission, but Juncker has… his former chief of staff, and after, Secretary General, [Martin] Selmayr, has delivered us, in early 2017, of the curse of the compulsory EU Pilot! Saying that it's no longer compulsory. Because they have noticed how the pathology has developed in the Commission! And some Commissioners on their own! For instance, the [x] Commissioner…[they] didn't want to hear about infringements and even Pilot, were, how to say, the name of the beast for [them]. So the enforcement policy… came almost to a halt, because of this! They realized that, no, no, no, even if we dislike this, we take other solutions, we postpone the decisions about the infringements in the College after the European Council, we tell stories to Juncker, etc., we manage the President, but we need to unclog the system because otherwise this is the death of a very important political responsibility and arm, force, of the European Commission! So they delivered us from this, and I think it was salutary to do so…"

The official confirms that the Juncker Presidency's decision to partially revoke EU Pilot triggered a substantial backlash from member states, who had gotten "addicted" to the procedure. The official also notes how this member state backlash caused the EU Pilot procedure to "com[e] back" at the time of the interview (i.e. during the Von Der Leyen Commission):

"Ah yes, there was a backlash! Yes, "what are you doing? What are you doing? You have… why don't you use this?" Of course! Everybody got addicted, even my, the member state that I knew best! Why not take it slower?... It's coming back, but in a very uneven way… so some [DGs] have really come back, others still are slow to do this [like the DG where this official works]. So we have decided after this liberation, we have said: "Look, Pilot is useful if we are not certain that we understand correctly the factual circumstances in a country, or the reading, the significance of some legal provisions…so you can misunderstand certain things. So then we

use the Pilot, and for the rest, the things are clear, and the member states don't report anything about a certain obligation, or on the contrary, we see that they report… is a very bad one. Why do I do Pilot? So I go forward with the infringement procedure…"

The official, however, is adamant that the politicization and centralization of enforcement in the Commission was hardly revoked by the Juncker Commission. To the contrary:

"what has happened, in particular under the Juncker Commission and has certainly remained the same now, is that the formal triggering of Pilots and infringement procedures is always validated by the top, by the political level, by the cabinet of each Commissioner: In order to launch a pilot, in order to close a pilot, in order to launch an infringement procedure, you need the validation of your Commissioner…

Currently the Secretariat General is the instrument of the President's cabinet…and even more… it's in a way swallowed… yeah, sort of, I mean, it doesn't have a power of its own. It's just carrying the mandate which was entrusted by the President's cabinet…and we see this in the, I mean, all the questions. Even in the Juncker Presidency, all the questions that we have relating to enforcement, they come from the cabinet of the President."

In fact, this official is adamant that although the head of President Juncker's Cabinet – Martin Selmayr – was centrally involved in partially revoking EU Pilot, he was hardly enforcement-prone:

"[Martin Selmayr], later to become Secretary General..was very tight in terms of authorizing [infringements]… We had some gains, but not always with him. It was difficult."

More broadly, the fact that the explicit approval of political actors – like Commissioners – is necessary to move forward with EU Pilot files and later with infringement files tends to tip the scales against enforcement despite the fact that the EU Pilot procedure was partially revoked by the Juncker Commission – because, this official argues, politicians are far less interested in enforcement than civil servants, and because enforcement can negatively impact the Commission President's position in the intergovernmental European Council:

"You may detect also a political drive in the reduction of the number of infringements of the Commission… I think the explanation is more prosaic. Everybody loves law-making, nobody loves enforcement because [national] ministers call you [to complain]…

So people don't like enforcement. And sometimes the decisions of the College are postponed to be taken after the European Council so that the President of the Commission – this was certainly the case under the Juncker Commission – is not dragged into the corridors by Prime Ministers and Presidents who would catch him and tell him, "oh, listen! Don't sue me about that highway?" Or "don't sue me about [that] railway." Or "don't do this and that." So there is a human, rather than political, necessarily political, though it has political connotations – a human difficulty in dealing with the… nasty things that are enforcement. While legislation and law-making: Who hates ambition? We all like ambition! And say, "oh, an ambitious legislative proposal…" Everybody loves ambitious legislative proposals… This is the naked truth.

…our previous Commissioner, who was a very nice [person]…But when we came with enforcement proposals to [them] the rabbit was turning into a lion, mmh! Again: "Ah, no, I worry! They [member state governments] will call me, oh!" But the cabinet was very realistic and politically savvy, and together we have managed to explain to [them]. So even if [they were] conflict-averse … we managed to explain to [them] "Listen, no matter

how difficult it is, there are important gains, and 99% of the cases we have succeeded [before the Court of Justice]." Other [civil servants] have not succeeded…"

In conclusion, we asked the official whether party politics had any role to play with enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance. The official argued that such an explanation would be too reductive, given the internal fragmentation within the EPP and the fact that non-EPP members of the Commission's College also supported forbearance:

"…it's not like magic, the EPP… are they EPP or are they not EPP, it's not that simple. There are philosophical tendencies, but not everything, not, this doesn't explain everything. So it's a more complicated outcome…

…I don't know if you have watched, not the American Netflix-made series of 'House of Cards,' but the British series, 'House of Cards…' And you know that there was a character in the British series who said, "You can possibly say that, but I wouldn't possibly comment." So let me start by quoting that character… you may very well think that, but I couldn't possibly comment. No, but now seriously speaking… I don't think this explains everything. Yes, there was a growing influence, we could see [it] in the policymaking, even on enforcement, certainly on Better Regulation, etc. But this doesn't explain everything, because we have seen tight Commissioners [on enforcement] that were not coming from EPP, and we have seen more ambitious or liberal Commissioners even coming from the EPP."

TRAX 16 - Interview with Commission official 14, January 6, 2021

This senior-level official has been serving on the Commission for many years, since well before the Barroso Commission assumed office, and has continued to serve in the Commission since then. They have occupied both technocratic and quasi-political roles in various DGs, the Legal Service, and Commissioner cabinets, and they are intimately familiar with the Commission's shifting approach to law enforcement. Although this official is relatively supportive of the Commission and its evolving enforcement approach, they also emphasized that law enforcement in the Commission is "pretty fragile," adding, "please don't spare us" – referring to the results of our analysis.

The official begins by recalling how enforcement worked pre-Barroso: It was largely at the discretion of civil servants in the Commission, who devised a number of implicit practices to escape political supervision and control. The official also notes that EU Pilot was adopted by the Secretariat General of the Barroso Commission – Catherine Day –under a mandate from President Barroso himself. The goal was not only to, as the previous quote suggests, ensure great "periodical control at the highest level" over law enforcement, but also to entrench a policy of forbearance that would "avoid" launching infringements "as much as possible":

"As from the Barroso Commission, I would say…I think the EU Pilot – one of the main tools to create some structure and some uniformization which the Secretary General introduced, but it was instructed to do so and mandated to do so by the President, relates to these EU Pilot. Now EU Pilot is an interesting phenomenon, because the purpose was always to serve several purposes… One was to avoid that, well, let's put it this way: Before EU Pilot was introduced, every DG had an obligation as soon as it received a complaint to enter that into a database which was centrally managed by the Sec Gen…not all of them did so. Quite a few DGs or units in DGs had a series of infringement cases or complaints, which they managed one way or another, by putting pressure on Member States, or in discussions with Member States or the Complainants, before they were centrally registered. Because central registration meant that on a periodical basis, these cases were brought

to the attention of the College of Commissioners… and to avoid to be bound by that periodical control at the highest level, quite a few DGs actually did not comply with that duty to centrally register their cases…So by using EU Pilot somehow that practice was legalized and given a structure.

The second objective was of course to avoid as much as possible formal infringement procedures. Because those DGs who instead of trying to find a solution very easily asked to have recourse to the formal opening of a procedure were of course dissuaded in doing that. That was the second thing. And thirdly, it meant that, it was a way to, to, stimulate complainants to refer to national instances to seek relief rather than to the Commission. So that is what happened."

The official then confirms that the Juncker Commission – which succeeded the Barroso Commission – partially revoked the EU Pilot procedure not because it wished to return to the era of vigorous law enforcement by civil servants, but because the Juncker Presidency wanted even greater political control over when to wield enforcement or forbearance:

"[Question: Why did the Juncker Commission decide to partially phase out the EU Pilot procedure?] Well, it, it was felt that ultimately the decision whether to pursue a case through a formal infringement procedure, or to resolve it through more informal talks was a decision which had to be taken at the political level of the Commission. I think that was the main rationale for it. Because the change which was introduced was – it can always been decided to an EU Pilot, but authorization has to be sought at the political level, which I think was the President's cabinet and the cabinet of the Commissioner responsible for that infringement…"

The official notes the degree to which enforcement by the Commission is, today, centrally managed in the office of the President, a shift that began in earnest under the Barroso Commission, and how this diminished the role of the civil services over law enforcement:

"…what you always should bare in mind is that whether an infringement is pursued is a decision taken by the College of Commissioners and a crucial role, an indispensable role for that purpose is played by the President of the Commission, because it is the President only who determines the agenda of the Commission. Who decides to, who has to agree whether an action in an infringement case is decided either through a written procedure or through an oral proceedings, meaning during the weekly meeting on Wednesdays of the College. So all the power is vested in the President as regards initiating these procedures, and that implies that already at that level a huge filter is used…so much of the role of the Commission as guardian of the treaty is linked to and determined by the development of the Commission into a more presidential mechanism. The power of the president of the Commission has increased substantially over the years…

[Question: Was there pushback from the Legal Service or DG civil services?] Yes, yes yes. Certainly. But also that has diminished following this concentration of power at the level of the President. I think the DGs, less than when I started [several decades ago], over time… are more followers than they initiate within the institution. And so many have adapted to the fact that they have to await signals from the higher levels.

[Question: When did this centralization process begin?] As from the Barroso Commission, I would say. As from the Barroso Commission."

In conclusion, we asked this official whether party politics had any role to play with enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance. The official rejected this claim and noted that

the shift in enforcement policy may have had more to do with the Commission's Better Regulation agenda than party politics or partisan coddling of EPP-led member states:

> *"No, I, haven't really noticed that. Occasionally, in the decision to go ahead with a case, where from a legal point of view… if legally it is perfectly possible to launch or to continue an infringement procedure, that has sometimes been stopped or delayed… it's absolutely true that the EPP was very much in favor, and also very much Germany-driven agenda, the Better regulation policy, a German-Dutch agenda, I would say. And since it included also the use of infringement policy to serve general policy choices of the Commission, there might have been some impact of the EPP which is bigger than some other parties, yes… the better regulation policy was very much supported by the EPP, and also the liberals. And very little by the groups more on the left side of the political spectrum."*

TRAX 16 - Interview with ex-Commission official 15, February 19, 2021

This senior EU official had a longstanding career both within the Commission and the European Court of Justice, although their experience at the Commission is limited to the pre-Barroso period. As such, they confirmed that some civil servants in the 1990s were known as very vigorous promoters of law enforcement – to the point that even the leadership of the Legal Service tried to sometimes advocate for a slightly less adversarial approach. They also emphasize the degree to which infringements were largely managed by civil servants with almost no interference from the President's cabinet or the Secretariat General:

> *"[when infringement files were discussed] there was not only the presence of a member of the cabinet of the President; there were, well, I think always, also for some cabinets someone present. And if they thought that a particular case was sensitive… well, then, they would inform their chef de cabinet, and eventually the Commissioner. But I must say that discussions in the College meetings on infringement cases was limited really to, well, exceptionally important, politically important cases… [and] it would astonish me, I must say, if indeed the Secretariat General would have become the main leader in determining the handling of the procedure…*
>
> *[Question: Would it have been possible for the Secretariat General in the 1990s to block an infringement for political reasons?] No no, it's excluded! Also the quality of the civil servants there who participated in these meetings, there might have been lawyers but they were certainly not of the expertise and the level of the lawyers handling the cases in the Directorate General and the Legal Service. No…"*

The ex-official then elaborates on how several civil servants and lawyers in some DGs – like DG environment – were particularly emphatic that all cases of noncompliance had to be pursued:

> *"In the 90s, we were confronted with an ever-increasing number of complaints. And particularly, a good example, was the environment Directorate General. They got a lot of complaints, ever-increasing, and they were very insistent about pursuing each particular case… There was a big team of lawyers in [DG] environment, and the chief of that team, [they were] quite, quite keen, [they were] a kind of prosecutor, also in the individual cases. And, well, we tried to…soften the zeal and the very active interventions, interventionist approach of these people."*

In conclusion, we asked the ex-official whether party politics had any role to play with enforcement – for instance, whether the dominance of the European People's Party (EPP) in the Commission College and Presidency may have driven forbearance. The official proved skeptical of this inference and emphasized their perception that the Commission's shifting law enforcement approach had broad political support within the Commission – beyond that of any one European political party:

"Well, I mean, the question raised concerns more particularly also the less regulation policy… whether behind this particular influence by the EPP members of the Commission, I don't know. My personal impression is that it was a much more general accepted approach, that it would be difficult to demonstrate that this can be more particularly explained by the EPP…"

TRAX 17 - Interview with Member of the European Parliament 2, January 5, 2021

This Member of the European Parliament (MEP) has been serving in the Parliament since the Barroso Commission, and they have grown a particularly keen interest on supervising the Commission's enforcement-related activities. Nevertheless, they are emphatic that for most of their tenure in the Parliament, monitoring and pressuring the Commission to enforce EU law was not a priority for the majority of MEPs – including themselves:

"I have to admit, for a long time, I didn't do much [to monitor infringements]… we were so overwhelmed with legislation, nobody really cared about infringement proceedings in the Parliament…

…most politicians find infringement proceedings awfully boring. But the longer I am in the Parliament, the more interested I am in this matter… but I see generally, when I start speaking about this in the [party] group, it's very often: "Ah, [name of MEP] again! With these legalistic details!"

The official also perceives that the idea of creating a more "political" Commission is in some tension with the Commission's role as law enforcer and "Guardian of the Treaties:"

"There was a debate over the so-called "political commission," which was Juncker's idea, which was seen by some, including myself, as being in a certain tension with the "guardian of the Treaty." Because when you are guardian you should be fair and principle oriented, and not mainly about politics."

We then asked the MEP whether their impression is that the Commission is simply prioritizing bigger cases – rather than simply adopting a policy of forbearance. The MEP did not find this convincing:

"My impression is that in the area where I work most, which is financial services, there is a culture of having no infringement proceedings whatsoever… it seems to me that the bar is very high. In tax law…we had an investigative committee… and there we had access, on my question, we got all the material from the Commission in the area of people who complained concerning the non-application of EU law and then the responses of the Commission… and the answers of the Commission I've seen were much more of a style, "how can we prove that there was no case?"… If I look at what the Commission did in the area, it is ignorance! There was not one single case which was brought forward because of lack of effective implementation."

TRAX 18 - Interview with Member of the European Parliament 3, November 24, 2020

This young Member of the European Parliament has a keen interest on the Commission's law enforcement activities. Although they cannot speak to the Commission's enforcement approach during the Barroso years, they do confirm some of the reasons why the Parliament has not been as effective as it could be in pressuring the Commission. They emphasize that the Parliament is now taking on a more active role in monitoring the Commission and pressuring for more enforcement given its "pathetic" enforcement approach, but that most MEPs are much more focused on legislating rather than law enforcement:

"But still, I think this [the infringement procedure] is something we are looking into, especially because we see, or we tend to see… that there's lots of legislation, but actually very pathetic enforcement of the legislation…

<y general feeling is… that we [MEPs] tend to put more and more legislation on the table, but not so much follow-up on it. And it gets pretty difficult for an MEP to do it because we tend to work… everyone works on his or her file. The work tends to be very much focused on: "This is a proposal from the Commission. We are working in it… finishing it," and not so much on everything [with enforcement]…and it's really, I think, it needs these very experienced MEPs to say no…

…we have exchanges with the Commission, of course with the Commissioners, of course also with the director generals and also my staff has relations to the Commission. But, I don't know, sometimes it's also when it comes to contacts with the Commission, I would say it's more focused on new legislation, to be honest… the Commission tends to lobby a lot the Parliament, when it comes to what they want to bring to the Parliament, and then they are very active. But, yeah, to be honest, it's not so much contact, we don't have much discussions about enforcement I think."

The MEP also recalls an anecdote indicating the degree to which Commission (non-)enforcement decisions are now tied to intergovernmental politics within the Council, and obstructed by prioritizing political dialogue over law enforcement:

"So I have one example for you. When we had a talk with I think it was Commissioner [X] we had a lunch with [them]… And to be honest I cannot remember the exact thing we wanted her to act on, but it was actually a list: "Can you do an infringement here, and infringement here…" And then [they] actually said something – and that I think is the main point, what you're looking for… one of the factors. [They] said: "Yeah, we are also trying to discuss this new migration pact and everything. And we want to have a constructive discussion, and infringement procedures would not be so healthy in this"… Commissioner [X] said they had this whole dialogue, they talk to all home affairs ministers and I think they tried to get the problem solved and not create other troubles. So this was very clear for me. And this is of course a big problem we see with the role of the Commission. That they are the Guardian of the Treaties, and they have to be strong in infringement and enforcement, but the other side, they want to reach very difficult goals, like migration pact, like for example climate targets, and it's of course difficult with Poland, and maybe they don't want to add other difficulties…For me, it looks like this is the big problem."

TRAX 19 - Interview with ex-judge at the European Court of Justice, December 9, 2020

This ex-official at the Commission was also a member of the European Court of Justice served at the Court before, during, and after the Barroso Commission took office. They emphasize a crucial point – judges at the European Court were aware that the Commission had reduced the number of infringement actions that they brought, but they hardly protested, because fewer infringement cases would alleviate their workload. As such, another EU institution besides the Parliament did act as a counterbalance to the Council's intergovernmental political signals to the Commission to decrease enforcement. The official also confirms hearing of cases that were stopped by the Commission's leadership for political reasons:

"At the very end of the Barroso Commission – I think it was in winter… he came to the Court. And I remember, he also then was sort of explaining that it was an intentional move to try to be a little bit more selective on when to go to the Court. But it was not only because the Commission, at that time, was becoming more political, and then of course you had Juncker declaring that the Commission is now a political body and so on. But it was also, partly, even, according to the wishes of the Court. Because we kind of signaled in different

contexts, and even, I remember, once, when I was chairing an oral hearing in a five judge chamber, that one of the other judges started to criticize the Commission for coming with these kind of cases… there were a lot of cases which really concerned nitty gritty [issues]…

we certainly noted [the decline in infringements] at the Court of Justice. We frankly didn't feel that bad about this development at all. Because the Court was, and still is probably, not a big fan of these very technical infringement cases… In my first year as a judge, I had a lot of infringement cases where the government agreed with the Commission… it was simply the Parliament didn't have time to pass legislation to implement a directive, there could be regional problems…we kind of informally encouraged the Commission to become a little bit more selective…

I think this development we've been talking about – less infringement cases…[one] reason is certainly this development towards this so-called political Commission. And, what I heard – this is something I have no personal knowledge of, it's more what you just heard in the grapevine – that especially under the previous Secretary General, [Martin] Selmayr, this was the Juncker Commission, this was sort of very obvious. I was told that there were the cases that he more or less stopped an infringement case going forward because it was considered by him probably and Mr. Juncker that it was politically more wise not to go to the Court at least at that point, but to try to solve the problem via more political means…

I would assume that this phenomenon [of dropping infringements that could derail legislative negotiations in the Council] has increased with the so-called political Commission."

TRAX 20 - Interview with official in the European Parliament, December 9, 2020
This official has been working for the European Parliament since the 1990s, including its Legal Service. The official corroborates the recollections of various MEPs that the Parliament has not historically scrutinized law enforcement by Commission – including at the civil services level – except for a few MEPs and the Committee on Legal Affairs. The Parliament did not raise any objections to EU Pilot when it was proposed:

"In fact, we don't deal a lot with infringement procedure in the legal service. Or, I would say: Nothing at all. But there is another place in the Parliament which is the Committee on Legal Affairs. We had Green rapporteur…Monica Frassoni, who used to be the president of the Greens – the co-president of the Greens with Daniel Cohn-Bendit… and so it was an influential person and very interested in the implementation of Union law. So she followed: It was during that period that the Commission came with this idea of the [EU] Pilot, yeah. It was just at that moment. And we were in principle really favorable – I mean, the rapporteur was very favorable… instead of the infringement procedure, which is typically a strong instrument…Well, the thing is that, maybe, at the end of the day we have to arrive to the conclusion that it didn't work as expected. I mean, it was not expected to increase the number of infringements- it was supposed to decrease the number of infringements…"

The official then channeled the Parliament's view of the Barroso Commission as "weak" or beholden to the member states and the Council, which likely affected law enforcement. The official also commented on how the politicization of the Commission may have incentivized horse-trading with member states and forbearing from law enforcement:

"And we supposed at the time that the Barroso Commission was a, was a weak Commission, politically speaking…2004 was a complete shift in the way of acting for the Commission, I think. So this is the main instrument of the Commission and the main weapon of the Commission, to establish its authority, it's the

infringement procedure. It's the authority to ensure that the implementation of Union law is, the respect of Union law, it's the main thing… it's the proof of the independence in relation to the member states. So probably Barroso, coming, obviously, from the European Council… he has this culture. And it was visible from the beginning, I think…"

"it's clear that the politicization is happening. Not necessarily because of the Spitzencandidat but because the politicization exists in the European Council. And that is new. In the Commission what is happening with this process… [is] that will clearly put things in the Commission in another perspective – in a political perspective. Infringement procedure of course is part… if you are changing policy, you are changing your priorities… and you help Italy with all those infringement procedures about the use of… maybe you can be tempted to abandon the infringement procedure, because you will obtain something in another, well, it is political bargaining of course!"

Finally, the official corroborates the sentiments of other interviewees from the Parliament that they lack leverage over the Commission in enforcement matters:

"…the fact is that you cannot convince the Commission to do – Parliament is not able to convince the Commission to do one thing it doesn't want to do. That is clear. Because the only real instrument is… la motion de censure, and it's a nuclear weapon to never be used. It's never been used and it will probably never used. Because at the end of the day, look what you have? Look at the structure. The structure is a member of the Commission by member state, which corresponds to the majorities that are reflected, that are represented in the Council."

TRAX 21 - Interview with José Manuel Barroso, 20 April 2018, Florence, Italy – Historical Archives of the EU Oral History Project "Leaders Beyond the State," video file, interviewed by Benedetto Zaccaria in English

In this interview – preserved by the Historical Archives of the European Union (HAEU) at the European University Institute in Florence, Commission President José Manuel Barroso recalls his election as Commission President and some of the institutional changes he made within the Commission. While the interview was broad and did not touch on specific issues related to law-enforcement, the foregoing excerpts provide some context to how and why Barroso pursued policy change within the Commission, and why member states supported his candidacy for the Commission Presidency in the first place.

First, Barroso describes how member state governments supported his candidacy for Commission President:

"We should have a candidate. We should not only oppose Verhofstadt. We [the EPP] should have a candidate. And all the leaders of the EPP accepted that with two exceptions, that was myself and Jean-Claude Juncker from Luxembourg. I said, "I cannot support immediately another candidate, an EPP candidate, because I already committed to support publicly my compatriot, the socialist, [Antonio] Vitorino. And Jean Claude said, "I cannot commit to support an EPP candidate because I've already committed to support, by Benelux solidarity, Verhofstadt from the Liberals. But then if those could not be elected, I could have as a fallback Chris Patten [EPP]." And I said to the President in office from Ireland, "I said I support Vitorino or, second option, Chris Patten." And then he said, "What if it is you? If it is Barroso?" I said, "I'm sorry?" He said, "because most of the Prime Ministers who came here said you should be." "I'm sorry but I'm Prime Minister of Portugal…" But when the meeting afterwards resumed, it was obvious that there was not support for

Verhofstadt… but many leaders came to me asking me to be the President of the Commission. Namely Tony Blair, and it is important because he was one of the most important, if not the most important, personalities in the Socialist family; Berlusconi, he was in fact conveying that to a large extent on behalf of the EPP, because at that time the EPP had not so many leaders in the European Council; and, what was more interesting was the new member states, including Socialist-led Poland, Hungary, but also Malta, came to me saying, "You should be the President of the Commission." With the argument that coming from Portugal it would not just be appearing as an imposition of the bigger countries. And then there were many discussions…one person who called me twice asking me to be President of the Commission was Angela Merkel. Angela Merkel at the time was the leader of the opposition in Germany, but she was my colleague in the EPP…"

Next, Barroso discusses the need to put things "back on track" after the failure of the referenda on the EU constitution in France and the Netherlands:

"We were already very concerned before, because we were following of course the public opinion polls, and we were very sad… and then of course my mood was to try to put things back on track…"

Next, Barroso recounts the need for change within the Commission and his Presidential leadership style:

"My style was considered by commentators as a Presidential style. And if you want I can accept that, in the sense that for me it was clear that we have to have a strong center in the Commission. Why? Because we became a Commission – at the end of 2008 – because look, my Commission was the first Commission of the enlarged European Union. So in… 2004 the year I joined the Commission we 15 countries, and in 2014, the year I left, we were 28. We have almost doubled the membership of the European [Union] in times of crisis! And people forget but at that time in 2004, many of the commentators in Brussels were saying it's impossible to run a commission of 25, or 27, or 28. It's impossible!... And I had a culture of being a Prime Minister, I had been 12 years in the government… so my goal was to keep the coherence and effectiveness and the executive capabilities, and also the management, a strong management, in the Commission. That's why I reinforced… the head of cabinet until my time was not sitting in the table of the College. And with me I started doing it. It was the Secretary General to my right and the head of cabinet at my left... reinforcing the center because with 25 or 27 28 members if there is not an appropriate, let's say, management, this will not deliver results… that's why I was quite happy to see for instance some academic studies about the Commission that already said that the fact that we enlarged the Commission did not reduce the capabilities of the Commission to prepare and to adopt decisions. And I think that is in fact one of the successes at the European level…

[role of cabinet and sec gen] Very active relations… we have a meeting usually on Monday, with the head of cabinet of the President with the other heads of cabinet and afterwards there are meeting at other levels… one of the keys of management within the Commission is upstream coordination, with the cabinet and the Secretary General. I had in fact, I was working at the beginning of my Commission with David O'Sullivan, a very competent member of the Commission, civil servant at the Commission, that was the Secretary General under Prodi, I kept him for some time… but afterwards I wanted of course to renew, because it's it's important also. And I chose another Irish national, the first woman ever Secretary General at the Commission, Catherine Day, and she's very effective leader as well…"

Next, Barroso describes his intent to have as cooperative a relationship as possible with the intergovernmental European Council:

"[European Council President Herman] von Rumpuy when he came to the position of President of the European Council… we have discussed this very frankly… at least I was very

open to him and I said "look, we should not be competing! That would be a service to our enemies, the enemies of the European Union! So maybe we're not going to agree on everything, but let's try to get regular meetings every week and I don't remember a single issue where it was publicly a disagreement between me and von Rumpuy…"

TRAX 22 - Interview with Catherine Day, September 26, 2006, *Euractiv*. Available at: https://www.euractiv.com/section/future-eu/interview/interview-with-european-commission-secretary-general-catherine-day/

In this interview with the news site *Euractiv,* conducted near the end of Cathrine Day's second year as Secretary General under the Barroso Presidency, Ms. Day emphasizes the need to rekindle member states' support – following a "quite difficult time" in the prior few years due to the Commission "irritat[ing]" member states – in order to be able to forge intergovernmental compromises around salient policy priorities. While the interview does not touch upon enforcement per se, it highlights that the goal of rekindling intergovernmental support for the Commission was a core goal of Ms. Day and the Barroso Commission.

First, Ms. Day begins by recounting the Barroso Commission's efforts to regain "the respect of the member states:"

> *'First of all, I think that the Commission has established itself once more with the member states as a 'player'. I think we went through a quite difficult time, when we seemed only to be arguing with the member states, when at least some of them really questioned the Commission's value. I think we have come through that period. I think that all of the various political crises surrounding the 'No' votes and the rest of it, and the stalemate for a while on a number of important dossiers, have made the member states realise that the Commission has a value added, because we always scan across the member states, and because we are the only organisation that is paid to think European, and we are able to come up with solutions that helped the member states to achieve their own objectives. So I feel after a very difficult first year, in which we had the 'No' votes, we had the failure in June last year to agree on the financial perspectives and we had major rows over things like the Services Directive or REACH, all of that is gradually being put in place. I think the Commission has played an important role in finding the solutions on all of those. The member states had to find the political will to do it, but I think the Commission was very instrumental in helping to design the parameters of the compromises. And so I think two years in, this Commission again has the respect of the member states for the role it can play."*

Ms. Day then emphasizes the fact that the loss of member state support was due in large part to the Commission overreaching and irritating member states – which, as we have seen from other interviews, was tied significantly to the Commission's law enforcement actions. Crucially, MS. Day emphasizes that the desire to enter into a "partnership" with member states stemmed from the top-down – from the Commission presidency – and by its capacity to be viewed as a "neutral player" capable of brokering intergovernmental bargains:

> *'I think we got to the stage where the member states only saw the things the Commission was doing that irritated them. And they did not see the value of things that we were doing. And I think that now we have managed to restore the balance a little bit. Maybe also after enlargement they realised yet again that there needs to be some neutral player, which is not advancing any particular national agenda but which is advancing the overall agenda…I think it is also to do with, in particular coming from the president, this emphasis on wanting a partnership with the member states. So we are in this together, you know, the problems are enormous, the issues we are trying to work on, we can tackle them better if we have good co-operation than if we're fighting with each other…*

… I think it is rather whether the Commission has the capacity to get it right in terms of political shape and structure, and then the substantive capacity to develop a real policy that over time can deliver something more than what the member states can achieve individually."

TRAX 23 - Interview with Günter Verheugen, February 25, 2016, Potsdam, Germany – Historical Archives of the EU Oral History Project "History of the European Commission, 1986 – 2000," written transcript, interviewed by Michael Gehler and Nicolae Păun in English

Günter Verheugen was a prominent member of the College of Commissioners, serving as Commissioner for Enlargement and Commissioner for Enterprise and Industry between 1999 and 2010. As such, he was uniquely placed to note how the Commission as transformed during Barroso's Presidency, beginning in 2004. In this interview, Commissioner Verheugen notes two crucial transformations of the Commission College. First, he notes its partisan politicization – driven in large part by President Barroso himself. Secondly, he notes its increasing irrelevance due to the political centralization of the Commission, through which the Presidency could determine all salient matters through "upstream coordination" before they reached the College for discussion.

Although Verheugen does not specifically discuss law enforcement and infringement matters, his comments both (a) corroborate other interviewees highlighting the increasing central role of the Presidency in setting policy (including in enforcement), before any College discussion; and (b) the fact that forbearance would probably have taken a more partisan form if it had been driven by the College of Commissioners – which it was not. First, Commissioner Verheugen discusses the politicization of the Commission under Barroso:

"I left all societies, clubs, because I had the very strong sense that members of the European Commission should be completely independent. I did not leave my party, but I stopped the activity in my party, fully. And I'm very unhappy about the fact that this tradition, that Commissioners are not active in party politics, was destroyed by Barroso, and even more by Juncker. I think it does the Commission no good, that members of the European Commission are now again active as party policy-makers. It does not help to improve the reputation of the Commission, just the contrary…

I repeat, I really regret that this behaviour has changed, responsible is Barroso, the first thing he did when he became the President of the European Commission in 2005 was to join the election campaign in Portugal, to fight for his party comrade, who was foreseen as his successor. Since then, it slipped."

Next, Commissioner Verheugen discusses the increasing Presidentialization and centralization of the Commission under Barroso, which marginalized the role of the College of Commissioners:

"Despite the fact that the character of the Commission as a College is disappearing, it was still relatively strong during the Prodi Commission, and already in the Barroso I Commission it was weaker, and now, as far as I can see it, the character of the Commission as a College has totally disappeared. And Barroso has introduced a presidential system or presidential regime, I would say, and the strong majority of Commissioners did not care very much about the collegial role at all. So, they concentrated simply on their portfolio…

I know from Commissioners who served in previous Commissions that it was completely different, that this idea of a College was really meaningful. Barroso says you cannot run a meeting of twenty-eight people like a College, you need to have upstream coordination. So the term that is used as upstream coordination means centralised

leadership or top-down approach. And I can give an example – in the Prodi Commission we had few votes. In the Barroso Commission there were no votes at all. In the Prodi Commission there were normally two or three issues on the agenda, with a quiet discussion. In the Barroso Commission the rule was that something appears on the agenda only if there's no discussion required. Everything was already ironed out before the meeting of the College. So, it's really a radical change of the character of the Commission."