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Challenging compliance: A comparative study of the attitudes of four Member States regarding environmental directives and the explanatory power of past attitudes on future noncompliance to EU law

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Humanities

Challenging compliance:

A comparative study of the attitudes of four Member States regarding environmental directives and the explanatory power of past attitudes on future noncompliance to EU law

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Abstract

Why do Member States, that are similar in many aspects, still have varying levels of compliance? As current compliance theories are unable to answer this question a new theory has been developed that adds an historical aspect into compliance research: the challenging attitude approach. This theory proposes that earlier adopted attitudes by Member States, that range from agreeable to challenging, which they display before, during and after infringement proceedings, affect future compliance. Member States initially base these attitudes on a normative assumption about the importance of compliance to a policy field.

For this research the Netherlands has been compared to Belgium, which yearly faces twice the amount of infringement proceedings as the Netherlands. Portugal has been to Spain, which faces from 10% more to twice the amount of infringement proceedings as Portugal. Their portrayed attitudes in regards to the Dangerous Substances Directive and the Birds Directive have been studied.

This research showed, however, that Belgium did not adopt a challenging attitude more often than the Netherlands. Spain did adopt a challenging attitude more often than Portugal. There was also great variation displayed by Member States in adopted attitude per directive. However, there appears to be a correlation between adopted attitude and future compliance. More research is needed to make substantial claims about the challenging attitude approach .

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1. Introduction

1.1 Contextualisation

The success of European integration relies heavily on whether Member States comply with European legislation (Zhelyazkova, 2013, 702). Noncompliance has been a subject of studies since the European Union was established (*inter alia* Börzel et al., 2010; Falkner et al. 2005; Hartlapp, 2009; Tallberg, 2002). Compared to other supranational organisations, non-compliance is relatively low in the European Union (Zürn & Neyer, 2005, 183-186).

Theories to explain (non-)compliance in International Relations research can be divided into four dominant approaches: goodness of fit, enforcement, management and legitimacy theories. These approaches have mostly been used to explain noncompliance in international institutions, but can and have been applied to the country level (Börzel, et al. 2010, 1367; Tallberg, 2002, 611-614).

The goodness of fit approach theorizes that compliance is higher in countries where national institutions and legislation already fits European policy. The enforcement approach sees compliance by a state as a rational cost benefit assessment, where the cost of compliance is measured against that of noncompliance. The management approach on the other hand, sees non-compliance as involuntarily and caused by the incapacity of a state to comply. Lastly the legitimacy approach proposes that states comply out of a normative agreement with the legislation (Börzel, et al. 2010, 1367-1371).

Although these approaches explain many instances of noncompliance, there is still a gap in explaining noncompliance among countries which are very similar in size, political system and culture; exemplary of this are the level of compliance of the Netherlands compared to Belgium and that of Portugal compared to Spain. Using these cases this research illustrates how not all aspects of noncompliance are explained by current theories. By analysing the behaviour of Member States before, during and after their infringement proceedings, this research offers an insight in why noncompliance can be stubborn.

1.2 Research questions

There is thus a theoretical gap in explaining why very similar countries have a better or worse compliance record regarding EU legislation. What most of the dominant theories are lacking is the historical aspect of noncompliance. Belgium and Spain have not suddenly started to fail to transpose EU directives. Instead, both countries have continually had twice the amount of open infringement cases as the Netherlands and Portugal respectively. This brings up the following research question: Why do some Member States comply better yearly to European legislation than other Member States that are similar in size, political system and geographical location? In order to answer this question, the following sub questions are examined as well:

1.2.1 How do the attitudes displayed before, during and after infringement proceedings by the Netherlands compared to Belgium regarding the Dangerous Substances Directive and The Birds Directive explain noncompliance?

Studies and data show that Belgium yearly faces more infringement proceedings than the Netherlands does. The theory of this research claims that earlier attitudes explain part of the differences in level of compliance in Member States that are alike in many ways. A comparison of the way Member States act during infringement proceedings and afterwards could offer insights in if and how history can explain the differences in compliance among Member States that share many similar attributes.

Hypothesis Belgium and the Netherlands: Belgium will adopt a challenging attitude more often than the Netherlands. The Netherlands will adopt an agreeable attitude more often than Belgium.

1.2.2 How do the attitudes displayed before, during and after infringement proceedings by Portugal compared to Spain regarding the Dangerous Substances Directive and The Birds Directive explain noncompliance?

What we find in relation to the Netherlands and Belgium might work only specifically in that comparison. In order to test whether this theory also works in other contexts, this research will also look at the subjects of the infringement cases of Portugal and Spain.

Hypothesis Portugal and Spain: Spain will adopt a challenging attitude more often than Portugal. Portugal will adopt an agreeable attitude more often than Spain.

1.2.3 Are the attitudes displayed by Member States general or different per directive?

To gain further insight in how the attitudes of Member States are shaped, an important aspect to study is whether Member States have vastly different attitudes per directive. Since both directives that are included are on environmental policies, there should not be great differences in displayed attitudes for one directive or the other.

Hypothesis different attitude per directive: All Member States will display a similar attitude per directive.

1.2.4 How can the challenging attitude approach explain the difference in level of compliance?

Lastly, we will discuss how the newly formulated "challenging attitude approach" can explain the difference in amount of infringement cases and how long a Member State takes in order to solve them. This theory reads that the attitude, which is initially the result of a normative assessment of a directive, adopted by a Member State before, during and after an infringement proceeding regarding a directive, can influence later attitudes and compliance.

Hypothesis challenging attitude: The challenging attitude approach is a useful tool to explain why Member States, that share many similarities, nonetheless have different levels of compliance to EU directives.

1.3 Methodology

This research compares how two groups of Member States of the European Union that share similarities in size, political system and culture, deal with infringement proceedings over time to explain differences in compliance: Belgium has been compared to the Netherlands and Spain has been compared to Portugal. Belgium, one of the first Member States joining the European Union, has a low level of compliance to European law and directives and is considered to be part of the "lousy performing Southern European Member States" (Hartlapp, 2009, 467-468). Belgium also takes longer than the average Member State to eventually end their violations of European law (Börzel, et al., 2012, 457). Even though its neighbour the Netherlands has a similar political system, population and economy, the Netherlands has a higher level of compliance to European law (European Commission, 2019[1]; European Commission, 2019[2]; CBS, 2020; Belgian Foreign Trade Agency, 2020).

The other two Member States that are included are Portugal and Spain, which both joined the European Union in 1986. Earlier compliance research, such as that of La Spina and Sciortino (1993), Börzel (1998) and Weale, et al. (2002) on EU compliance has stressed the relative homogeneity of the Southern Member States. They are indeed very similar in regard to economy, history with authoritarianism, religious cleavages and importance of their agricultural sector. They also share similar attitudes to compliance in having mostly weak implementation records (Hartlapp & Leiber, 2010, 468-469). However, Portugal yearly faces between two thirds and half the amount of infringement proceedings as Spain (European Commission, 2019[3]; European Commission, 2019[4]). By comparing Portugal to Spain in addition to the Netherlands to Belgium we can gain a further insight in whether Member States attitudes before, during and after an infringement proceeding regarding certain directives is explanatory for their level of compliance.

Most research on noncompliance involves environmental policies (Treib, 2014, 8-12). The environmental policy field has the second highest number of violations of EU law and the highest number of infringements that end up as infringement proceedings (Börzel & Buzogány, 2019, 315-316; Panke 2009, 492). Member States take longer to solve infringements in a specific field when current non-compliant policies are either very popular or when there is a larger economic benefit from non-compliance. Agriculture is an economically important field for all involved Member States, which makes infringements that reach the infringement proceedings stage in this field more likely (Hofmann, 2018, 798).

Since this research uses the ECJ judgements, the environmental policy field is a favourable field to use in legal comparison. In order to diminish the amount of influence the variety of themes of infringement cases can have on how they deal with transposition of directives and to be better able to focus on the specific historical aspects, only EU laws regarding the environmental policy field will be used as a framework. The documents of the judgement includes the details of how the parties conducted themselves during the infringement proceeding and will be the base of the analyses.

In this research a multidisciplinary approach has been adopted, applying International Relations theories to law. To answer the research questions, I have looked at existing research on compliance and formulated a new theory, which incorporates history in noncompliance, which is called the "challenging attitude approach". Additionally a doctrinal method was used, where I looked at the amount and the subjects of infringement cases the Member States were subjected to. I then analysed these infringement cases in depth using a legal comparison method and

specifically looked at the process of how the infringement ended up before the Court of Justice, the arguments put forward by the Member State and the Commission during the court case and if the Member State failed to comply again to the same directive.

The behaviour of Member States before, during and after infringement proceedings can be found within the ECJ judgements. Tracing their responses over time reveals the attitudes of the Member States towards the directives that are covered in this research and demonstrates how earlier attitudes affect future attitudes.

Specifically I looked at infringements regarding the Dangerous Substances Directive (76/464/EEC) and the Birds Directive (79/409/EEC). These directives were chosen because the Netherlands, Belgium, Portugal and Spain all had their infringements regarding these directives brought before the Court of Justice. These was also a high level of multiple infringements by these Member States involving these directives. In addition, these directives are both part of the environmental policy field. The subjects and goals of these directives are similar to an extend that the challenging attitude approach can be tested.

When an infringement is not solved after a case of infringement regarding a directive was brought before the Court of Justice, a Member State can be tried again. Therefore, the amount of infringement cases is a good indicator of how well a Member State complies. This research only includes infringement cases, since in this stage the arguments of both the Commission as well as the infringing Member State is laid down within one document. In addition, this stage only takes place if the Member State continues to not transpose a directive properly after negotiations have been had, therefore the infringement can be assumed to be structural and not caused by a mistake (Börzel, et al., 2010, 1373-1374).

To find out how the Member States treat their noncompliance and to see if challenging attitude in this policy area plays a role, specific infringement cases of Belgium compared to those of the Netherlands have been analysed through the use of case law analysis and have been compared. Likewise for the cases of Spain versus Portugal.

In this research the cases from 1993 onward have been included. Firstly, this choice was made because the signing of the Maastricht Treaty in 1992 changed the foundation of how the EU operates greatly. In addition, a lot of earlier research has been conducted including mostly older infringement cases (*inter alia* Börzel, et al., 2010; Haverland, Steunenberg & van Waarden, 2011). Lastly, the European Commission has become more selective in bringing cases to the

European Court of Justice (Falkner, 2018, 779-780). This change in strategy could bias outcomes.

1.4 Limitations

The infringement cases that are discussed in this research are all regarding environmental policies. Although this choice accounts for variance and is therefore potentially more useful and it makes it possible to zoom in and look at how Member States manage noncompliance in relation to specific subjects, it could possibly limit the usefulness as well if variance outside of this policy field turns out to be important.

Another limitation of this research is the fact that only primary sources of the infringement cases will be used. Not every consideration of every governing person from these Member States is written down. As Schmälter describes: "Empirically, the management and persuasion approaches are difficult to distinguish from an outside perspective, since it is hardly possible to disclose what is discussed behind closed doors and whether the underlying intention is to transfer knowledge or to change values." (Schmälter 2018, 1338). This is also true for theory built in this research, because the data analysed is based on what has been reported.

For infringement proceedings the Commission has to rely on what Member States or organisations and citizens of that Member State report to them. However, according to research by Börzel, et al. there is no indication that this leads to a positive or negative bias regarding certain Member States (Börzel, et al., 2007, 6). Nonetheless, there is a distinction to what a Member State reports on paper and how a directive is actually implemented and acted upon (Mateo-Tomas, et al., 2022). Because this research uses legal documents as the source of comparison, how the directives are really acted upon is not covered.

1.5 The directives and the comparability of the included Member States

Some distinct differences between the compared Member States decrease their comparability. First of all, there is a cleavage in policy preferences between Northern European Member States and Southern European Member States about either supporting strengthening fiscal rules or supporting more European solidarity. Countries such as France, Belgium, Spain and Portugal belong to the Southern Member States and countries such as Germany and the Netherlands belong to the Northern Member States. For example, Germany and France are comparable in size, geography and culture, but support opposing policies in the European Union (Selck, et al. 2004, 92).

This is also true for The Netherlands and Belgium, which could influence how both countries deal with compliance to European policy and is therefore an important distinction to mention. This is not the case for Spain and Portugal, that both belong to the group of Southern European Member States that share a common ideology for what the purpose of the European Union is. This reduces possible differences in compliance and behaviour in regards to infringement proceedings.

Lastly, the political and government system of Member States could also affect their level of compliance. While both countries constitute as constitutional monarchies, the government system of Belgium is distinct from that of the Netherlands in multiple ways. For instance, while the Netherlands has only one centralised government, which handles its relations with the European Union, Belgium has a federal structure of three powers: the Federal government, the Communities and the Regions. Of these the Federal Government is responsible for dealing with public interests including the European Union. However, the Regions, which consist of the Walloon region, the Brussels-Capital Region and the Flemish region, also have legislative and executive powers (Government of the Netherlands, n.d.; Belgian Federal Government, 2022).

Like Belgium, Spain is also a federal state and consists of multiple Autonomous Communities in addition to being a Parliamentary Monarchy with a centralised government (La Moncloa, n.d.). Portugal, on the other hand, is a semi-presidential republic and has a central government, which governs the whole of Portugal in addition to two small autonomous islands: the Azores and Madeira (Costa, 2019).

The conditions in the Federal States, specifically Belgium and Spain, could potentially lead to more noncompliance. In both Spain as well as Belgium a directive can be incorrectly transposed on the national level and on the regional level, whereas in Portugal and the Netherlands only

the decisions of the central government can lead to noncompliance to a EU directive. These smaller federal governments also do not have the same administrative capacities as centralised governments have and a lack of administrative capacities can lead to late transposition (Tallberg, 2002; Haverland, Steunenberg & van Waarden, 2011).

1.5.1 About the Dangerous Substances Directive (76/464/EEC)

The Dangerous Substances Directive covers rules on how certain dangerous substances should be disposed of in order to protect the aquatic environment. The substances are categorized in two lists. List I includes substances that are dangerous for the environment, whereas List II includes substances that are deleterious to the environment. Some aspects of this distinction remained vague. For example, 99 substances that belong to the same family group of List I substances are treated as List II substances until emission limit values are set. This was decided in the Council Resolution of 1983, which put these 99 substances in the Annex of the Dangerous Substances Directive. Article 6 of this Directive deals with the substances from List I and Article 7 deals with substances from List II. It was later repealed in 2006 by a similar directive (EUR-Lex, n.d.).

Important characteristics of the compared Member States that could influence their level of compliance to the Dangerous Substances Directive include what percentage of the land is used for agriculture. Agriculture can lead to certain hazards to the environment, such as leading to a surplus of nitrogen, which leads to atmospheric or water pollution (Anas, et al., 2020, 1). Since the Dangerous Substances Directive involves the release of dangerous substances in the marine environment, the length of the coast line of a Member State could also greatly influence their compliance to this directive.

There are some distinctions between Belgium and the Netherlands that could influence their level of compliance. Firstly, there are distinctive differences in land use. While Belgium uses 44,1% of their land for agriculture, the Netherlands uses 55,1% of their land for this purpose. More significantly, Belgium has only 230 square kilometres of irrigated land, whereas the Netherlands has 4860 square kilometres of irrigated land. There is also a distinct difference in the length of the coastline, where the coastline of the Netherlands extends to 451 kilometres long and that of Belgium is only spans for 66,5 kilometres (Indexmundi, n.d.).

The Netherlands is economically more dependent on agriculture than Belgium, since it takes up a larger share of their land-use, industry and export. The Netherlands also has higher nitrogen emissions than Belgium (OECD, 2008, 45-54). Examining all differences, it lies within the lines of expectation for the Netherlands to comply worse to the Dangerous Substances Directive than Belgium, with their national government choosing agriculture over environment. The Netherlands benefits more than Belgium from less restriction on their agriculture and maritime economy, which clashes with directives that intent to protect the environment. Yet, the Netherlands complies better.

Comparing Spain and Portugal, Spain uses more than 54% of its land for agriculture, whereas Portugal uses almost 40% of its land for this purpose. This difference in land use is not as stark as that of the Netherlands compared to Belgium, but is still considerable. In addition, the difference in square kilometres irrigated land is 38000 for Spain and 5400 for Portugal, which contrasts much more. Lastly, the coastline of Spain is 4,964 kilometres long and that of Portugal is 1,793 kilometres long, which is also a bigger difference than that of the Netherlands and Belgium (Indexmundi, n.d.).

Examining these differences, Spain is more likely to infringe on the Dangerous Substance Directive than Portugal. This matches the data on yearly amount of infringement proceedings (European Commission, 2019[3]; European Commission, 2019[4]). Therefore, it must be taken into account that the land use of Spain could be a more important explanatory factor for their noncompliance than their exhibited attitudes are.

1.5.2 The Birds Directive (79/409/EEC)

The Birds Directive, which was adopted in 1979, aims to ensure the survival and reproduction of certain European wild migratory birds. Since, these birds are migratory, to protect these species coordination on the European level is necessary. It tries to achieve this in a varied of ways including providing legislation on hunting practices and the protection of area's were certain bird species temporarily settle for breeding and rearing.

A mayor aspect of this directive is the creation of a network of special protection areas, also known as SPA's, that include suitable territories for these bird species. The European Commission bases their assessment on which area's are to be classified as SPA's on identified Important Bird Area's, which were renamed in 2014 to Important Bird and Biodiversity Areas. These IBA's are published in IBA directories, which are established through research from BirdLife International (Waliczky, et al., 2019, 199-200). The Birds Directive has five annexes, which group certain bird species and specify how these bird species can be protected from harm (European Commission, n.d.)

Differences in characteristics that could influence the Member States' ability to comply to the Birds Directive are for example the number of endangered migratory bird species that temporarily settle in the Member States. The IBA-98 directory identified the following numbers of migratory bird species of conservation concern, that regularly settle in the Member States and that the Birds Directive applies to: 94 species in Belgium, 99 species in

the Netherlands, 115 in Portugal and 175 in Spain (Heath, et al., 2000[1], 105, 468; Heath, et al., 2000[2], 446, 515).

Another aspect is the percentage of the total area of the Member State that has been included as an IBA in the IBA directory used by the European Commission at the time of the infringement proceeding. The IBA-98 directory identified the following percentages: 24% of the Netherlands, 20% of Belgium, 10,6% of Portugal and 32% of Spain (Heath, et al., 2000[1], 103, 465; Heath, et al., 2000[2], 445, 515).

From this data the Netherlands and Belgium appear to be comparable. Portugal and Spain have more differences, where Spain has a disadvantage in their ability to comply to the Birds Directive. Just as was the case with the Dangerous Substances Directive, Spain complies worse, which may result mostly from these differences instead of their portrayed attitudes.

2. Compliance theories

2.1 Compliance

Dominant approaches in International Relations on compliance are the approach of goodness of fit, enforcement, management and legitimacy (Börzel, et al., 2007, 8-18). These approaches apply to international institutions but can be altered to fit country specific contexts as well: "such as power (enforcement), the capacity (management) of Member States and the acceptance of international rules and institutions (legitimacy)" (Börzel, et al., 2007, 8).

Furthermore, the view that all Southern Member States perform badly, is inaccurate. For instance, Börzel et al. show that Belgium drags their infringement proceedings for years, while other countries, such as Portugal, settle them quickly (Börzel, et al., 2012, 467). In addition, within the Southern European Member States group there is a large amount of variance in how well they comply with EU legislation. Alike to the case of the Netherlands and Belgium, Spain complies much better than Portugal (Hartlapp & Leiber, 2010, 476).

2.2 Goodness of fit

During the second wave of non-compliance research, the goodness of fit approach became popular. This approach theorizes that Member States are more likely to comply when existing national institutions and the requirements of European policy fit together (Mastenbroek, 2005; Treib, 2014). According to this theory, misfits can occur in specific dimensions, such as the content of the policies as well as within the structure of institutions. Another dimension conceptualized by this theory is whether misfits occur within in the legal domain or in the practical domain.

The goodness of fit approach assumes that national governments want to maintain the current situation. However, this is not always true and in some cases the national government even employs these requirements by the European Union in order to be able to change current policies (Mastenbroek, 2005, 1109).

Although the theory has a strong framework, in practice it is barely supported by research (Mastenbroek, 2005, 1109; Toshkov et al., 2010). For example, the research by Haverland identifies the example of the the European Packaging and Packaging Waste Directive, which although involving a high level of misfit, was quickly and correctly transposed by the UK,

whereas Germany, despite enjoying a good fit with this directive, took much longer and inadequately transposed this directive (Haverland, 2000, 100-101).

2.2 Enforcement approach

The approach of enforcement explains non-compliance as states unwilling to bear the costs of compliance. Especially the more national regulations differ from European Union regulations, the costs of compliance can be excessive and can thus lead to the Member State unwilling or unable to comply. Subsequently non-compliance can be prevented by making non-compliance more expensive than compliance is (Tallberg, 2002, 611).

The approach of enforcements consists of three theories. Each explains non-compliance at a different stage of the compliance process. These stages are the implementation stage and the decision-making stage. The theory of *recalcitrance* applies to the implementation stage. There are differences between states in how costly compliance is and therefore how well sanctions work. When a state is larger and has more economic and political power, it is not disturbed as much by economic or political sanctions. Using this theory, it is hypothesized that these states will be more often *recalcitrant* to European Union legislature.

The theory of *assertiveness* exists at the stage of decision-making. It proposes that if a state is bigger and more powerful, they can shape European Union imposed regulations according to their preference. Finally, there is the theory of *deterrence*, which holds that the power of the enforcement authority, such as the European Commission, is dependent on the Member States, because the latter can refute the authority of the former. Because the enforcement authority does not want to lose power, they do not desire to provoke powerful states with sanctions or infringement proceedings. This theory hypothesises that on paper, powerful states comply more, but in reality, they comply less. The theory of deterrence thus supposes that more powerful states have a lower record of infringement proceedings (Börzel, et al., 2007, 9-11). Börzel, et al. claim that of these theories only the theory of recalcitrance explain non-compliance correctly (Börzel, et al., 2007, 32; Tallberg, 2002; Mastenbroek, 2005).

2.3 Management approach

Unlike the enforcement approach, the management approach proposes that non-compliance is not caused by unwillingness of Member States, but by Member States being unable to meet

their goals because of them not meeting certain preconditions. These preconditions consist of: enough state capacity, clear definitions of norms and adequate timetables. Of these preconditions only state capacity can explain differences between Member States and thus only that concept is discussed in this thesis (Börzel, et al. 2007, 13).

The management approach therefore concludes that the lower a Member State's government capacity and government autonomy, the less it is able to comply to European Union legislation. Unlike monitoring and sanctioning non-compliant Member States, management approaches attempt to enhance state capacity.

National administrative capacity has been found to be an important limiting factor in compliance (Haverland, Steunenberg & van Waarden, 2011; Dimitrova & Steunenberg, 2017). However, the management approach is, similar to the goodness of fit, enforcement, and legitimacy approach, unable to explain differences of how well a Member State complies with one directive versus the other. It also is unable to explain these differences within the same policy area (Dimitrova & Steunenberg, 2017, 1212).

2.4 Legitimacy approach

The third approach regarding compliance is legitimacy and is also sometimes called the persuasion approach. This approach again considers the willingness of states to adhere to directives and regulations. Since the Council makes their decisions through qualified majority voting, directives that are immensely opposed by a certain Member State, can still pass (Falkner, et al., 2005, 342).

According to the legitimacy approach states comply when they agree with the legislation. The normative opinion of the Member State thus explains whether they comply or not. Raising the consciousness of Member States regarding a specific policy area would, according to this approach, challenge earlier conceptions that are in the way of compliance and create more compliance to certain policies (Schmälter, 2018, 1337-1338).

There is a distinction between support for the European Union as a rule setting institution and European Union law and both influence compliance. If there is no support for the rule setting institution, compliance in a country will exist to a lesser degree. However, non-compliance also happens if there is no support for the rule of law in a country (*ibid*). In addition, in practice the

legitimacy approach is not always supported. Börzel found that in Eurosceptic Member States compliance was not worse than in non-Eurosceptic Member States (Börzel, 2021).

2.5 Explanatory power of theories

In the research of Börzel, et al. the Enforcement and Management approaches are combined. Börzel et al. conclude that especially when power of obstinacy and power and government capacity are combined, the theory can explain almost all cases of non-compliance (Börzel, et al., 2010, 1381). Simultaneously, the legitimacy approach is considered to not be as able to explain non-compliance: both support for the rule of law and the rule setting institution do not seem not able to explain compliance according to Börzel, et al. (Börzel, et al., 2007, 29).

Still, not all cases of non-compliance can be explained using the theory of Börzel, et al. . Germany, for example should according to this combined theory be very compliant, but is less compliant than expected. Similarly Spain should not be very compliant and is more compliant than expected (Börzel, et al., 2007, 32).

In addition, according to Börzel, et al. the legitimacy approach cannot explain why certain Member States, such as Belgium, have longer infringement proceedings when they are caught violating European law (Börzel, et al., 2012, 455-456). In their research, Börzel, et al. looked at support for the rule of law in Member States and support for the European Union's rule setting institutions (Börzel, et al., 2012, 462). Notions such as "European identity" and "peer pressure by Member States" are not taken into account. Whether there is actually a link between normative principles of a Member State and longitudinal non-compliance is difficult to conclude from this research.

2.7 Challenging attitude approach

Combining these popular approaches shows us that compliance is more difficult in instances where their national legislation differs a lot from EU directives (goodness of fit), that Member States are restricted in their compliance by their administrative power (management), are able to endure more sanctions by the EU if they are richer and more powerful (enforcement) and that their government has political opinions that might not align with certain directives (legitimacy). These approaches lead to a generalized image, where countries that are similar should comply to a identical degree, which is not the case.

The second problem is that this difference in compliance does not decrease over time; laggards in compliance did not get off on a "bad start". Belgium, for example, persistently faces twice the amount of infringement proceedings as the Netherlands each year. This is also true for Portugal and Spain, where Spain faces one third more infringement proceedings than Portugal does.

The importance of attitudes is underlined by the Commission as well. A reason for the Commission's desire that Member States quickly resolve their infringements is born from a desire to change their attitudes (Jack, 2011, 89). The Court takes attitudes in account as well in their judgements. For example, the Court imposed on France the obligation to pay a lump sum of 10 million euro's, when they continuously failed to comply to EU directives on GMO issues (Jack, 2011, 82-83). The fact that attitude-change of Member States is considered to be essential by both the Commission as well as the Court, demonstrates that this is an important explanatory aspect of future compliance.

Nonetheless, the doctoral thesis of Pircher, studying whether opposition in the Council lead to worse compliance in regards to those directives, indicates that in the case of Austria, other aspects, like a lack of administrative power, were a better identifier for noncompliance or late transpositions than a oppositional political stance (Pircher, 2015, 259-260). However, this research focused on attitudes in the Council and not during infringement proceedings. There is a stretch of time between the acceptance of a directive by the Council and the Parliament, its implementation deadline has passed, noncompliance of a Member State is detected and this Member State to be brought before the Court of Justice. Within this timespan the attitude of a Member State can change.

Most infringements are solved at the pre-litigation phase, where a Member State has more opportunities to explain themselves and negotiate with the Commission (Rawlings, 2000, 9-10). During the infringement proceeding there is little space for negotiations, which is exemplified by the fact that the Court has accepted the defence of the Member States only a few times (Andersen, 2012, 57-58). When a Member State takes on a more challenging stance during the infringement proceeding, this could be an indication of a more fundamental disagreement with the directive, because they already had opportunities to negotiate in the pre-litigation phase.

The challenging attitude approach asserts, unlike the legitimacy approach, that the initial assessment of importance of complying to a directive leads to the adoption of an attitude, which then influences future attitudes regarding the infringed directive. The challenging attitude

approach proposes that a Member State that is willing to comply, but unable to do so because of a lack of administrative capacity, has less incentive to protest their noncompliance during an infringement proceeding and will display a more cooperative or subdued attitude, whereas a Member State that initially concluded a directive to be unimportant will exhibit a recalcitrant attitude, which in turn negatively influences further compliance.

An agreeable attitude will be one where the Member State agrees with the Commission and does not oppose their claims. They can explain why they failed to fulfil the obligations of the directive, but they do not use that explanation to appeal for certain claims of the Commission not being admittable. During the pre-litigation procedure the Member State will respond to the Commission's requests to the best of their abilities.

A challenging attitude, on the other hand, will feature many counter arguments to the claims of the Commission. Some of these counter arguments are evidently hard to defend, because they are untrue or fallacies. They are likely to challenge the admissibility of the infringement proceeding, but will use arguments that have a weak foundation to do so. During the pre-litigation procedure the Member State will not respond on time.

Lastly, a neutral attitude will feature a Member State challenging claims with arguments that have a stronger foundation, but are still unsuccessful. In this case it is more ambiguous whether a Member State challenging the claims of the Commission is convinced of it fulfilling the obligations of the infringed directive or if it does not agree with the directive and tries to dodge the consequences.

3. The Netherlands and Belgium

3.1 Challenging attitude approach in the case of the Netherlands and Belgium

Looking at the number of judgements regarding Environmental policies, using the InfoCuria database the number of judgements that comes up for the Netherlands is 20. In the case of Belgium, it brings up 58 documents. Something that immediately stands out is that the last infringement regarding environmental policies that was brought before the Court of Justice in which the Netherlands was involved, was in 2009. In the case of Belgium, the latest judgement that was brought before the Court of Justice was in 2014.

Since 1993 Belgium was involved in more infringement proceedings regarding environmental directives than the Netherlands, which is surprising considering agriculture is more salient to the economy of the Netherlands, which lead them to have more reason not to comply than Belgium. When we look at the Dangerous Substances Directive we can see Belgium has failed to comply trice for substantial reasons and the Netherlands has failed to comply once. Both the Netherlands as well as Belgium failed to comply to the Directive on the conservation of wild birds twice.

3.2 The Netherlands and Belgium regarding the Dangerous Substances Directive (76/464/EEC)

3.2.1 Attitudes of the Netherlands regarding the Dangerous Substances Directive

With regards to the Dangerous Substances Directive, the Netherlands was involved in one infringement proceeding. This case, which took place in 2001, involved the Netherlands failing to transpose Article 7(1), (2) and (3) of the Directive. Specifically, the Netherlands did not set quality objectives for List I substances – which are substances dangerous to the aquatic environment – to which no limit values have yet been set, regarding the water in the Scheldt basin. During the pre-litigation procedure the attitude of the Netherlands was ambivalent. Specifically, they had sent a response to the Commissions letter of formal from 1994, but did not respond to the reasoned opinion of 1996 (Commission v Netherlands, C-152/98, ECLI:EU:C:2001:255, 16-17).

During this sitting the Dutch Government opposed many of the Commission's claims. For instance, the representative of the Netherlands disagreed with the Commission on the requirements of which Article should be followed regarding List I substances without established emission limits. The Netherlands blamed its inability to meet the Articles in the Directive on the institutions of the European Union not setting any specific limits for certain substances and used this argument to challenge the admissibility of the infringement proceeding (Commission v Netherlands, C-152/98, ECLI:EU:C:2001:255, paragraph 19). According to the Dutch representative these substances should be managed in the manner described by Article 3 to 6 and not 7. List I substances should only to be treated as List II substances if the Commission explicitly stated they were not planning to set down limits at all, which was not the case, the Netherlands claimed (Commission v Netherlands, C-152/98, ECLI:EU:C:2001:255, paragraph 27-29).

The Court sided with the Commission by judging that Article 7 is clear in how a Member State should act regarding List I substances without established emission limits (Commission v Netherlands, C-152/98, ECLI:EU:C:2001:255, paragraph 31-32). The argumentation of the Netherlands was therefore baseless. In addition, the claim of the Dutch Government that Article 3 to 6 should be followed instead of Article 7 were judged to be irrelevant, since the Netherlands did not have any programmes in place that followed either Article 3 to 6 or 7, which they had admitted to (Commission v Netherlands, C-152/98, ECLI:EU:C:2001:255, paragraph 36).

Furthermore, the Netherlands argued that if List I substances without established emission limits were to be treated as described by Article 7, Member States would have to lay down

quality objectives for thousands of substances, which would not be reasonable (Commission v Netherlands, C-152/98, ECLI:EU:C:2001:255, paragraph 30). This last claim resembles the slippery slope fallacy, which should have been evident to the Netherlands, are unlikely to be accepted by the Court, since they follow general law principles and argumentation (Paso, 2012, 25). The Court rejected this by claiming that quality objectives are only to be imposed on those 114 substances for which no limit had been set yet and not thousands of other substances (Commission v Netherlands, C-152/98, ECLI:EU:C:2001:255, paragraph 34).

Yet, the attitude of the Netherlands displayed was not just one of challenge: the Government of the Netherlands agreed with some claims of the Commission. For instance, they admitted that they had failed to set quality objectives for multiple substances, such as titanium (Commission v Netherlands, C-152/98, ECLI:EU:C:2001:255, paragraph 41). Although this was the only instance, it does show some agreeableness on the part of the Netherlands.

The Netherlands claims to not have known about their noncompliance, but this is questionable, since the Netherlands was informed multiple times that it was not complying. On the other hand from the judgement document it does not become clear why the Commission was not satisfied with the answer the Netherlands gave on the letter of formal notice, which may have included requests for explanations (Commission v Netherlands, C-152/98, ECLI:EU:C:2001:255, paragraph 16-18).

After this infringement proceeding in 2001 the Netherlands did not fail to meet the requirements of this directive again. Challenging most of the Commission's claims with argumentation that had a weak foundation, but admitting some fault, overall shows the Netherlands' attitude was leaning more towards challenge than ambivalence. Examining these aspects, this case contradicts the challenging attitude approach.

3.2.2 Attitudes of Belgium regarding the Dangerous Substances Directive

Belgium was involved in three infringement proceedings regarding the Dangerous Substance Directive. Over the span of these multiple infringement proceedings, Belgium demonstrated a variety of attitudes, which did not follow a pattern towards either more challenging or more agreeable. During the first infringement proceeding in 1999, Belgium adopted a challenging attitude. This attitude was found in their responses to the Commission where they wrote they were in compliance with Article 7, but did not elaborate on this claim.

They did, however, eventually provide the Commission with a study that included data on dangerous substances that Belgium emitted into the air and water. Furthermore, Belgium claimed in their response that the list of 99 substances had no binding force (Commission v Belgium, C-207/97, ECLI:EU:C:1999:17, paragraph 17-20). Both of these claims Belgium were not substantive (Commission v Belgium, C-207/97, ECLI:EU:C:1999:17, 12-21).

Belgium also displayed a challenging attitude during the infringement proceeding itself. At the start of the court hearing, Belgium challenged it's admissibility without offering thorough argumentation. The government of Belgium was of the opinion that because the Commission had taken five years to respond to Belgium's first reply, Belgium had wrongly assumed that they had convinced the Commission, which then had negatively affected their ability to prepare their defence, they claimed (Commission v Belgium, C-207/97, ECLI:EU:C:1999:17, paragraph 23). The Court rejected this argument by arguing that the Commission does not have an obligation to act within a specific time limit. In addition, Belgium did not demonstrate how the length of the pre-litigation procedure made it more difficult for Belgium to form their defence (Commission v Belgium, C-207/97, ECLI:EU:C:1999:17, paragraph 24-27).

Furthermore, during the infringement proceeding, Belgium repeated their already rejected argumentation from their responses to the Commission during the pre-litigation phase. This indicates a more challenging attitude, since these arguments did not prevent the infringement proceeding from taking place before and therefore had only little chance to be accepted by the Court (Commission v Belgium, C-207/97, ECLI:EU:C:1999:17, paragraph 28-29).

During the second infringement proceeding in 2001, Belgium had adopted a different attitude. This infringement was again on Article 7, but also 3, 4, and 5 of the Dangerous Substances Directive and was caused by provisions within Belgium law which included the tacit authorisation of certain projects (Commission v Belgium, C-230/00, ECLI:EU:C:2001:341, paragraph 1, 5). In their initial response during the prelitigation stage, the Belgian Government

sent the response of the Flemish Government as attachment where they admitted there being an issue of tacit authorization, but simultaneously tempered this claim by stating that competent authorities treated every assessment with care (Commission v Belgium, C-230/00, ECLI:EU:C:2001:341, paragraph 8-9). During the infringement proceeding itself Belgium admitted failing to comply (Commission v Belgium, C-230/00, ECLI:EU:C:2001:341, paragraph 13). While initially taking a more neutral stance, this developed to more agreeable as the case progressed.

What further substantiates this interpretation is that the infringement was caused by provisions ingrained within both Flemish as well as Walloon law which included automatic tacit grant and rejection of authorization in regards to environmental regulations (Commission v Belgium, C-230/00, ECLI:EU:C:2001:341, paragraph 4-5). As the infringement was caused by a system of provisions that were already in place for some time instead of an incorrect implementation of the Dangerous Substances Directive, the infringement was more difficult to solve. Even though Belgium was found to be infringing on multiple articles – specifically Article 3, 4, 5, and 7 – which could indicate unwillingness to comply, that Belgium was not able to solve it in time is understandable. Taking this context into account they did not demonstrate a challenging attitude.

Belgium got involved in one last infringement proceeding regarding this directive in 2004 (C-406/02). This time Belgium failed to communicate within the prescribed period the information that was required by the Dangerous Substances Directive, although no specific article was mentioned that was infringed on. During this infringement proceeding Belgium had made the claim that they had sent information to the Commission, however, due to the information they sent being unsatisfactory, they were not successful (Commission v. Belgium, C-406/02, ECLI:EU:C:2004:97, paragraph 15-23). This claim, which was their only counterclaim, was a claim that had some chance of being accepted, since it's foundation was true: Belgium had sent a response. That it was not a sufficient response, could have been something that Belgium had not expected. Therefore, the attitude they adopted during this last infringement was not fully agreeable, but also not challenging.

Belgium's attitude changed over the infringement proceedings. During the first they employed a challenging attitude, during the second one they were agreeable and during the last one they displayed a slightly ambivalent attitude. The fact that Belgium adopted a more challenging approach again after being agreeable could be a contradiction to the challenging attitude approach. However, a neutral approach, as it has argumentation that has some chance to be

accepted, could be more similar to agreeableness than challenge. In that case, the challenging attitude approach could also not be contradicted, as Belgium did not get involved in another infringement proceeding afterwards.

3.3 The Netherlands and Belgium regarding the Birds Directive (79/409/EEC)

3.3.1 Attitudes of the Netherlands regarding the Birds Directive

The Netherlands was called before the Court of Justice twice, once in 1998 and once in 2005, due to infringing on the Birds Directive. Both of these infringements were on Article 4. In the infringement proceeding of 1998 the Netherlands was reprimanded for the quantity and the quality of the classified SPA's, although this last complaint was judged to be inadmissible since this complaint was introduced at the infringement proceeding (Commission v Netherlands, C-3/96, ECLI:EU:C:1998:238, paragraph 32 - 33).

In the years leading up to this infringement proceeding the Netherlands had displayed a neutral attitude. Although they had responded to the Commission's letter of formal notice, their response was late. Within their response, they only claimed to not be infringing on the directive and did not add proof for this claim (Commission v Netherlands, C-3/96, ECLI:EU:C:1998:238, paragraph 8).

During the infringement case itself, the Netherlands presented a challenging attitude by countering the Commission with arguments that did not have a great chance to be accepted by the Court. For example, the Netherlands alleged that in addition to classifying SPA's, a Member State can also comply to this article by implementing other conservation measures, which they claimed they did. However the Court explained that the creation of a network of SPA's can only be achieved by Member States classifying SPA's (Commission v Netherlands, C-3/96, ECLI:EU:C:1998:238, paragraph 58). As this goal was explicitly written down in Article 4(3), the Netherlands could not have been confused about its meaning.

What corroborates this interpretation further is that there were inconsistencies in the argumentation used by the Netherlands. For instance, the Netherlands made the claim that in their classification of the SPA's they had used the same, albeit, broad ornithological criteria as the IBA 89 to classify the SPA's, but eventually admitted this statement to be false (Commission v Netherlands, C-3/96, ECLI:EU:C:1998:238, paragraph 65). Similarly, while the Netherlands first claimed that they had only used ornithological criteria in their classification of the SPA's, they later claimed that in addition to the ecological factors in Article 4(1), they also had to take into account economic and recreational factors that are in accordance with Article 2 (Commission v Netherlands, C-3/96, ECLI:EU:C:1998:238, paragraph 49 & 67). Not only was this contrary to what they stated earlier, Article 4 does not allow for other factors being taken into account in the selection of SPA's (Commission v Netherlands, C-3/96, ECLI:EU:C:1998:238, paragraph 59).

During the second infringement proceeding on this directive in 2005, the Netherlands displayed a completely different attitude. The Netherlands acknowledged not complying to Article 4 of the Birds Directive (Commission v Netherlands, C-441/03, ECLI:EU:C:2005:233, paragraph 17). With admitting their non-compliance, they displayed a more agreeable attitude.

This was also true during the pre-litigation phase of the 2005 infringement proceeding: although the Netherlands were unable to convince the Commission of their compliance with their responses, this time they had included a draft of a law that would amend the Dutch Nature Conservancy Law so it would be in compliance to the Birds Directive (Commission v Netherlands, C-441/03, ECLI:EU:C:2005:233, paragraph 11 – 12). Notably, after this case the Netherlands did not end up in another infringement proceeding in regards to the Birds Directive.

The initial attitude of countering claims with argumentation that the Court would not accept and giving statements that were untrue, was that of challenge, whereas the attitude in the later case was that of relative agreeableness. One reason for this switch might be that during the initial infringement proceeding, the Netherlands had the support of Germany. This support could have increased the confidence of the Government of the Netherlands in their weak argumentation.

Another explanation could be that the initial attitude did not lead the Netherlands either fully or partially in convincing the Court. They could have determined that the effort would not lead to anything and agreeing to their shortcomings in their compliance would be the easier option. That the Netherlands did not face another infringement proceeding regarding this directive again after adopting an agreeable attitude would fit the challenging attitude approach.

3.3.2 Attitudes of Belgium regarding the Birds Directive

Like the Netherlands, two of Belgium's infringements on the Birds Directive escalated into infringement proceedings in two occasions. Before, during and after the infringement proceedings Belgium displayed an agreeable attitude. During the first infringement proceeding, which took place in 2003, they did not counter most of the accusations cast at them by the Commission, but instead put them into context. For instance, Belgium mentioned that there were local protection measures that protected newly classified SPA's already, but also admitted that they failed to automatically link newly classified SPA's to the system of protection provided for by Birds Directive (Commission v Belgium, C-415/01, ECLI:EU:C:2003:118, paragraph 14).

One claim that they did counter was that the Commission's assertion that the borders of SPA's were not protected against thirds parties, due to the maps demarcating the SPA's being solely published in municipal offices instead of the Belgian official journal (Moniteur belge), where official laws are usually published in Belgium. Belgium claimed that this method of publication should be sufficient. However, they also claimed a new amendment was already being drafted (Commission v Belgium, C-415/01, ECLI:EU:C:2003:118, paragraph 20).

This demonstrates that even without seeing to much merit in doing this, they were still willing to comply and would constitute a more agreeable attitude. At the same time it would disprove the legitimacy approach as being the best explanatory theory, because even if Belgium did not agree with the directive, they are still willing to comply. However, it is notable that Belgium initially chose to treat this directive differently by not publishing it in the Belgian official journal.

Unlike the Dutch cases, Belgium's first infringement case involved more infringements; this infringement proceeding involved an infringement on Article 4(1), (2) and (4) (Commission v Belgium, C-415/01, ECLI:EU:C:2003:118, paragraph 1). The chances of Belgium disagreeing with at least one of the Commission's claims rises due to a bigger number of claims, however Belgium only countered one claim. This could support the view that Belgium had a rather agreeable attitude during this infringement proceeding. On the other hand, this fact also demonstrates that Belgium's noncompliance was more severe.

That Belgium's attitudes during the first infringement proceeding was rather agreeable appears to have had an effect on them not infringing on Article 4 again. In 2009 Belgium was called towards the Court again regarding the Birds Directive, however, this time the infringement was

about the import, keeping and sale of specific bird species that are subject to restrictions. Belgium did not permit traders to keep European birds that were legally put on the market and therefore interfered in the free market upheld by Article 28 EC (Commission v Belgium, C-100/08, ECLI:EU:C:2009:537, paragraph 1). The court documents however, do not offer any further details on this infringement proceeding, the article that Belgium infringed on and the arguments given by both parties.

After the second infringement they did not let any possible infringements in regards to this directive escalate into an infringement proceeding again. That this second infringement on the Birds Directive by Belgium was on a completely different article, shows that Belgium tried to resolve the first infringement and was successful in doing so. It should also be taken into account that Belgium initially did not reply to the Commission during the pre-litigation phase of the infringement proceeding in 2003, but during the infringement proceeding displayed an agreeable attitude (Commission v Belgium, C-415/01, ECLI:EU:C:2003:118, paragraph 7). That Belgium's attitude developed within the same infringement from more challenging to more agreeable and then did not infringe on this specific article again supports the challenging attitude approach as well.

3.4 Conclusion the Netherlands and Belgium

The way both Member States acted on either directive differed to a great extent. While the Netherlands was more cooperative in the case of the Dangerous Substances Directive (76/464/EEC), they had the opposite attitude in the case of the Birds Directive (79/409/EEC). The same is true for Belgium.

What stands out by comparing the cases of the Dangerous Substances Directive is that not only did Belgium face multiple infringement proceedings, Belgium's attitude was different per infringement proceeding and did not develop towards a certain attitude over time. Belgium started out displaying a very challenging attitude, during the second infringement they demonstrated an agreeable attitude and then during the last proceeding it was a more ambivalent attitude.

While the Netherlands did not employ an agreeable attitude either, it was less recalcitrant than Belgium's during it's first infringement proceeding involving this directive by admitting to some of their infringements. Both the Netherlands and Belgium infringed on Article 7 of the Dangerous Substances Directive, but Belgium infringed on the same directive again. Belgium's case shows how one infringement can lead to multiple infringements, because the infringement of Article 7 of the 1999 case was not solved in their 2001 case, while the Netherlands did not fail to comply again.

Both the Netherlands as well as Belgium infringed on Article 4 of the Birds Directive (79/409/EEC). On first glance, Belgium seems to be the worse complier: the infringement of Belgium involving Article 4 included more aspects of the Birds Directive that Belgium was not in compliance with than that of the Netherlands. However, while Belgium quickly agreed during the infringement proceeding that it was not in compliance, the Netherlands not only disputed most of the claims of the Commission, but offered statements that were untrue. Belgium, afterwards, was proven to be more willing to comply than the Netherlands was. In the case of the Netherlands, it failed twice on the same ground, therefore, not solving the first infringement, while those of Belgium were on two separate articles.

The second infringement proceeding faced by the Netherlands did not involve a complete noncompliance, but instead not implementing Article 4 on time. Nonetheless, this time Belgium was able to solve their earlier infringement on this article time. This case proves that earlier dismissive attitudes regarding infringements could therefore cause future non-compliance as was the case for the Netherlands.

Because the attitudes portrayed by both Member States between both directives differed greatly and both Member States greatly contrasted in their ability to comply to one directive over the other, using these examples it is difficult to claim one Member State is clearly more successful in their compliance. These cases do not proof that Belgium is more often defiant regarding infringements, something we would expect, or the other way around. However, attitudes seem to be a big factor in determining whether a Member State infringes again.

4. Portugal and Spain

4.1 Challenging attitude approach in the case of Portugal and Spain

The directory of InfoCuria shows there are 59 judgements registered against Spain on environmental policies, while for Portugal there are 33 judgement documents. That Spain would let more infringements escalate into proceedings is not surprising since Spain should be a worse complier. Additionally, Spain has the disadvantage of being comprised of a larger environmentally salient area.

Although Portugal infringes less than Spain does, according to Hartlapp & Leiber, who looked at how long Member States took to implement six EU directives, Portugal exceeded the deadline more often than Spain did (Hartlapp & Leiber, 2010, 477). However, in this research Spain had the advantage that most of these directives already had a better "fit" to national legislation, which could have made implementation easier. We must also note that the research of Hartlapp & Leiber only included six directives, which all related to the policy field of work and employment.

Surprisingly, in the case of the Dangerous Substances Directive, Portugal infringed more often than Spain did. In the case of the Birds Directive, the Spanish Kingdom was caught up in more infringement procedures than Portugal: six infringement procedures of Spain versus two of Portugal.

4.2 Portugal and Spain regarding the Dangerous Substances Directive (76/464/EEC)

4.2.1 Attitudes of Portugal regarding the Dangerous Substances Directive

Twice, Portugal was involved in infringement proceedings for not complying to the Dangerous Substances Directive of which both were held in 2000. Both infringements had different subjects; the infringement of case C-261/98 was on Article 7 of the Dangerous Substances Directive, which is about the obligation to establish pollution reduction programmes for substances listed in Annex II (Commission v. Portugal, C-261/98, ECLI:EU:C:2000:398, paragraph 8), whereas case C-435/99 was an infringement on Article 13(1), which covers the obligation to send reports on their pollution reduction programmes (Commission v. Portugal, C-435/99, ECLI:EU:C:2000:684, paragraph 1).

During both infringement cases, Portugal displayed a nonconfrontational attitude: in both cases they admitted to be lacking in fulfilling the obligations of the directive and blamed their infringements on their lack of administrative power. For instance in case C-435/99, Portugal defended itself by claiming their national institutions responsible were experiencing difficulties, but that the drafts for pollution reduction programmes would be ready soon. Portugal claimed the same in case C-261/98, although they admitted that their plans when adopted would still not be fully in compliance to Article 6 (Commission v. Portugal, C-261/98, ECLI:EU:C:2000:398, paragraph 12-13, 32).

Both infringement proceedings took place in 2000. Portugal having had to answer to both requests of the Commission at the exact same time, could have been a severe strain on their administration. However, the date of receiving the Commission's letter of formal notice was different: in the case of C-261/98, this happened in 1992 and in the case of C-435/99, they received a letter of formal notice in 1998. That the infringement proceedings of these two cases was in the same year should not have complicated Portugal's compliance.

The attitude of Portugal before and during the infringement proceedings was mostly cooperative. In the pre-litigation procedure of case C-261/98, Portugal provided the Commission with multiple reports after the Commission made its complaint formal, for example. Yet, there were also some instances during the pre-litigation procedure of C-435/99 where Portugal did not respond to the Commission's requests. However Portugal explained that there were "serious difficulties in the bodies responsible for completing the Commission's questionnaires" and they had sent all the information they had (Commission v. Portugal, C-435/99, ECLI:EU:C:2000:684, paragraph 12). That Portugal was not caught up in another infringement

proceeding on this directive after these cases, would support this explanation. Together with the cooperative attitude it would support the challenging attitude approach.

4.2.2 Attitudes of Spain regarding the Dangerous Substances Directive

Spain had to face one infringement proceeding regarding the Dangerous Substances Directive, which was in 1998. Like Portugal, Spain's infringement proceeding also involved an infringement on Article 7 of the Dangerous Substances Directive. But unlike Portugal, Spain's displayed attitudes were less agreeable. Spain argued that changes in national administration in part caused by their adoption of a new constitution in 1978 and their ascension to the EU in 1986, resulted in administrative difficulties that in turn lead to not being able to comply to this directive. However, while Portugal only explained how internal difficulties resulted in noncompliance, Spain used this reasoning to justify their noncompliance, which the Court rejected (Commission v. Spain, C-214/96, ECLI:EU:C:1998:565, paragraph 16-18).

The Spanish Government challenged some of the Commission's claims: while they agree that their plans regarding surface water are not yet implemented and do not fit the obligations of Article 7, they claim that other measures they took to monitor substances listed in Royal Decree No 484/95 did result in the objectives of Article 7 being met. According to the Spanish Government, only 30 out of 99 substances were found in Spanish waters and therefore they had created programmes only for those substances. However this argument was rejected due to the fact this decree was not in force when the deadline passed and that the measures within this decree do not constitute as a coordinated system as is according to what is laid down in Article 7 (Commission v. Spain, C-214/96, ECLI:EU:C:1998:565, paragraph 23-26).

However, Spain also agreed with the Court in some instances. For example, in regards to discharges in seawater, the Court judged that the Autonomous Communities responsible had not produced programmes that would fulfil the obligations of Article 7. The court document states that the Spanish Government did not dispute this statement (Commission v. Spain, C-214/96, ECLI:EU:C:1998:565, paragraph 32).

Although Spain did challenge some of the Commission's claims, which was not unsuccessful, their displayed attitude was not either completely agreeable or completely that of challenge. After this one infringement proceeding they were not involved in another regarding the Dangerous Substances Directive again. Together, this would not support the challenging attitude approach.

4.3 Portugal and Spain regarding the Birds Directive (79/409/EEC)

4.3.1 Attitudes of Portugal regarding the Birds Directive

Portugal faced two infringement proceedings regarding the Birds Directive. During both infringement proceedings Portugal did not portray a challenging attitude: instead of offering counterarguments, they admitted fault. In regards to the first infringement, the Portuguese Government claimed that new legislation that was in accordance to the directive was being drafted, which suggests that the late transposition of the directive was caused by a lack of administrative power and not an unwillingness to comply. In the pre-litigation phases Portugal did not fail to respond, although their responses were late.

Portugal's attitude during their first infringement proceeding in 2003 involving the Birds Directive is illustrative of this. Portugal did not challenge the claims of the Commission that they failed to fulfil the obligations in regards to the implementation of Articles 7, 8 and 12. Further, Portugal affirmed their incorrect transposition of Articles 2, 4(1) and (4) and 6. Notably, however, without Portugal countering the claims of the Commission, the Court judged that Portugal was compliant to Article 12, which concerns the obligation that Member States send the Commission reports on the implementation of provisions under the Birds Directive every three years. Portugal had done so in the past, the Commission admitted and this complaint had to be rejected by the Court (Commission v. Portugal, C-72/02, ECLI:EU:C:2003:369, paragraph 17-22).

The infringement at the core of the second proceeding in 2006 could, however, not have been caused by lack of administrative power. Portugal had made sudden adjustments to the demarcation of an SPA and had made it's total spanning area smaller. Portugal had altered the demarcation to exclude lands that were not important for steppe-land birds that are included in Annex I of the Birds Directive. However, the Birds Directive also covers the protection of certain migratory bird species; for the protection of these migratory species this SPA was also designated, the Court judged.

Portugal also argued during the case that the demarcation of the SPA was in the process of being adjusted to fit the requirements of the Birds Directive (Commission v. Portugal, C-191/05, ECLI:EU:C:2006:472, paragraph 8). This means that Portugal had been working on a draft for new boundaries of this SPA in the time before the infringement proceeding in 2006, which in turn would indicate that they were not opposed to fulfilling their obligations under Article 4. On the other hand, that would not explain them changing the demarcation of the SPA in the first place.

While Portugal solved the infringements on multiple articles from the infringement proceeding in 2003, this excluded the infringement on Article 4. However, although this article was repeatedly infringed on, the infringement was not the same: the second proceeding was about a recent change to the demarcation of a specific SPA, which happened after the first infringement proceeding. It appears Portugal did not ignore the first infringement after the proceeding, but infringed in another way due to an incorrect interpretation of the article. Although it could also be interpreted as a disregard of the requirements of this article, since they should have been informed by then what these were.

After these infringement proceedings, Portugal did not get involved in infringement proceedings regarding the Birds Directive again. During both infringement proceedings Portugal did not portray a challenging attitude: instead of offering counterarguments, they admitted fault, but claimed that new legislation that was in accordance to the directive were being drafted. Portugal not displaying a challenging attitude combined with them not being involved in many infringements, would support the challenging attitude approach.

4.3.2 Attitudes of Spain regarding the Birds Directive

The Spanish Kingdom got involved in six infringement proceedings in regards to the Birds Directive, which is more than Portugal. Most of the infringements in these proceedings were on Article 4, which is about the creation, demarcation and protection of Special Protection Areas, but a few others were on Article 7, 8 and 9, which are all on if and how bird species included in the Annexes of the Birds Directive should be hunted. In all of these infringement proceedings, the Spanish Kingdom countered the claims of the Commission, with success on only a few occasions. While Spain did answer The attitude presented by Spain was that of challenge, which they presented in all of the six infringement proceedings.

An example of this was demonstrated during the first infringement proceeding of 1993. Spain presented multiple opposing arguments, which related to how Article 3 and 4 of the Birds Directive should be interpreted. Essentially the questions were whether the Santoña marshes were required to be classified as an SPA and whether the Spanish Kingdom was obligated to protect this habitat. During this proceeding the Commission determined infringements to Article 4(4) in six area's of the Santoña marshes. Only regarding two of those area's did the Court side with Spain, due to harmful operations having seized before the Commission had issued its reasoned opinion (Commission v Spain, C-355/90, ECLI:EU:C:1993:331, paragraph 57).

Some of Spain's unsuccessful claims during these infringement proceedings could have been due to an incorrect interpretation of articles, such as in the 2007 C-186/06 case where the Court judged that certain areas that had not been classified as SPA's, but should have been, still fall under the obligations of Article 4 of the Birds Directive (Commission v Spain, C-186/06, ECLI:EU:C:2007:813, paragraph 32). However, other assertions offered by Spain could not be attributed to this interpretation and were clear violations of the Birds Directive.

An example of this is that although some provisions of articles specifically mentioned that certain arguments could not be accepted, Spain still presented these in some occasions. For instance, during the first infringement proceeding, Spain asserted that their infringement of Article 4(4) was justified due to the ecological interests of this article being of lesser or equal importance compared to social and economic ones. The Court did not accept this argument as was decided from an earlier case that the consideration of other interests cannot be ground for noncompliance with this directive. In the case of Article 4 in particular, other interests can be superior to ecological ones, however this specifically excludes economical and recreational

interests, as was decided by earlier cases (Commission v Spain, C-355/90, ECLI:EU:C:1993:331, paragraph 19).

Other unsuccessful claims raised by Spain were positions that were hard to defend or baseless. For example during the 2004 proceeding the Spanish Government defended the use of a traditional bird hunting method called the 'parany' method in some Autonomous Communities, which is described as the use of lime twigs to catch birds. Although Spain agreed the method itself was indiscriminatory, they claimed the hunters were using it in a "selective way" by being obligated to release birds that were accidentally caught, which is a position that is hard to defend (Commission v Spain, C-79/03, ECLI:EU:C:2004:782, paragraph 1, 17). A Member State using these claims, which are unlikely to have been generated by a misinterpretation of the articles of the Birds Directive, during infringement proceedings would indicate a more challenging stance as well.

Another example of the Spanish Government seemingly purposefully using clearly unacceptable arguments, was the use of counter arguments that were previously rejected by the Court in earlier infringement proceedings. For instance, in the 2005 infringement proceeding, the Spanish Government presented the argument that it should be allowed to hunt for woodpigeons all year round since the United Kingdom did the same. This argument was deemed not relevant by the Court (Commission v Spain, C-135/04, ECLI:EU:C:2005:374, paragraph 25-26).

In the 2007 C-235/04 case, which involved an infringement on Article 4 of the Birds Directive, the Spanish Government used a similar argument; during this court case they claimed that, although only half of the size of the area's of importance for bird conservation were classified as SPA's, the percentage of Spain's surface area classified as SPA's was already twice as great as the Community's average and that they had made a greater effort to comply than most other Member States. The Court judged again that perceived noncompliance of another Member State may not be used as an argument by Member States to not comply themselves (Commission v Spain, C-235/04, ECLI:EU:C:2007:386, paragraph 42-45).

The Court, however, had sided with the claims of the Spanish Government on some occasions. For example, in the 2007 C-186/06 infringement proceeding the Commission had suddenly included not only an infringement of Article 4(4), but also of Article 2 and 3, in their claim, without notifying Spain beforehand. Furthermore, they had not offered Spain an explanation of what aspect of Article 4(1) they had infringed on (Commission v Spain, C-186/06,

ECLI:EU:C:2007:813, 12120, paragraph 13). Regarding these points, the Court agreed with the Spanish Government, which meant only the infringement of Article 4(4) was to be discussed in the proceeding (Commission v Spain, C-186/06, ECLI:EU:C:2007:813, 12121-12123).

Another instance was the infringement proceeding of 2016, where Spain challenged it's admissibility on the account of that the complaint in the infringement proceeding suddenly including more sections of a railroad site that was potentially harming an SPA than in the letter of formal notice or the reasoned opinion. The Court agreed and judged that the newly added complaint about the 'Variante de Osuna' section would not be included in the proceeding (Commission v Spain, C-461/14, ECLI:EU:C:2016:895, paragraph 22-29).

Even though these instances of countering the claims of the Commission had not led to a full success for Spain, they led to partial success. This resulted in Spain not having to pay all of the proposed costs. According to a cost-benefits approach, this could have incentivised Spain to counter more of the Commissions claims; the Court rejecting their arguments did not lead to more costs, but them accepting Spain's arguments would result in a reduction of costs.

In regards to the Birds Directive, Spain displayed a challenging attitude overall. They also faced many more infringement proceedings concerning this directive than concerning the Dangerous Substances Directive. This could suggest the challenging attitude approach to have some explanatory power.

4.4 Conclusion Portugal and Spain

The infringement proceedings of both countries on the Dangerous Substances Directive, involved infringements on Article 7. Another similarity was that in their earlier infringements both blamed having to adjust a lot of national legislature in a short time as the reason for their infringements. This makes sense as both joined the EU in 1986. Both Spain and Portugal at that time had to adjust their provisions and political systems to conform to European legislation.

Nevertheless, Portugal faced two infringement proceedings on the Dangerous Substances Directive, while Spain faced one. This is surprising, since Portugal should be the better complier. Furthermore, as Portugal overall displayed a cooperative attitude and Spain a neutral attitude, this could contrast what we would expect using the challenging attitude approach.

On the other hand, the difference between the Member States was only one infringement proceeding. We must also take into account that Portugal's second infringement procedure was in the same year as their first as both were held in 2000. Furthermore, the second infringement proceeding involved Portugal not sending reports on pollution reduction programmes they had not yet implemented during the first infringement proceeding.

Another interpretation can be that since neither displayed a defiant attitude both countries not infringing again afterwards would support the challenging attitude approach. After two infringements in the case of Portugal and one in the case of Spain, they did not end up in an infringement procedure involving the Dangerous Substances Directive again.

In regards to the Birds Directive, however, there was a big difference in displayed attitudes. The more challenging attitudes displayed by Spain were indeed related to more infringement proceedings. Concerning this directive the differences in attitudes were more clearcut with Spain countering the complaints of the Commission in every case and infringing on the same articles repeatedly. Using the challenging attitude approach we could explain when comparing the cases of Portugal and Spain why Spain faces more infringement proceedings.

5. Conclusion

The challenging attitude approach is the first theory incorporating an historical aspect into compliance research. This theory was developed, because no compliance theory is able to explain why the level of compliance of Member States, that share many similarities, varies greatly. Looking at the constructed hypotheses, not all have been supported. Belgium did not portray a challenging approach more often than the Netherlands did, which rejects the first hypothesis. Spain, however, did portray a challenging approach more often than Portugal, which means the second hypothesis is supported.

The third hypothesis, however, was not supported. There were some stark differences with the attitudes displayed by the Member States per directive. This is illustrated by the attitudes displayed by Belgium with their initial attitude in regards to the Dangerous Substances Directive being challenging versus their initial attitude towards the Birds Directive being agreeable.

As a Member State's displayed attitudes vary greatly per directive, these results are greatly dependent on the choice of which directives to include in this research. This choice could therefore be source for biases. For example, both the Netherlands as well as Spain had disadvantages due to having a larger agricultural industry and a larger coastline than the country they were compared to.

There are also some possible internal difficulties with certain directives. For example, all countries failed to comply to Article 7 of the Dangerous Substances Directive. While some Member States, such as Belgium and Portugal infringed on other articles as well, the Netherlands and Spain did not. This article might have been confusing and Member States may have failed to fulfil its obligations unknowingly. Nonetheless, in a comparison it would just as much show up as a full infringement.

The last hypothesis includes the question of the usefulness of the challenging attitude approach. The included cases suggests that there is correlation between adopted attitude and whether a country allows infringements to escalate into infringement proceedings. This is most evidently demonstrated by the case of Spain: during the infringement proceeding regarding the Dangerous Substances Directive, Spain displayed a fairly neutral attitude and Spain did not face another infringement proceeding involving this directive, whereas it displayed a very challenging attitude concerning the Birds Directive after which Spain had to face six more infringement proceedings.

This conclusion comes with a caveat: it must be taken into account that a challenging attitude might not be the cause of more infringements, but instead, another factor, such as a normative disdain for a certain directive, might lead to the display of certain attitudes. Furthermore, these cases show how national systems can facilitate non-compliance: national Belgium law complicated the implementation of directives about the environment, which led to an infringement of the Dangerous Substances Directive scaling into an infringement proceeding and it involving infringements on multiple articles simultaneously. This case demonstrates how noncompliance can lead to more infringement proceedings in the long run, but does not have to be caused by the adoption of a challenging attitude. Indeed, in this case Belgium adopted an agreeable attitude.

As the challenging attitude approach seems to have some explanatory power, more research is necessary to look into attitudes. There may be a development from an agreeable attitude to a neutral attitude to a challenging attitude with each step correlating to more infringements escalating into proceedings. However, a neutral attitude, as it is not exactly a challenging attitude, might also be similar to an agreeable attitude. It would then not correlate to a Member State facing more infringement proceedings, but to a similar amount as an agreeable attitude would.

Using a larger quantity of cases and with more research into the specific origins and effects of the attitudes of Member States before, during and after infringement proceedings, potentially a general adopted attitude may be found per Member State. The challenging attitude approach could then explain how noncompliance in certain fields remains relatively stable over time for each Member State even though the adopted attitude per directive might slightly differ per directive.

Judgements

Commission v. Belgium

Judgement of 21 January 1999, *Commission v Belgium*, C-207/97, EU:C:1999:17.

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Commission v. Portugal

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