

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 & Fjølseth 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

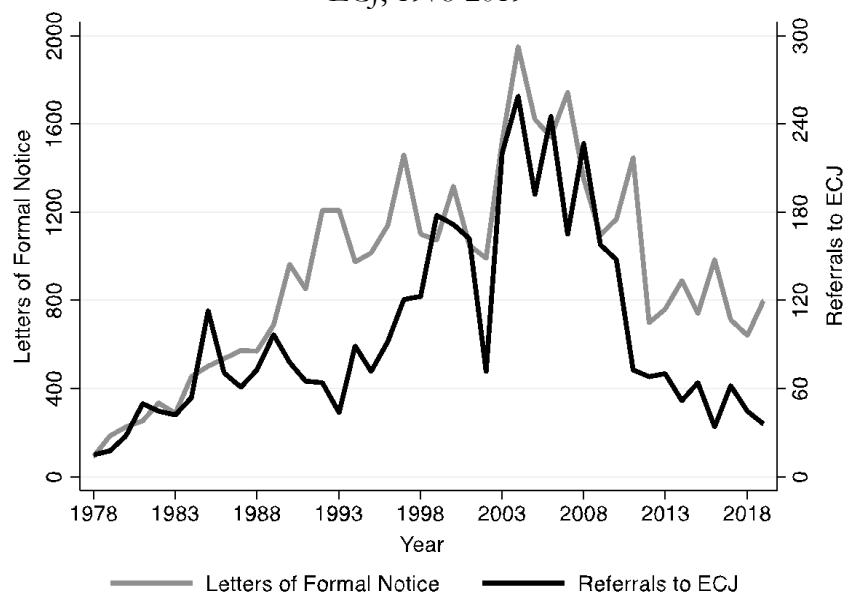
Over the past two decades, something dramatic has happened to law enforcement by the European Commission. From 1978 until 2004, the Commission's use of its primary enforcement tool – infringement proceedings – rose unencumbered. Infringements opened (via "letters of formal notice" served to allegedly 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).

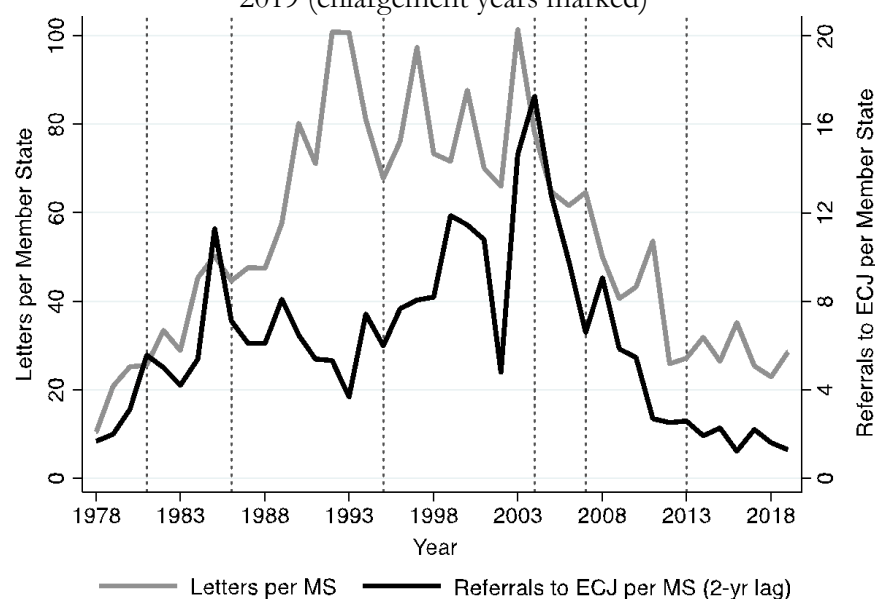
These data leave us with a major puzzle: Why would a supranational law enforcer with a history of assertively fulfilling its role as the guardian of the Treaties suddenly retreat from wielding its powers? To date, there is remarkably little research shedding light on this puzzle, with most accounts touching 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 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 Fjølseth (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 <i>facing interest groups</i>	supranational politicians <i>facing member state governments</i>
actors' motives	increase their electoral support	increase support for their policy agenda
key mechanism	electoral incentives to not enforce law <i>against interest groups whose support is valuable to winning elections</i>	intergovernmental pressure to not enforce law <i>against member state governments whose support is valuable to the passage of policy</i>
scope of outcome	targeted <i>to electoral constituencies</i>	generalized <i>to all member state governments</i>
visibility of outcome	publicized <i>as public policy</i>	concealed <i>as private bargains</i>

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 have 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

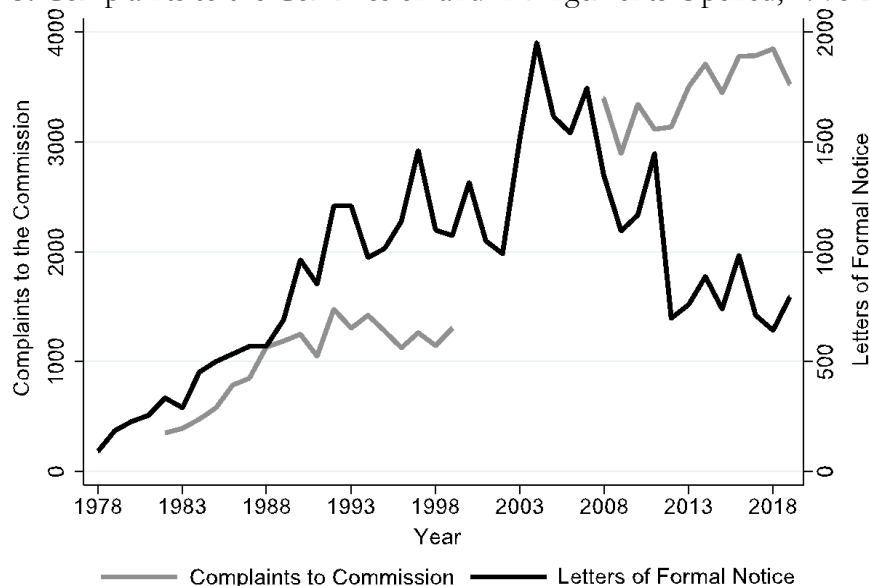
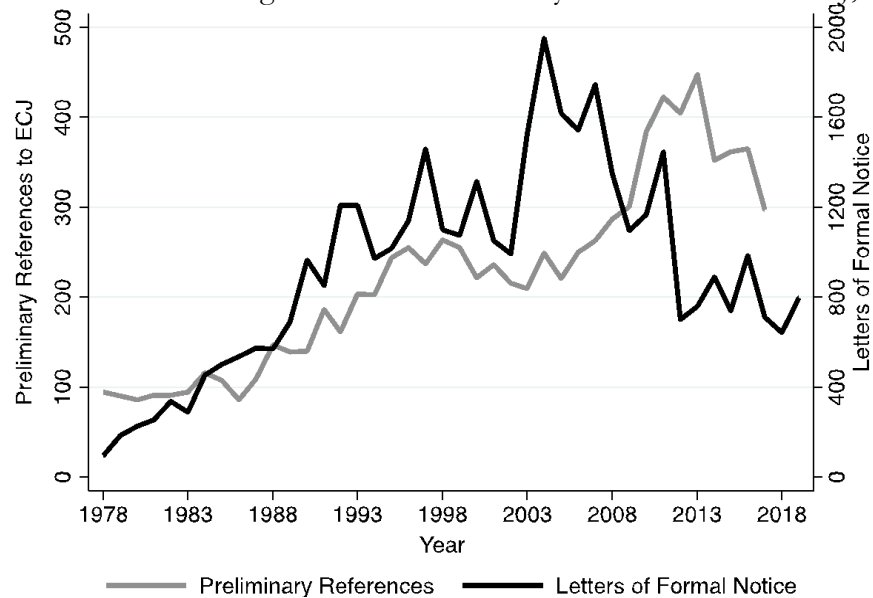


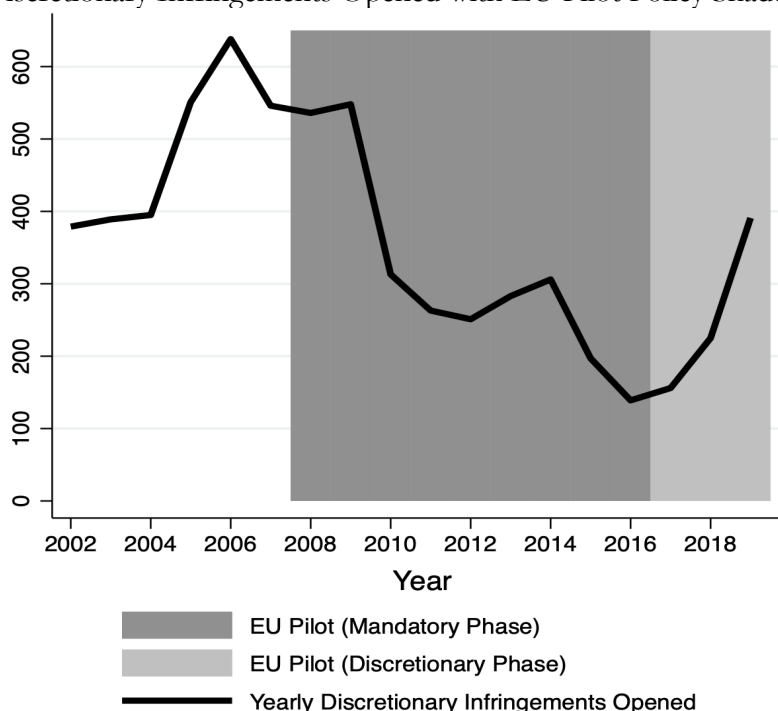
Figure 4: Commission Infringements and Preliminary References to the ECJ, 1978-2019



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 Fjølseth 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 Fjølseth 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

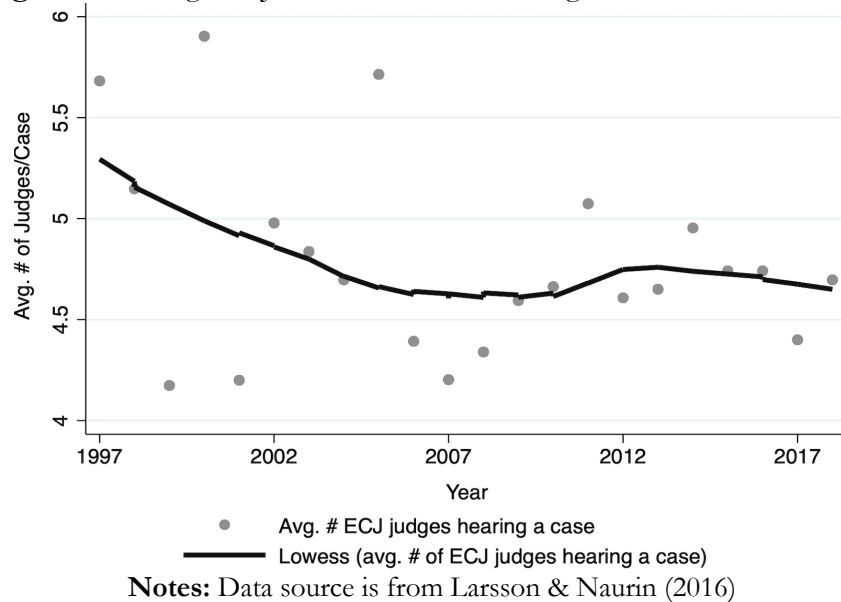
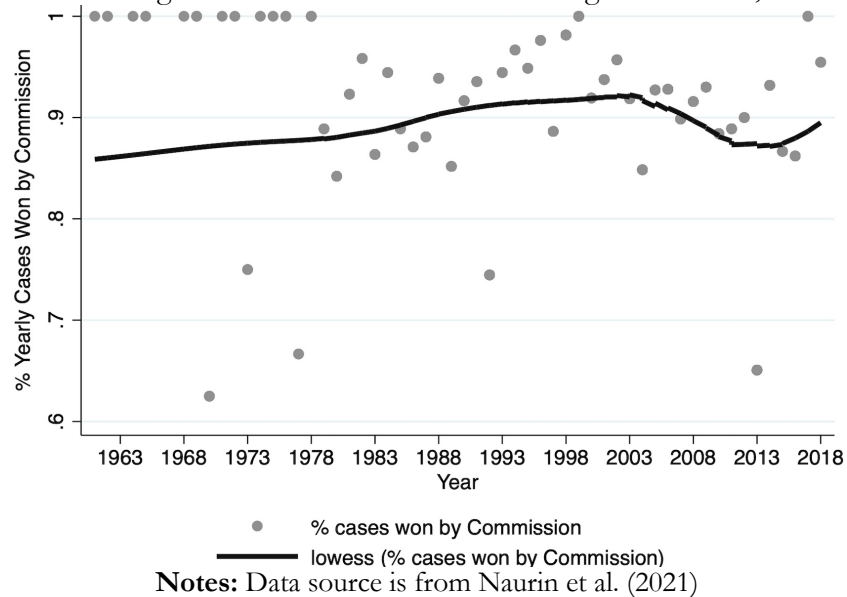


Figure 7: Average Commission Win Rate in Infringement Cases, 1962-2018



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 spanned 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
	<i>Pre-2004</i>	<i>Post-2004</i>			
# 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 person 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.

Indeed, 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 conceded 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 report³ 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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