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**Guardian of the Treaties: The European
Commission's Prioritization of EU Law
Enforcement through the Infringement
Procedure**

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Abstract

This paper traces the stages of the infringement procedure under Art. 258 TFEU and seeks to explain how the European Commission has prioritized its use. The paper has two substantive sections. Part 1 describes the stages of the infringement procedure, moving from the pre-judicial stage to the judicial stage and post-judgement compliance. Part 2 describes why the Commission must prioritize its enforcement decisions and seeks to understand how the Commission chooses which cases to pursue. The paper describes several important cases where the Commission's political incentives were heavily aligned with its decision to start infringement proceedings. The cases demonstrate there is some possibility that the Commission has used the infringement procedure to achieve political objectives.

Table of Contents

1. INTRODUCTION.....	1
2. UNDERSTANDING THE INFRINGEMENT PROCEDURE PROCESS	2
2.1 PRE-JUDICIAL STAGE	3
2.1.1 <i>Preliminary mechanisms</i>	3
2.1.2 <i>Administrative stage of the infringement procedure</i>	5
2.2 JUDICIAL STAGE.....	8
2.2.1 <i>Overview of the judicial stage of infringement proceedings</i>	8
2.2.2 <i>Post-decision compliance and penalty fines</i>	9
3. COMMISSION PRIORITIZATION OF EU LAW ENFORCEMENT	13
3.1 OFFICIAL COMMISSION STANCES ON PRIORITIZATION	13
3.2 CASES	15
3.2.1 <i>Open Skies</i>	15
3.2.2 <i>Energy policy</i>	18
3.2.3 <i>Direct taxation</i>	19
4. CONCLUSION.....	21

1. Introduction

Enforcement of EU law is a central challenge for the European Commission. The EU today has more than 40,000 pieces of legislation in force, and the European Court of Justice (ECJ) has delivered more than 15,000 verdicts in its lifetime.¹ Each of the 28 (soon to be 27) Member States are obliged to comply with the vast majority of this legislation, and efficiently implement and enforce all new laws adopted by the Council of the European Union and the European Parliament. There are a litany of ways states may fail to comply: they may fail to transpose directives correctly and in a timely manner, attempt to pass legislation at odds with a European act, or reach a decision in a domestic court system that conflicts with EU law.

As Guardian of the Treaties, the European Commission executes the herculean task of ensuring Member State compliance with EU law.² A critical tool in the Commission's enforcement efforts is the infringement procedure, where the Commission considers legal proceedings against a Member State that is potentially noncompliant with an aspect of EU law.³ The process begins with issuance of a formal notice, progresses through an administrative stage, and then turns to the ECJ should the dispute continue. As the breadth and complexity of EU legislation grows, so too has the use of the infringement procedure: the average number of infringement cases brought per Member State per year has nearly doubled since 1980, and today the Commission launches nearly 1,000 infringement cases per year.⁴

¹ "Number of Laws." *EUABC*. May 2015. Accessed online 22 March 2017 at <http://en.euabc.com/word/2152>

² Art. 258, *Treaty on the Functioning of the European Union (herein 'TFEU')*

³ *Ibid.*

⁴ "2016 Commission report and factsheets on monitoring the application of EU law." *European Commission*. 6 July 2017. Accessed online 22 March 2018 at https://ec.europa.eu/info/publications/2016-Commission-report-and-factsheets-monitoring-application-eu-law_en

Faced with a massive slate of potential EU law infringements and limited administrative resources, the Commission must make decisions about which cases of potential non-compliance it will pursue. This prioritization decision delicately conflates law and politics: while the Commission is responsible for enforcing EU law, it is also responsible for proposing new legislation. This paper seeks to understand how the infringement procedure has been used, and how the Commission prioritizes its enforcement of EU law through this mechanism.

The paper is divided into two substantive sections. First, it will describe the stages of an infringement procedure and contextualize the mechanism's use. Second, it will turn to the political conditions of prioritization: given the impossibility of pursuing every possible infringement, the Commission must make decisions about which infringements to prioritize. This paper will highlight some of the leading cases and evidence that suggest these prioritization decisions are not wholly immune from political considerations.

2. Understanding the infringement procedure process

The infringement procedure process can be understood as comprising two broad components: a pre-judicial stage and a judicial stage. In the pre-judicial stage, the Commission works with states through a variety of administrative mechanisms to attempt to resolve disputes. The vast majority of potential EU law infringements are resolved in the pre-judicial stage; many such cases arise simply because states were unaware they were non-compliant and are happy to comply. In this stage the Commission has broad discretion in terms of the arguments it can supply and the arrangements it can deem acceptable. Should the Commission and a Member State fail to reach agreement in the administrative stage, however, the case may move on to the judicial

stage where the Commission's discretion is far more limited and the European Court of Justice (ECJ) is in control.

2.1 Pre-judicial stage

The pre-judicial stage can be further divided into two groups of processes: preliminary mechanisms aimed at resolving compliance disputes before the infringement procedure begins, and the administrative stage of the infringement procedure itself. Preliminary mechanisms have proven very effective at resolving compliance issues that arise as a result of ignorance or misinformation, and efficiently handle many of the complaints that arise from businesses or private individuals. However, the Commission can open the formal administrative procedure for an infringement proceeding at any time; preliminary compliance mechanisms should be viewed as helpful tools for decreasing the number of cases that reach the infringement procedure rather than a necessary prerequisite in the process.

2.1.1 Preliminary mechanisms

A variety of preliminary mechanisms have been created over the past decade to process and resolve potential noncompliance issues before the Commission and Member State begin formally discussing compliance issues within the framework of an infringement procedure. These preliminary mechanisms are *not* formally part of the infringement procedure, but they play an important role in resolving many of the cases that would likely otherwise become infringement cases.

The EU Pilot Program launched in 2007, for example, supplies an informal mechanism for the Commission to discuss compliance issues with states via an online

database and communication tool.⁵ If the Commission suspects a Member State is noncompliant it can send a query to a national government via the EU Pilot, and the national government is given 10 weeks to reply. Only if the national government fails to comply, and the Commission decides to proceed with infringement action after an additional 10 weeks, does the case move to the formal administrative procedure.

Similarly, the EU's SOLVIT platform provides citizens, organizations, and Member States with an accessible digital mechanism to hold preliminary discussion on issues relating to the misapplication of internal market law. Specifically, any EU actor can use the SOLVIT mechanism when they feel they have been denied the ability to exercise their internal market rights because the public administration in another Member State has misapplied internal market legislation.⁶ Their query will be processed by a network of state-based SOLVIT centers, and the lead national SOLVIT center will issue preliminary guidance no later than 10 weeks after receiving the complaint.⁷ Only if SOLVIT discussion fails to resolve the dispute do SOLVIT cases move forward to infringement proceedings.

Preliminary mechanisms like SOLVIT and EU Pilot are very effective. EU Pilot, for example, resolved 72% of the cases presented to it in 2016.⁸ It is also worth noting that of the cases that the Commission moves forward to formal legal proceedings, a small fraction are dealt with through other mechanisms that deal with specific types of suspected infringement cases. For example, Arts. 101 to 105 TFEU provide a special mechanism by which the Commission can initiate proceedings

⁵ "Single Market Scoreboard: EU Pilot." *European Commission*. December 2016. Accessed online 22 March 2017 at http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm

⁶ "SOLVIT: Effective Problem Solving in the Internal Market." *IDABC*. September 2005. Accessed online 22 March 2018 at <http://ec.europa.eu/idabc/en/document/2057/5637.html>

⁷ "SOLVIT." *European Commission*. 14 September 2016. Accessed online 22 March 2018 at http://ec.europa.eu/solvit/index_en.htm

⁸ "Single Market Scoreboard", *European Commission*., *supra* note 4.

against private actors violating EU competition rules, and Arts. 107 to 109 TFEU provide a unique channel for the Commission to launch proceedings against state actors in the domain of control of subsidies. However, cases that fail to be resolved in preliminary mechanisms are often the most controversial and important topics, and a majority of these cases are handled through the infringement procedure. Hence by narrowing its focus to the infringement procedure specifically, this paper captures a key component of EU law enforcement.

2.1.2 Administrative stage of the infringement procedure

Unlike preliminary resolution mechanisms like EU Pilot and SOLVIT, once cases arrive at the administrative stage of the infringement procedure, an infringement proceeding formally begins. Preliminary resolution mechanisms are also not necessarily prerequisites for entering the administrative stage: it is possible for a state to receive a formal notice without first attempting a preliminary fix via SOLVIT or EU Pilot. The decision to enter the formal administrative stage can be taken against a Member State by another Member State under Art. 259 TFEU, or by the Commission under Art. 258 TFEU. However, since the Commission is responsible for the majority of initiations, this paper focuses on the Commission's role.

There are several ways the Commission may be inspired to launch an infringement action: it may begin an action in response to a complaint lodged by a citizen, corporation, or non-governmental organization, at the request of a Member State, in response to a petition or question from the European Parliament, or of its own accord.⁹ Importantly, however, the final decision to launch an infringement proceeding

⁹ Borzel, Tanja A. "Non-Compliance in the European Union. Pathology or Statistical Artifact?" *Robert Schuman Center for Advanced Studies*. 2001. Accessed online 22 March 2018 at http://cadmus.eui.eu/bitstream/handle/1814/1737/01_28.pdf?sequence=1&isAllowed=y

in this context always lies with the Commission. If a private individual, business, or other societal actor asks the Commission to begin an infringement proceeding and the Commission declines to do so, the requesting actor cannot begin an infringement proceeding of their own accord.

The Commission's complete authority over the initiation of its infringement proceedings has been well established by the ECJ. As early as 1988 in a case against the UK, the ECJ stated: "in the context of the balance of powers between the institutions laid down in the Treaty, it is not for the Court to consider what objectives are pursued in an action brought under Article 169 [*now Art. 258 TFEU*]. Its role is to decide whether the Member State in question has failed to fulfil its obligation as alleged... An action against a Member State for failure to fulfill its obligations, the bringing of which is a matter for the Commission in its entire discretion, is objective in nature."¹⁰ The ECJ has reaffirmed this ruling in several subsequent decisions.¹¹

The Commission has used its complete authority concerning when to begin an infringement proceeding to launch actions in a wide set of situations. First, the Commission has used the infringement procedure to target nearly all obvious infringements of EU law: violations of treaty provisions, regulations, and decisions, non-transposition of directives, incorrect legal implementation of directives, incorrect application of directives, and non-compliance with ECJ judgements.¹²

However, the Commission has also used the infringement procedure with meaningful effect in a variety of tertiary situations. The *International Dairy Agreement*¹³ and *Berne Convention*¹⁴ cases made it clear that that the infringement

¹⁰ Case 416/85 Commission v. UK [1988] E.C.R. 3127

¹¹ See, e.g. Cases C-200/88 Commission v. Greece [1990] E.C.R. I-4299, C-472/98 Commission v. Luxembourg [2002] E.C.R. I-09741, and C-255/05 Commission v. Italy [2007] E.C.R. I-5767.

¹² Borzel, Tanja A. "Non-Compliance in the European Union", *supra* note 8.

¹³ Case C-61/94, Commission v. Germany [1996] ECR I-3989.

¹⁴ Case C- 13/00, Commission v. Ireland, [2002] ECR I-2943.

procedure could be used to enforce non-compliance with international agreements concluded by the EU, which are by Article 216(2) TFEU binding on both EU institutions and the Member States. In several cases, the EU has also used infringement proceedings to enforce against the conclusion of Member State agreements with third countries that are incompatible with EU law.¹⁵

When initiated by the Commission, the administrative stage begins when the Commission issues a formal notice to a Member State. This notice describes what the Commission perceives to be the Member State's violation. The Member State is then given a fixed time – usually two months - to respond and can either choose to concede and comply (in which case the Commission will likely end infringement proceedings), refuse to respond, or actively disagree with the Commission's position and supply defensive arguments. If the Member State selects either of the latter two positions, the Commission must decide whether to proceed. If the Commission chooses to proceed, it supplies a reasoned opinion: a formal document listing the arguments in support of its position. After the issuance of the Commission's reasoned opinion, the Member State again can comply – in which the Commission will likely be satisfied and end the procedure - or maintain its objection. If the Member State still believes it is in the right, it can again supply arguments to the Commission. The Commission now makes a second decision on whether to proceed with the case, and if it chooses to continue, the case is passed to the ECJ. At this point the administrative stage ends and the judicial stage begins.

The preliminary mechanisms and administrative stage of the infringement procedure together are very effective. Prete and Smulders 2010 estimate the number of

¹⁵ See, e.g. Case C-170/98 Commission v. Belgium [1999] E.C.R. 1-5493.

actions sent to the ECJ represent no more than 10 – 15% of the overall suspected infringements identified each year by the Commission.¹⁶

2.2 Judicial stage

At each in the lead-up to ECJ submission, the Commission has broad discretion in reaching an agreement with the Member State about how the Member State will comply. These arrangements are sometimes not *sensu stricto* compliant, but rather positions the Commission deems acceptable.¹⁷ The Commission also has the freedom to select which arguments it will use to support its position and choose the arguments it will include in its reasoned opinion. However, once an infringement case enters the judicial stage, the Commission has much more limited discretion. Several points are worth noting.

2.2.1 Overview of the judicial stage of infringement proceedings

First, once the judicial stage begins, neither the Commission nor the Member State can supply new arguments in defense of their position. Both parties can only use arguments already made during the administrative stage when arguing before the ECJ. The ECJ will then decide which position is correct based on the legal quality of each party's stance. The restriction on new argumentation in the judicial stage makes the administrative state crucially important: both the Commission and the Member State must be careful to put all possible arguments on the table.

¹⁶ Prete, Luca, and Ben Smulders. "The Coming of Age of Infringement Proceedings." *Common Market L. Rev.* 47 (2010): 9, at p.11.

¹⁷ Andersen, Stine. *The enforcement of EU law: the role of the European Commission*. Oxford University Press, 2012. p.18.

Second, once the case enters the judicial stage, it must receive a court ruling and both parties must comply accordingly. Even if after entering the judicial stage the Member State or the Commission realizes they are likely to lose and decides they want to comply or retreat and end the proceeding, they cannot. The inability to retreat from a case once it enters the judicial stage makes the Commission's decision whether or not to enter the judicial stage highly charged: if the Commission moves forward and loses, it risks substantial perceptual damage and harm to its legitimacy. The Commission must be confident in their chances before moving forward.

The Commission is relatively successful in infringement proceedings before the ECJ: in these cases, in a given year the Commission's outright win rate varies from 60% to as high as 90%.¹⁸ It is also worth noting that the average duration of infringement proceedings varies dramatically by sector: in 2016 the average digital-sector infringement proceeding lasted 24.9 months and the average services infringement proceeding lasted 26.1 months; by contrast, the average infringement proceeding in the energy sector is a mere 13.7 months.¹⁹

2.2.2 Post-decision compliance and penalty fines

The final portion of the infringement procedure addresses continued non-compliance by a Member State after an ECJ ruling has been issued. Art. 228 TEC (now Art. 260 TFEU) provided from 1993 forwards that should a Member State fail to comply with the ECJ's judgement, the Commission may issue a second letter of formal

¹⁸ See, e.g., Andersen, Stine. *The enforcement of EU law*, supra note 15; see also Cash, William Sir. *HC 219-ix-House of Commons European Scrutiny Committee Ninth Report of Session 2014-15*. The Stationery Office, 2014. p.98, see also Tallberg, Jonas, "Paths to Compliance: Enforcement, Management, and the European Union." *International Organization* 56:3 (2002) 609-643.

¹⁹ "Priority Areas." *European Commission*. December 2016. Accessed online 23 March 2018 at http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/priority_areas/index_en.htm

notice and reasoned opinion and bring the case before the ECJ a second time – this time explicitly seeking the imposition of a penalty payment. The Commission initiated more than 100 of these cases from 1997 to 2005.²⁰ Their frequency has dropped somewhat in more recent years; the Commission asked for penalty fines in two failure-to-comply cases in 2015²¹ and three in 2016.²²

The Commission calculates its recommended fines on the basis of publicly published criteria: (1) the importance of the rules breached and the impact of the infringement on general and particular interests, (2) the period the EU law has not been applied, and (3) the country's ability to pay, ensuring that the fines have a deterrent effect.²³ The Commission usually recommends both a lump-sum penalty and a per-unit-time penalty that increases until the state implements corrective measures.

Since 2010 the Commission has updated and annually published the minimum fine metrics for each state, which vary greatly with the Commission's assessment of the state's ability to pay. In 2017, for example, the minimum lump sum penalty for the UK was 10,908,000 euros; for Belgium 2,799,000 euros and for Latvia only 392,000 euros.²⁴ The Commission similarly publishes data on the “n” factor – a scalar by which per-unit-time penalties are multiplied according to willingness to pay – which spans from 0.36 (Malta) to 20.50 (Germany).²⁵

²⁰ Kelemen, Daniel R. “Suing for Europe.” *Comparative Political Studies* 39:1. February 2006. Accessed online 23 March 2018 at <http://journals.sagepub.com/doi/pdf/10.1177/0010414005283219>

²¹ European Commission. *Report from the Commission on Monitoring the Application of European Union law: 2016 Annual Report*. 15 July 2016, COM/201/463 final, accessed online 30 March 2018 at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1498125212214&uri=CELEX%3A52016DC0463>

²² European Commission. *Report from the Commission on Monitoring the Application of European Union law: 2016 Annual Report*. 6 July 2017, COM/3017/370 final, accessed online 30 March 2018 at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM%3A2017%3A370%3AFIN&from=EN>

²³ European Commission. “Financial Sanctions v1.0” *The European Commission at Work*. 22 December 2017. Accessed online 23 March 2018 at http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/financial-sanctions/index_en.htm

²⁴ European Commission. *Communication from the Commission on Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings*. 13 December 2017, COM/2017/8720 final, accessed online 23 March 2018 at http://ec.europa.eu/atwork/applying-eu-law/docs/c_2017_8720_en.pdf

²⁵ Ibid.

The influence of the Commission's recommendation for fines on the final outcome is complex. By Art. 260 TFEU the ECJ has final say in the size and type of financial penalties imposed, but also by Art. 260 TFEU, the court cannot impose fines that are higher than those proposed by the Commission. In case law, the ECJ's early judgements established willingness to diverge from the Commission's recommendations for fines, both in assigning lower fines than those recommended and altering the structure of fines proposed.

The Commission's first request for imposition of fines came in a 2000 case against Greece for failing to comply with a judgement where it was found to have not fulfilled its obligations under two directives concerning the disposal of waste. The Commission suggested a EUR 24,600 daily fine until legislation was corrected; the ECJ settled on a EUR 20,000 fine and remarked that they found the Commission's recommendation "helpful."²⁶ In a 2001 case against France concerning bans on the import of British beef the ECJ decided to create a lump sum fine in addition to a per-unit-time fine even though the Commission did not request a lump sum.²⁷

In 2003 the Commission took Spain to the ECJ a second time after Spain failed to comply with a ruling finding it in breach of a directive concerning the quality of bathing water. The Commission proposed a daily fine, but the ECJ instead proposed an annual fine and allowed it to scale with the number of baths that remained non-compliant each year.²⁸ In a 2006 case against Italy concerning non-compliance with a judgement on foreign workers, the Commission requested a fine and the ECJ declined

²⁶ Case C-387/97 Commission v. Greece [2000] E.C.R. I-05047., *see also*, Oving, Anna-Karin. "The Effectiveness of the Enforcement Procedure in the European Community." Spring 2008. *University of Lund Faculty of Law*. p.29-30. Accessed online 23 March 2018 at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1563347&fileId=1566255>.

²⁷ Case C-1/00 Commission v. France [2001] E.C.R. I-9989.

²⁸ Case C-278/01 Commission v. Spain [2003] E.C.R. I-14141.

to impose one.²⁹ In 2007 the Commission asked for a daily EUR 21,450 fine for Germany after Germany failed to comply with a judgement that found the awarding of contracts for waste water management in the Municipality of Brockton and City of Brunswick to be contrary to Directive 92/50/EEC. The court instead imposed a EUR 19,392 daily fine.³⁰

This case law suggests that the ECJ does not feel bound by the recommendations of the Commission with respect to fine magnitude or structure. However, the Commission's ability to propose fines can be an influential tool even despite the ECJ's demonstrated willingness to at times decrease or restructure fines. The mere proposal of fines by the Commission has a large deterrent effect, and states may be pressured into acceding to Commission demands before the ECJ verdict is delivered. Even if the ECJ ultimately assigns lower fines, the Commission can use the perceptual threat of large fines to push states in particular directions. Additionally, the ECJ may feel implicit pressure to not stray too dramatically from the Commission's recommendations.

Since the Treaty of Lisbon, Art. 260(3) TFEU also gives the Commission power to suggest imposition of fines on the first referral of an infringement case to the ECJ when a case is "brought on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures." In 2011 the Commission's *Communication on Implementation of Article 260(3) of the Treaty* declared that "the Article 260(3) instrument should be used as a matter of principle in all cases of failure to fulfil an obligation covered by this provision", but also acknowledged that in some "special cases" it would not be appropriate to seek penalty payments on the first

²⁹ Case C-119/04 Commission v. Italy [2006] E.C.R. I-6886, para 27.

³⁰ Case C-503/04 Commission v. Germany [2007] E.C.R. I-6153.

referral.³¹ As a result, the Commission now regularly asks for penalty payments on the first-round infringement procedures often but makes some exceptions to this practice for certain infringements, such as infringements where non-legislative directives are not transposed.³²

3. Commission Prioritization of EU Law Enforcement

In practice, the Commission does not have the time or resources to pursue all potential cases of non-compliance: several thousand suspected new infringements arise each year. The Commission thus must make decisions on which potential infractions to pursue.³³ Here, political and legal boundaries blur: the Commission is a political body as well as the Guardian of the Treaties, and it is often proposing or advancing legislation that is related to possible infringement actions. Hence, commentators and several cases have highlighted potential political motivation in the Commission's prioritization decisions. Some argue that the Commission has at times used the threat of infringement action to pressure Council into delegating it specific competencies or passing policies.³⁴

3.1 Official Commission stances on prioritization

The Commission has produced several documents outlining its philosophy towards infringement procedure prioritization, but their stated prioritization goals

³¹ European Commission. *Communication from the Commission — Implementation of Article 260(3) of the Treaty*. 15 January 2011, OJ 2011/C 12/01.

³² *Ibid.*

³³ See, e.g., Falkner, Gerda. *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press, 2005., see also, Prete, Luca, and Ben Smulders. "Coming of Age of Infringement Proceedings, The." *Common Market L. Rev.* 47 (2010): 9, at p.16

³⁴ See, e.g. Schmidt, Susanne K. "Only an agenda setter? The European Commission's power over the Council of Ministers." *European Union Politics* 1.1 (2000): 37-61. Accessed online 23 March 2018 at <http://journals.sagepub.com/doi/pdf/10.1177/1465116500001001003>

remain rather broad. In its 2001 White Paper on Governance, the Commission established a set of “priority criteria” for pursuing cases. These criteria declared the Commission would prioritize cases regarding the “effectiveness and quality of transposition of directives”, “the compatibility of national law with fundamental Community principles”, that “seriously affect the Community interest” – like those with cross-border implications, where “a particular piece of European legislation creates repeated implementation problems in a Member State”, and cases regarding community financing.³⁵

In a 2006 Commission Staff Working Document the Commission further clarified its enforcement priorities, declaring that “priority was given to the non-communication of national measures transposing directives, failures to implement the Court of Justice’s judgements, and complaints denouncing structural problems in Member States.”³⁶ The Commission also occasionally states in its annual Report on Monitoring the Application of EU Law that it has noticed infringement proceedings in particular issue areas are more likely to concern some types of violations than others. For example, in the 2006 report the Commission noted that its infringement proceedings in the area of labor law mostly concerned “lack of communication of the necessary national transposition measures or incorrect transposition”, while proceedings in gender equality issue areas mostly related to non-conformity issues.³⁷

While the Commission’s communications suggest prioritization is limited to selection of subject areas and cases of the greatest importance for the EU as a whole,

³⁵ European Commission. *European Governance: A White Paper*. 25 July 2001, COM/2001/428, accessed online 23 March 2018 at http://europa.eu/rapid/press-release_DOC-01-10_en.htm

³⁶ European Commission. *Commission Staff Working Document, annex to the 24th annual report from the Commission on the Monitoring the Application of Community Law (2006)*, ‘Situation in the different sectors’, COM/2007/398 final, para 1.3.

³⁷ European Commission. *24th annual report from the Commission on monitoring the application of community law (2006)*. 17 July 2007, COM/2007/398 final, accessed online 23 March 2018 at http://europa.eu/rapid/press-release_DOC-01-10_en.htm <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007DC0398&from=EN>

commentators have pointed to several cases where politics and enforcement appear to have been combined in a less altruistic manner.

3.2 Cases

3.2.1 Open Skies

Perhaps the most well-known example of Commission infringement proceedings with a political tint are the *Open Skies* cases commenced in 1988 and settled by the ECJ in 2002.³⁸ Beginning in the mid-20th century, several EU Member States had begun individually negotiating airspace agreements with the US. By the early 1990s the US was making a concentrated effort to conclude bilateral airspace agreements, and several Member States- including Belgium, Luxembourg, Germany, Austria, and others – were in the process of negotiating deals.

At the same time Member States were negotiating bilaterally, the Commission was negotiating with the Council to gain the authority to negotiate airspace deals with third parties at the EU level. As several Member States continued with bilateral negotiations and the Council did not immediately grant the Commission the mandate to negotiate on their behalf, the Commission turned to legal mechanisms. It first pursued the right to negotiate unsuccessfully in 1986 through the ECJ's *Nouvelles Frontieres* ruling, where the court did not give it exclusive competence to negotiate. The Commission then initiated infringement proceedings against eight Member States

³⁸ Cases C-466/98 Commission v. United Kingdom [2002] E.C.R. I-09427, C-467/98 Commission v. Denmark [2002] E.C.R. I-09519, C-468/98 Commission v. Sweden [2002] I-09575, C-469/98 Commission v. Finland [2002] E.C.R. I-09627, C-471/98 Commission v. Belgium [2002] E.C.R. I-09681, C-472/98 Commission v. Luxembourg [2002] E.C.R. I-09741, C-475/98 Commission v. Austria [2002] E.C.R. I-09797, and C-476/98 Commission v. Germany [2002] E.C.R. I-09855.

in 1995 for attempting to negotiate bilaterally.³⁹ The Commission argued that since community air transport legislation had established a comprehensive system of rules designed to establish an internal market in that sector, Member States no longer had the competence to conclude bilateral agreements.⁴⁰

Over the following years five of the Member States threatened with infringement proceedings conceded to the Commission during the preliminary phase and ended their bilateral negotiations. The remaining three Member States - Belgium, Luxembourg, and Germany – moved forward to the ECJ and argued that the Commission's actions should be deemed inadmissible because their true purpose was to put pressure on the Council to authorize the Commission to negotiate an EU-level airspace deal.⁴¹

The ECJ joined the three cases and proceeded to reject the arguments of the Member States, holding that the Commission alone can decide when it chooses to bring infringement proceedings against a Member State, and that it was not for the court to consider the political conditions under which actions were brought.⁴² In its ruling against Luxembourg, the judgement explains:

As regards the Luxembourg Government's argument concerning the Commission's motives in choosing to bring the present action rather than taking action against the Council, it must be borne in mind that, in its role as guardian of the Treaty, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and on account of which conduct or

³⁹ States targeted with infringement proceedings were the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany in Cases C-466/98 to C-476/98; *supra* note 32.

⁴⁰ *Ibid.*

⁴¹ Andersen, Stine, *The enforcement of EU law*, *supra* note 14, p. 21.

⁴² Cases C-471/98 Commission v. Belgium [2002] E.C.R. I-09681, C-472/98 Commission v. Luxembourg [2002] E.C.R. I-09741, and C-476/98 Commission v. Germany [2002] E.C.R. I-09855.

omission attributable to the Member State concerned those proceedings should be brought.”⁴³

Advocate General Tizzano’s opinion to the joined cases provides some additional insight into the reasoning of the court, and suggests the Commission would be protected even if it could be concretely proven that infringement actions were brought with political motivations:

“The Commission has a wide discretion as to whether or not to initiate an infringement procedure against a Member State, the relevant assessments not being amenable to review by the Court. Therefore, if in making such assessments the Commission also takes into account the potential political and legal repercussions of a finding of infringement (which, in any event, is not proved to be the case here), this of itself does not render inadmissible an action under Article 169 of the Treaty [*now Article 258 TFEU*] nor can such an action be rendered inadmissible by the fact that the purposes allegedly pursued could equally be achieved by a different action, since the Commission is free to choose, from among several actions that it could in theory bring, the one which it deems the most appropriate in a given case.”⁴⁴

By 2004 the Commission published a regulation on the negotiation of air service agreements declaring that “all existing agreements between Member States and third countries that contain provisions contrary to Community law should be amended or replaced” and establishing a variety of new guidelines surrounding airspace use.⁴⁵

⁴³ Case C-472/98 *Commission v. Luxembourg* [2002] E.C.R. I-09741, para 34.

⁴⁴ Opinion in *Joined Cases C-466 to 476/98, Commission v. UK et al.*, [2002] ECR I-09427, para 30.

⁴⁵ Regulation (EC) No 847/2004 of 29 April 2004 on the negotiation and implementation of air service agreements between member states and third countries. Accessed online 23 March 2018 at <https://publications.europa.eu/en/publication-detail/-/publication/76381cf7-4841-4b06-bbb4-ed18f9d4af1f/language-en>

By way of the infringement procedure, the Commission gained the competence to legislate in an area it had long targeted.

3.2.2 Energy policy

Though Open Skies was perhaps the most well-known conflation of political and legal responsibility with regards to the infringement procedure, it is not the only case: network-based energy comprises another salient example. Prior to 1990 several EU states featured import and export monopolies for gas and electricity. In July 1991, the Commission circulated a draft policy for network-based energy that would open electricity markets to competition.⁴⁶ However, adoption of the policy would require unanimity from the Council, and France – the EU’s largest electricity exporter at the time and home to import and export monopolies for electricity and gas – staunchly opposed it. Italy, the Netherlands, and Spain also featured state import and export monopolies on either electricity, gas, or both and opposed the policy.⁴⁷

It quickly became clear that the Member States with existing state import and export monopolies would be politically difficult to convince. Thus in August 1991 the Commission initiated infringement proceedings against the existing import and export monopolies for electricity and gas in ten Member States.⁴⁸ The Commission argued that gas and electricity ought to be considered similarly to other goods in the community, and that state monopolies impinged on market freedom.⁴⁹

⁴⁶ Eikeland, Per Ove. "The long and winding road to the internal energy market." *Consistencies and inconsistencies in EU policy* (2004).

⁴⁷ Schmidt, Susanne K. "Only an agenda setter? The European Commission's power over the Council of Ministers." *European Union Politics* 1.1 (2000): 37-61. Accessed online 23 March 2018 at <http://journals.sagepub.com/doi/pdf/10.1177/1465116500001001003>

⁴⁸ Ibid. at p.51

⁴⁹ Ibid.

While France's political clout allowed it to effectively block political attempts in the Council to move towards EU-level energy policy, this clout was useless against the infringement procedure. By the time the proceedings reached the ECJ in 1994, five Member States had conceded to the Commission and their infringement proceedings were closed. Rather than risk losing and seeing its monopolies crumble chaotically in the courts, France then proposed an alternative model for liberalization called the "single buyer concept" before the ECJ ruled on the case. The Commission proposed a policy based on the new French model and the Council approved it in 1996.⁵⁰ The ECJ did not reach a judgement on the case until 1997.⁵¹

3.2.3 Direct taxation

Direct taxation provides a third example worth highlighting. Because policy on taxation requires unanimity in the Council as a "sensitive policy area",⁵² the Commission has long struggled against Member State resistance in its attempts to harmonize tax policy. However, although much of taxation policy currently falls within the competence of Member States, ECJ precedent has established that they must exercise this competence consistently with EU law.⁵³ The Commission has in several cases launched infringement proceedings in parallel to policy initiatives aimed at coordinating tax policy, and openly acknowledges that "monitoring application of

⁵⁰ Ibid.

⁵¹ Cases C-157/94 *Commission v Netherlands* [1997] E.C.R. I-05699, C-158/94 *Commission v Italy* [1997] E.C.R. I-05789, C-159/94 *Commission v France* [1997] E.C.R. I-05815, C-160/94 *Commission v Spain* [1997] E.C.R. I-05851. The court found accessed the Netherlands, Italy, and France responsibility, but declined to assign responsibility to Spain.

⁵² "Voting System." European Council – Council of the European Union. 09 November 2017. Accessed online 23 March 2018 at <http://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/>

⁵³ See, e.g., Case C-10/10 *Commission v. Austria* [2009] E.C.R. I-05389

Community tax law has recently moved from a rather reactive to a more pro-active infringement policy in general.”⁵⁴

A specific case is particularly illustrative: in December 2006, the Commission launched a coordination initiative on “Co-ordinating Member States’ Direct Tax Systems in the Internal Market.”⁵⁵ On December 2nd, 2008, the Council adopted a resolution concerning coordination in a specific area, exit taxation. The Commission had in the years prior attached particular importance to a subset of exit taxation policy, tax treatment of transfers of (business) assets, and pursued several infringement actions in this regard. In the Commission’s view the 2008 policy did not adequately address this specific issue, and so at the same time infringement actions progressed through the administrative stage, the Commission addressed a letter to Member States in March 2009 urging them to take taxation of transfers of assets into consideration when implementing the Council policy:⁵⁶

“The resolution however remains largely silent on an important aspect of the tax treatment of such transfers of (business) assets. This aspect concerns the timing of the collection of any taxes on capital gains or recapture of depreciation, which in the Commission's opinion, as expressed in its 2006 Communication, may not take place any earlier than would have been the case if the transferred assets had remained within the territory of the exit State. As you may know, this aspect is the subject of a number of ongoing infringement procedures concerning exit tax provisions in respect of individual and corporate

⁵⁴ “Monitoring the application of Community law.” European Commission. n.d. Accessed online 23 March 2018 at https://ec.europa.eu/taxation_customs/infringements/Commission-policy_en

⁵⁵ European Commission. “Monitoring application of Community law. *Commission policy*. N.d. Accessed online 23 March 2018 at https://ec.europa.eu/taxation_customs/infringements/Commission-policy_en

⁵⁶ Verrue, Robert. *Letter to Ambassadors*. European Commission. TAXUD E3/BZ. Accessed online 30 March 2018 at https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/common/infringements/Commission_policy/letter_to_ambassadors_en.pdf

taxpayers. The Commission would therefore urge Member States to take this aspect into account in implementing the Council Resolution.”⁵⁷

Through these cases and others, it becomes clear that there are at least some situations where the Commission’s apolitical guardianship responsibility and political motives align. While it is not clear whether these cases would have been pursued had the Commission not been actively pursuing policymaking power in these areas, the potential political power of the infringement procedure in this context has been a subject of significant controversy.

The EU Ombudsman, who investigates complaints about maladministration in the EU institutions and launches inquiries of their own initiative, is one potential form to discuss political motives in the prioritization of EU infringement cases. The Ombudsman has previously issued reports on problems in other parts of the infringement process: for example, in 2004 it issued a report concluding that the Commission was unjustifiably slow in handling two infringement proceedings related to Spanish minority rights legislation,⁵⁸ and in 2015, it declared that one Commissioner who made decisions on an infringement procedure related to Financial Fair Play Rules had a personal conflict of interest.⁵⁹ However, as of yet the Ombudsman has not substantively addressed the concerns surrounding Commission prioritization of EU law enforcement.

4. Conclusion

⁵⁷ Ibid.

⁵⁸ “Unjustified delay in the handling of two infringement proceedings. *European Ombudsman*. Case 3369/2004/JMA, 10 January 2006. Accessed online 23 March 2018 at <https://www.ombudsman.europa.eu/en/cases/summary.faces/en/4523/html.bookmark>

⁵⁹ “Conflict of interest in handling a procedure for infringement of competition law.” *European Ombudsman*. Case 2086/2014/EIS, 30 November 2015. Accessed online 23 March 2018 at <https://www.ombudsman.europa.eu/en/cases/caseopened.faces/en/58780/html.bookmark>

This paper has highlighted the power of the infringement procedure and presented evidence to suggest that the Commission has at times used the infringement procedure to help advance its own policy goals. The ECJ has made it clear that possible political motivations for the Commission's decision to launch an infringement case are irrelevant from a legal perspective. However, if it is nonetheless true that political motivation exists, we are left with a political question: is politically-motivated use of the infringement procedure a concern?

A natural argument would hold that this conflation of politics and legal enforcement amounts to an abuse of power and is thus damaging, and that abuse of the infringement procedure concentrates more power in the hands of a Commission already accused of democratic deficit in the Union. However, careful thought casts some doubt on this stance. Increased economic integration has delivered many benefits for Member States, and in many cases collective action challenges mean these changes must be enacted over the opposition of some states.

The EU Member States have already recognized the benefit of strong intragovernmental structures in several ways: The Member States granted the Council the power to override opinions of a minority of states in some policy areas and pass legislation by qualified majority vote, and the Commission has been delegated agenda-setting power in the legislation process since its creation. The ability for the Commission to deploy the infringement procedure to help advance legislation it is proposing might be viewed as another way the EU can ensure individually-motivated preference structures do not block policy intended for the greater good.

Clearly, the preferable threshold of Commission power is not clearly defined: some level of supranational decision making brings clear benefits, and there is certainly a level of central power that is too much. The question Member States must

wrestle with is whether the Commission's deployment of the infringement procedure for political means is too far down the road to supranationalism.