Compliance with EU Environmental Law. The Iceberg is Melting

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The Iceberg is Melting

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Abstract

The European Union (EU) has become the main driver for environmental policy output for its member states whose number has more than tripled over the past four decades. The EU’s deepening and widening has led researchers to expect more non-compliance with EU environmental legislation. In fact, however, the implementation gap has narrowed over the past 25 years. Except for Southern enlargement, taking on new member states has not exacerbated the EU’s compliance problem in the field of environmental policy. Nor has the expansion of the environmental \textit{acquis}. This is explained by the European Commission’s strategies of managing and enforcing compliance. EU environmental policy has become less demanding on member states since it increasingly tends to amend existing rather than set new legislation. Simultaneously, the Commission has developed new instruments to strengthen member state capacities to implement EU environmental legislation.

Keywords:

Environmental Policy, Compliance, Implementation, Infringements, Enlargement, European Commission

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Introduction

Preventing member states from misusing national regulations as non-tariff barriers in the Internal Market was the main driver for developing a comprehensive body of environmental legislation (Zito 2000) and its ‘journey to centre stage’ (Haigh 2015). Becoming a proper European Union (EU) competence rather late, environmental policy has been one of the policy fields where European integration has substantially advanced during the last decades. The environmental acquis grew rapidly (Holzinger et al. 2006); the EU has become the main source of environmental policy output in the member states (Jordan and Adelle 2012; Delreux and Happaerts 2016). Simultaneously, EU environmental policy has suffered from serious compliance problems. It is the policy area with the second highest number of violations of EU law even without controlling for the legislation in force (see Hofmann, forthcoming). The high level of non-compliance in this core European integration area has regularly fuelled concerns about a (growing) compliance problem in the EU (Collins and Earnshaw 1992; Jordan 1999; Haigh 2015).

The EU’s growth is not limited to the environmental acquis; the number of member states has also tripled. A growing body of EU environmental law to enforce and an increasing number of states to monitor, support and socialize, should lead us to expect more non-compliance, particularly since the Commission’s resources have not matched the growth in law and member states. However, if we control for the increased numbers of environmental laws and member states that could potentially violate them, non-compliance has fluctuated and overall declined since 1994. We argue that decreasing non-compliance is part of a long-lasting trend. Conditions for non-compliance today differ from those existing 40 years ago because of the changing nature of EU law. EU (environmental) law has become less demanding, tending to amend existing rather than introduce new legislation. Moreover, the Commission has developed a whole set of new instruments to strengthen the compliance capacity of (new) member states. Pre-accession conditionality, for instance, explains why, unlike Southern Enlargement in the 1980s, the accession of 12 new members in the 2000s has not caused a spike in non-compliance with EU (environmental) law.

The literature on member state compliance and implementation of EU environmental law is exceptionally rich (cf. Tosun 2012; Bondarouk and Mastenbroek 2018). We contribute a longitudinal perspective on patterns of non-compliance with EU environmental legislation that covers more than three decades. Focusing on EU-level developments when interpreting these time-variant patterns, we rely on two well-established approaches in EU compliance studies –
enforcement and management (Tallberg 2002). These approaches provide different but not mutually exclusive perspectives that help explain the overall decline in breaches of EU environmental law and their temporal fluctuations.

We structure the contribution as follows. The first part briefly reviews research on (non-)compliance with EU environmental legislation, paying particular attention to how the literature has analysed compliance and implementation over time. Using a dataset of infringement procedures launched by the European Commission against the member states between 1978 and 2016, we then present a longitudinal mapping of non-compliance with EU environmental law. We show that non-compliance has fluctuated but declined overall since the Internal Market’s completion. The second section discusses the extent to which the compliance literature can account for the two major findings – fluctuation and decline – that our temporal analysis reveals. We conclude by discussing the policy implications of our main arguments and identifying new research avenues.

As time goes by: the implementation of EU environmental legislation

EU policies adopted in Brussels require legal implementation and practical application in the member states. In theory, EU law supersedes national regulations and entrenched practices. In practice, there is substantial cross-temporal, cross-national and cross-policy variation in compliance with EU law. In past decades, the literature has sought to explain what most identified as a growing compliance problem in the EU (see especially Treib 2014; Angelova et al. 2012). Qualitative studies usually focus on policy practices within states that lead to the legal adoption (or non-adoption) of EU policies or their practical implementation (or non-implementation). In this context, the implementation of EU environmental policy was a particularly popular case in the late 1990s (Knill 1998; Knill and Lenschow 2000; Jordan 2001; Börzel 2003). These studies highlight the existence of a substantial implementation gap; they also contributed to the theoretical and conceptual understanding of the research agenda on compliance in the EU (Treib 2014). Nonetheless, researchers have seldom investigated variation across time. Rather, many studies start from the assumption that the EU is facing a compliance problem and seek to explain why this is so. Detailed case studies of different pieces of EU environmental law largely drove research (Bondarouk and Mastenbroek 2018). Scholars located the major causes of non-compliance at member state level. Accordingly, country-specific variables, such as legal culture and administrative traditions, as well as state power and state capacity, were the analytical focus accounting for differences in non-compliance. This was also the case when the accession of Greece, Portugal, and Spain in the 1980s triggered a debate.
on whether the EU had acquired a ‘Southern problem’ (La Spina and Sciortino 1993; Pridham and Cini 1994). The three Southern newcomers had significant difficulties in complying with EU law, and particularly environmental policy. The literature suggested these problems stemmed from some common deficiencies the Mediterranean countries shared with regard to their administrative and political systems, the weakness of civil society, and low levels of socio-economic development (Spanou 1998; Eder and Kousis 2001; Börzel 2003; Koutalakis 2004).

The 1995 (EFTA) enlargement involved three new countries, two from the North (Sweden and Finland) and one from Central Europe (Austria). Their accession did not raise much concern regarding implementation and compliance, partly because analysts regarded these countries as ‘environmental pioneers’. Instead, the EFTA enlargement triggered debates about how small states can become influential by ‘uploading’ their innovative policies to the EU-level (Lauber 1997; Kronsell 2002).

The accession of the 10 Central and Eastern European (CEE) countries (plus Malta and Cyprus) in 2004 and 2007 revived the debate about environmental laggards in the EU (Skjærseth and Wetttestad 2007). Indeed, the CEE countries have shared many symptoms of the ‘Mediterranean Syndrome’: inefficient administrations ridden by patronage and corruption, legacies of authoritarianism, weakly organized societal interests, and lower levels of socio-economic development (Börzel 2009; Börzel and Buzogány 2010). Moreover, the environmental acquis had grown considerably, rendering its implementation costlier than when the three Southerners joined. Many students of EU environmental policy-making expected a slowdown or even set back as a result of Eastern Enlargement (Jehlicka and Tickle 2004; Liefferink et al. 2009).

Measuring non-compliance over time

How has non-compliance with EU environmental law fared over the past 25 years? Has the subsequent deepening and widening of the EU exacerbated its implementation gap? Has the Southern problem turned into an Eastern problem? To answer these questions, we trace non-compliance over time, making use of longitudinal data on infringements of EU environmental law.

Compliance and implementation research uses a large variety of different measurements to account for successful policy implementation. Most studies on compliance and implementation of EU environmental policies still rely on qualitative evaluation (see Bondarouk and Mastenbroek 2018). While such studies have the benefit of providing in-depth assessments of the implementation process, they are difficult to compare across member states or over time.
Quantitative measurements are less fine-grained, but allow for more systematic comparisons. Many studies use quantitative data on the transposition of EU directives as a compliance measure (e.g. Steunenberg and Rhinard 2010). However, this data relies on notifications by member states referring only to the timely transposition of directives into national law; it does not cover the incorrect legal implementation of directives or the incorrect application of directives, regulations and treaty articles. Other studies use implementation reports prepared by consultancies or analyse the implementation measures in great detail (König and Mäder 2014; Zhelyazkova et al. 2017) but they only cover a limited number of member states and/or member states in a limited time period and selected policy sectors.

Infringement procedures provide a more comprehensive analysis of non-compliance with EU legislation (Börzel 2003). Art. 258 TFEU specifies that the European Commission can open infringement proceedings against member states in violation of EU law. It can base its action on citizen complaints, petitions and questions by the European Parliament, non-communication of the transposition of Directives or simply on its own initiative. The infringement proceedings consist of various stages, starting with a ‘formal letter’ and continuing with a ‘reasoned opinion’. If member states fail to respond adequately to the Commission’s inquiry, it can refer the case to the European Court of Justice (CJEU), which ultimately can impose a financial penalty.

Unlike the other quantitative measures of non-compliance mentioned, infringement proceedings have the advantage of covering all types of legal acts and possible violations over a long period. While the Commission is neither capable nor willing to legally pursue all violations it detects and therefore consistently focus on cases of systemic and persistent non-compliance, previous studies have found no evidence of a bias in infringements towards certain member states or policy sectors (Börzel et al. 2010; Börzel forthcoming). Nevertheless, infringement proceedings are certainly no measure for the absolute level of non-compliance. Scholars have rightly criticized them for representing merely the ‘tip of the iceberg’, i.e. the visible cases of non-compliance (Hartlapp and Falkner 2009). Additionally, from a legal perspective we cannot yet regard infringement procedures as breaches of law as they refer to cases where the European Commission has good reasons to suspect non-compliance (Smith 2016). Legal proof requires a conviction by the CJEU, which sides in more than 90 per cent of cases with the Commission against the member states. These objections notwithstanding, infringement proceedings provide unbiased insights into member state non-compliance with core areas of the acquis communautaire. They remain the most systematic and comparable
information source on non-compliance, allowing us to trace variance across member states, policy sectors, and time.

We use the Berlin Infringement Database (cf. Börzel and Knoll 2012; Börzel forthcoming) which includes 2,341 infringements cases the Commission brought against member states between 1978 and 2016 in the environmental policy field. Unlike the data published in the European Commission’s Annual Reports on Monitoring the Application of Community Law or on DG Environment’s ‘Legal Enforcement’ site, this dataset contains more detailed information regarding the nature of non-compliance, the type of law infringed on, the violating member state, and the measures EU institutions have taken to tackle non-compliance. We use ‘reasoned opinions’ as our main measure for non-compliance for two reasons. First, for the first stage of the infringement proceedings, the formal letter of warning, the Commission only provides aggregate data on the total number of cases brought against individual member states – as it considers information on individual cases confidential. Second, reasoned opinions concern the more serious non-compliance cases as they refer to issues that could not be solved at the previous, unofficial stages. Note that more than two-thirds of all the cases in which the Commission sends a warning letter are settled before it officially opens proceedings by issuing a reasoned opinion. To support our finding on the decline of non-compliance, we compare the trend in reasoned opinions with CJEU decisions, which represent the most contentious (and also more politicized) enforcement phase (Panke 2010).

**Temporal patterns of non-compliance**

As mentioned above, infringements may only capture the ‘tip of the iceberg’ (Hartlapp and Falkner 2009). We have no means to measure how large the iceberg really is. We can, however, assess whether the visible part of the iceberg has changed size over time. Simply comparing the number of infringement proceedings across time does not say much about changes in the level of non-compliance in the EU. The number of environmental legal acts in force has increased almost six-fold since 1978; 19 more member states that can potentially violate these acts have joined the EU. We measure reasoned opinion against the number of EU environmental laws in force multiplied by the member states in a given year that could potentially infringe them. Compare Figures 1 and 2 to see what difference it makes when we control for these ‘violative opportunities’ (Börzel et al. 2010; Börzel forthcoming). Figure 1 shows the overall distribution of reasoned opinions per year in 1978-2016. Numbers gradually increased until 2005 and then started to drop – despite 13 more member states joining. Figure 2 depicts reasoned opinions against the legislation in force and the number of member states in a given year. If we calculate
infringements as the percentage of violative opportunities, non-compliance with EU environmental legislation already started to decline in the mid-1990s.

**Figure 1:** Annual reasoned opinions (ENVI) absolute numbers, 1978-2016 Opportunities

**Figure 2:** Annual reasoned opinions (ENVI) relative to violative opportunities (Directives in force*MS), 1978-2016

Source: Authors’ own compilation with data from the Berlin Infringement Database.

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

**Figure 3:** (Average) Annual reasoned opinions relative to violative opportunities in the area of environmental policy per member state, group means
Greece, which joined in 1981, clearly drove the first spike in 1983/4. Note that there is on average a two-year lag between the occurrence of a violation and the Commission sending a reasoned opinion seeking redress. Accordingly, the effect of Portugal’s and Spain’s accession in 1986 started to show in 1988, and again, in 1993-95, when the period of grace the Commission had granted them expired (Börzel 2001). Nonetheless, the other member states also saw a significant increase in non-compliance after the Single European Act entered into force 1987, indicating factors other than Southern enlargement. While relative numbers started to drop in the second half of the 1990s, they flared up in 1998, in 2001, 2005, and 2010. Three of the four spikes coincide with the accession of new member states. However, numbers increased for all member states, not only for the newcomers. Figure 4 illustrates that these trends are not specific to reasoned opinions but also show in later stages of infringement proceedings (see also Krämer 2006). Referrals to the Court and decisions of the Court concern breaches of EU law, which previous stages of the infringement proceedings could not resolve. As these referrals follow-up on reasoned opinions, there is a time lag between the spikes in Figure 3 and 4. The trends remain the same: while there is fluctuation, we witness a clear downward trend since the mid-2000s.

Figure 4: (Average) Annual court decisions in the area of environmental policy per member state, group means

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1 As our database includes only EU legislation starting from 1978, the first court referrals of these legal pieces are in 1981.
In sum, the various enlargement rounds certainly affected the trajectory of EU non-compliance, but they cannot fully account for the periodic spikes. Thus the downward trend is counter-intuitive.

**Understanding non-compliance: stricter enforcement and better management**

Apart from debates over the effects of different enlargements, compliance and implementation research has been largely silent on longitudinal change. However, the two major theoretical approaches, which dominate the compliance literature and that the Commission’s compliance strategies reflect (Tallberg 2002; Börzel 2003), offer some arguments for understanding the decline in non-compliance over time.

The *enforcement approach* understands compliance as a result of a rational choice (Downs *et al.* 1996). States weigh the costs of compliance against its benefits. The greater the distance between their policy preferences and the policies they have to comply with, the greater their compliance costs and the greater their incentive to defect. Punitive sanctions can inflict substantial non-compliance costs, deterring non-compliance (Fearon 1998). The weaker the monitoring and enforcement capacity of international institutions, the more likely is non-compliance. The *management approach*, in contrast, assumes that states lack the capacity rather than the willingness to manage compliance costs (Chayes and Chayes 1993; Raustiala and Slaughter 2002). Instead of monitoring and sanctioning, international institutions should help states cope with compliance costs by easing the burden and by strengthening their legal and administrative capacities.

The two dominant compliance theories allow the formulation of different arguments about why an increase or decline in non-compliance might occur over time in the EU. Enforcement approaches point to changes in the monitoring and sanctioning capacities of the European Commission increasing costs of non-compliance. For the management school, non-compliance depends on how effective the Commission is in managing compliance by clarifying behavioural requirements and assisting member states in coping with compliance costs. We do not systematically test these alternative accounts of declining non-compliance by using country- or sector-related variables, such as veto players, voting power, or administrative capacity, which are so prominent in the compliance literature (for an overview see Toshkov 2010; Angelova *et al.* 2012). While we acknowledge the importance of the domestic level for explaining non-compliance, we deliberately focus our attention on EU-level developments concerning
environmental policy that are central to this volume (see Zito et al. forthcoming). We now proceed to offer a congruence analysis (George and Bennett 2005, p. 181–204) that matches changes in the enforcement and management capacities of the EU with changes in non-compliance over time.

**Enforcement**

Enforcement does not account for the overall downward trend but contributes to explaining fluctuations in the downward trend in non-compliance. Intensified enforcement efforts of the Commission often relate to an (upcoming) enlargement and largely drive the seven periodic spikes (see Figure 3). The 1984/85 peak was the combined effect of Greece’s accession and the publication of the Commission’s first annual report on the implementation of EU law in 1984 (Börzel 2001). The accession of Portugal and Spain and the Commission’s more aggressive enforcement strategy to ensure the effective implementation of the Internal Market drove the second peak in 1988 (Tallberg 1999). The Market’s official completion scheduled for 1992 also explains the third peak in 1994. The significant increase in infringements in the EU in 1998 related less to the 1995 EFTA enlargement and more to a 1996 internal reform of the infringement proceedings to improve effectiveness. To accelerate the process, the Commission decided to issue letters more rapidly than before. The number of letters the Commission sent increased significantly after the reform’s implementation, which also stimulated the numbers of reasoned opinions (Börzel 2001). The second highest peak in 2001 reflects again a robust Commission effort to get the house in order before the ‘big bang’ enlargement. Likewise, the last two flare-ups in 2005 and 2010 relate to the Commission’s strategy to level the playing field between new and old member states and counteract concerns about an ‘Eastern problem’ (Börzel 2009).

Monitoring and sanctioning non-compliance is contingent on resources. While ‘violative opportunities’ increased over time, the Commission’s enforcement capacities did not. Contrary to its public image (see e.g. Moravcsik 2001), Brussels’ bureaucracy has always been comparatively small, equaling the administration size of a European city such as Cologne. Still, the Commission has different tools available to monitor and sanction non-compliance.

With regard to monitoring, the Commission may launch its *own investigations*. With its limited resources, however, it relies heavily on decentralized monitoring information provided by citizen and business *complaints*, *parliamentary questions* and *petitions* (suspected infringements), and information member states provide concerning the transposition of directives into national law (referred to as *non-notifications* or *non-communication*).
The consistency and availability of information on suspected infringements varies significantly; we cannot break the data down by policy sectors. Figures 5 and 6 survey the years 1988 to 2010 for which data are consistently available. The Commission used to launch between 200 to 300 *investigations* per year – with the exception of the late 1980s, where the numbers were three times as high, probably due to the Commission’s intensified effort to enforce EU law to complete the Internal Market. The numbers increased again post-Eastern enlargement but quickly returned to previous levels and have been dropping to an overall low in 2010. This may also relate to the introduction of new instruments such as SOLVIT and EU Pilot, designed to resolve compliance problems without resorting to infringement proceedings; they provide the Commission with information on potential non-compliance cases, reducing the need for launching own investigations.

*Parliamentary questions* and *petitions* have been much more limited but also peaked around the Internal Market’s completion and the introduction of the Political and Economic and Monetary Union in the first half of the 1990s. They briefly flared up in 1991, probably also relating to Internal Market completion, and again around Eastern enlargement (2002-2004) and have declined ever since. *Complaints* steadily increased until the early 1990s, then started to drop but rose again in the mid-1990s to an overall high in 2002. Afterwards, numbers have continuously declined, particularly after 2004. Again, this may be due to SOLVIT and EU Pilot (Koops 2011, pp.180-181). Both offer alternative venues for business, societal organizations, and citizens to articulate their grievances about non-compliance.

*Non-notification* (non-communication) patterns, finally, are more diverse; enlargement effects appear largely to drive them. Numbers were high in 1996, after Austria, Finland, and Sweden joined, sky-rocketed in 2004, after the EU admitted 10 new members, and peaked once more in 2007 when Bulgaria and Romania joined.
Overall, monitoring information fluctuates significantly. There is no linear upward or downward trend in investigations, complaints, petitions, parliamentary questions, and non-notifications that would match the overall decline in infringements.
While the Commission heavily relies on decentralized mechanisms to monitor non-compliance, the EU centralizes sanctioning in the Commission’s power to initiate infringement proceedings and the CJEU to impose financial penalties. Infringement proceedings provide a means to increase non-compliance costs by naming and shaming member states. They also offer the road to financial sanctions. The Maastricht Treaty introduced the possibility of imposing financial penalties on member states that failed to comply with CJEU judgments (Article 260 TFEU). Article 260 became effective in 1993, just when infringement numbers relative to ‘violative opportunities’ had started declining. The CJEU invoked it first in 2000 when Commission had started a procedure against Greece in 1997 for not taking measures against the disposal of toxic and dangerous waste into the Kouroupitos River in Crete (Case C-387/97). It is questionable whether the mere anticipation of financial sanctions started to bring infringements down seven years before the member states learned that the CJEU was prepared to impose them. In 2009, Article 260 (2) of the Lisbon Treaty removed the necessity for the Commission to send a reasoned opinion before asking the CJEU to impose a financial penalty for non-compliance with its ruling. This may accelerate the sanctioning procedure by eight to 18 months (Peers 2012). Moreover, Article 260 (3) introduced a fast-track procedure allowing the Commission to ask, without a ruling of the CJEU under Article 258, the CJEU to impose financial sanctions if a member state has not reported the transposition of a directive.

Another mechanism for naming and shaming is the Internal Market Scoreboard, which the Commission established in 1997. Twice a year, it reports on member states’ performance and their progress in implementing Single Market directives. The scoreboard allows for direct comparison of member state performance, highlighting the worst performers, not only among fellow governments but also in the public media (Tallberg 2002, p. 63). Only starting in 1997, has the Internal Market Scoreboard at best reinforced the downward trend. Cases of non-notification in this sector had dropped before 1997 and started to rise in 1998 until they reached an overall high in 2004 and 2007. Cases of incomplete and incorrect transposition and incorrect application of directives reached a high in 1995 after which they dropped; they climbed up again until they reached their overall high in 2006 before steadily declining. The introduction of the Scoreboard is unlikely to have driven these roller-coaster dynamics.

In sum, changes in the Commission’s enforcement capacity help account for the fluctuations in non-compliance patterns over time. They, however, cannot explain the overall decline.
Management

Management theories highlight the importance of international institutions managing rather than enforcing compliance. Over the past 30 years, changes in EU environmental law and the Commission’s focus on capacity building have helped member states cope with compliance costs. Some appear more effective in reducing non-compliance than others. Increasing use of amending legislation and financial and technical assistance to accession countries most closely relate to the declining trend. Amending legislation also reduces the need for enforcement due to lower compliance costs for all member states. Capacity building, in contrast, manages compliance in member states with weak capacities, which characterises the vast majority of countries that have joined the EU in the past 40 years.

Compliance is particularly demanding on the legal and administrative capacities of member states when they have to introduce new laws. EU legal acts that require adaptation of existing domestic legislation incur lower compliance costs because they produce lower misfit. While the compliance literature contests the causal relevance of misfit (see e.g., Duina 1997; Börzel and Risse 2003; but see Falkner et al. 2004), several studies have shown that amending directives are less likely to give rise to delayed transposition than directives enacting new provisions (Mastenbroek 2003; König and Luetgert 2009; Haverland et al. 2011).
Data on new versus amending EU legislation is only available until 2012 and refers to directives. Nevertheless, Figure 6 shows a clear trend of the EU increasingly adopting amending directives; new legislation started to decline since 1994. Internal Market completion in the first half of the 1990s did more than reduce the need for new legislation. The rise of subsidiarity (Nugent 2016) and the shift of the policy agenda towards more controversial issues related to the extent to which the completed Internal Market should be regulated (Hix 2008) made it increasingly difficult for the Commission to table proposals for new laws. Since 2005, the EU has adopted more amending than new legislation. With the financial crisis, the EU appears reluctant to adopt legislation in several environmental policy subfields (Steinebach and Knill 2017).

Besides EU law becoming less demanding, the EU has also increased its efforts to build member state capacities for achieving compliance. First, it provides financial and technical assistance under various EU funds and funding programs. The Cohesion Fund and Community programs, such as the Action for the Protection of the Environment in the Mediterranean Region (MEDSPA), the Regional Action Programme on the Initiative of the Commission Concerning the Environment (ENVIREG), or the Financial Instrument for the Environment (LIFE),
offer(ed) funding to assist member state’s compliance with EU environmental legislation. Similarly, the EU established pre-accession funding schemes in the Eastern enlargement process, supplying Central and Eastern European candidate countries with significant financial and technical assistance (cf. Sissenich 2007, pp. 54-57). The EU organized technical assistance through ‘twinning’ programs and TAIEX, the EU’s Technical Assistance Information Exchange Office (Börzel and Buzogány 2010). Member state experts have assisted candidate states in developing the legal and administrative structures required to implement effectively selected parts of EU environmental legislation. Transgovernmental networks between national administrators responsible for implementing EU law have fostered a common understanding of what compliance entails and facilitated processes of mutual learning about best practice. One of the oldest and most effective networks is the EU Network for the Implementation and Enforcement of Environmental Law (IMPEL). EU member states established it in 1992 as an informal network of European regulators and authorities concerned with the implementation and enforcement of environmental law. Likewise, EUFJE (European Union Forum of Judges for the Environment) promotes the enforcement of national, European and international environmental law by exchanging experiences on environmental case law and training judges.

Country studies provide ample evidence on how EU capacity building has helped accession countries and (new) member states improve their compliance with EU environmental law (Buzogány 2009). Pre- and post-accession financial instruments and twinning programs have played a major role in bringing new member states into compliance and may explain why Eastern enlargement has not exacerbated the EU’s compliance problems (Sedelmeier 2016; Schimmelfennig and Sedelmeier 2004; Börzel 2009, forthcoming). The combined effect of less (new) legislation and continued efforts at strengthening member state capacities to comply with existing legislation explains convincingly the narrowing environmental policy implementation gap.

*Declining non-compliance: Managing rather than enforcing the Treaties*

While enforcement approaches help explain the fluctuation in non-compliance, management approaches appear to largely explain the declining trend in non-compliance in the EU since the mid-1990s. Compliance with EU environmental law has become less demanding with the increasing adoption of amending rather than new legislation. This eases compliance costs, reducing the need for both enforcement and management. Nonetheless, the vast majority of member states that have joined the EU in recent decades suffer from weak capacities. They still face difficulties complying with EU laws that member states with higher regulatory standards
and capacities have uploaded to the EU level (Börzel 2003, 2009). Therefore, the Commission has developed a comprehensive toolbox to strengthen member states’ compliance capacities. Compliance research reveals that member states’ administrative capacity is a powerful factor in explaining why some states comply less than others (Mbaye 2001; Hille and Knill 2006; Börzel et al. 2010; Börzel forthcoming). Accordingly, the Commission’s use of pre-accession conditionality and pre-accession assistance to CEE candidate countries explains why they perform better than their Southern counterparts despite equally low administrative capacities (Börzel and Sedelmeier 2017). The Commission supported CEE (unlike Greece, Spain, and Portugal) in building capacities necessary to comply with EU law (Bruszt and Vukov 2017).

While CEE states share bureaucratic similarities with Southern member states, general capacity indicators do not capture the specific capacities for implementing EU law. Qualitative environmental policy studies find significant implementation problems in the region (Orru and Rothstein 2015) and show that in some fields, such as climate policy, CEE countries are indeed among the brakemen (Braun 2014). Nevertheless, there is also sufficient evidence of conflicts related to the implementation of community legislation (Buzogány 2015; Sotirov et al. 2015) or of the empowerment of pro-compliance constituencies (Andonova and Tuta 2014, Dimitrova and Buzogány 2014) suggesting that the Commission’s management strategy produced more than ‘empty shells’ (Dimitrova 2010) in a ‘world of dead letters’ (Falkner et al. 2008).

The Commission’s management strategy has helped narrow the implementation gap. Capacity-building and easing compliance costs have proven more effective than surveillance and punishment (Bieber and Maiani 2014). Unsurprisingly, the Commission has developed a clear preference for management over enforcement (Hartlapp 2007; European Commission 2016). Reducing compliance costs by adopting less demanding legislation and strengthening member state capacities to cope with compliance obligations have reduced the need to bring legal action against member states. Yet, non-compliance is not only a matter of capacity. Enforcement remains an important element in the Commission’s compliance approach, which often uses it in combination with management (Hofmann, forthcoming). Powerful member states, for instance, tend to delay compliance with EU law when they anticipate domestic opposition (Börzel et al. 2010; Börzel forthcoming). There is still a substantial, albeit decreasing, number of systematic and persistent violations of EU law, e.g. the Fauna, Flora, Habitat Directive, which the Commission seeks to redress through punitive action (Gerdes et al. 2015). Thus, enforcement efforts contribute to but do not drive the downward trend.
Conclusion

The implementation gap in EU environmental policy has narrowed over the past 25 years – despite the tripling of member states that must comply with a four times larger environmental *acquis*. Except for the Southern enlargement, taking on new member states has not exacerbated the EU’s compliance problem. Most importantly, Eastern enlargement has not made a difference, largely because of the Commission’s management strategy for building capacity in the accession process. In response to the (anticipated) accession of 12 new members with weak capacity, the Commission prioritized the provision of financial and technical assistance to promote effective EU environmental legislation implementation. Next to capacity building, non-compliance has been declining because EU environmental policy has become less demanding by amending existing rather than creating new legislation.

Our findings have implications for future EU environmental policy. First, there is no contradiction between deepening and widening, at least when it comes to compliance. This is, second, because compliance is primarily a matter of administrative capacity rather than political willingness. A ‘centralized Community inspectorate’, as the Special Issue ‘Green Dimension for the European Community’ discussed 25 years ago, is not only “[…] at present politically unrealistic, if not possibly inappropriate” (Collins and Earnshaw 1992, p. 213); it is unlikely to make a substantial difference. Strengthening and harmonizing implementation activities in member states – something actors operating in the context of EU environmental policy have increasingly discussed (and practised) in recent years (Angelov and Cashman 2015; Hedemann-Robinson 2016; Knill *et al.*, 2018) – appear much more promising.

We close by highlighting two major avenues for further research on compliance with EU (environmental) legislation. We have provided a first quantitative overview, which reveals an important trend and some plausible theoretical interpretations of the observed variation but calls for further empirical exploration and theoretical refinement. First, most of the environmental sector research has examined predominantly market-correcting policies setting production and product standards to fight environmental pollution (Article 191 TFEU). Over time, EU environmental law has become highly diverse in terms of policy sectors, policy tools and governance approaches (Jordan *et al.* 2013). We have also seen an increase in the relevance of issue areas, such as climate change, energy or transport, which are often closely related to environmental policy. Moreover, we know that EU legislation differs significantly concerning clarity, novelty (versus amendments, see above), comprehensiveness, consistency, and practical recommendations of individual legal acts (Haigh 2015). Nevertheless, we know little about
whether there are structural differences in how member states comply with different types of environmental or environment-related legislation – or whether there are differences in how the Commission guards the Treaty (Čavoški 2015). Future studies could differentiate between compliance patterns regarding genuinely new and important legislation versus amending legislation. This also raises the question whether ‘better’ quality – more comprehensive, clear and consistent legislation – is better complied with, a question of particular relevance in light of the European Commission’s Better Regulation Agenda and the recent ‘Make it Work’ Initiative aimed at harmonizing drafting provisions on compliance assurance in EU environmental law (Squintani 2016).

Second, enforcement and management approaches offer theoretical explanations of non-compliance in the EU. Rather than treating them as competing or alternative theories, our analysis shows that we can and should combine them. While this contribution has deliberately focused on EU-level developments, scholars should also apply these explanations at member state level. We need both more quantitative and qualitative research that systematically tests the (combined) explanatory power of enforcement and management and explores related causal mechanisms. Moreover, the literature has developed other theoretical explanations, for instance more sociological conceptions of compliance (Checkel 2001; Börzel et al. 2010; Börzel forthcoming). Public support for transferring legislative competences in a specific policy sector to the European level is highly relevant as EU citizens differ in degree of support for EU competencies over policy sectors; they are rather supportive of EU environmental policy-making but prefer their member states to retain control of employment and social affairs. However, if public acceptance matters for non-compliance, it might result in more rather than less non-compliance (Zhelyazkova et al. 2016). Environmental policy offers numerous research opportunities that can keep students of EU (environmental) policy busy for the next 25 years.

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