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UNEVEN RULES, EVEN PRACTICES

HOW A DIFFERENTIATED EUROPE AND THE IMPLEMENTATION OF EU LAW ARE INTERTWINED

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List of abbreviations

DI	-	Differentiated Integration
EC	-	European Commission
ECJ	-	European Court of Justice
EU	-	European Union
EP	-	European Parliament
IP	-	Infringement Procedures
IR	-	International Relations
MEPs	-	Members of the European Parliament
MLG	-	Multilevel governance
MS	-	Member states
RO	-	Reasoned Opinion
TD	-	Transposition Deficit

I. Introduction

1. Differentiated Integration and the rightful application of law

> "The European Union is founded on the rule of law and relies on law to ensure that its policies and priorities are realised in the Member States." (European Commission 1/19/2017, p. 1)

The European Union (EU) seems to be in a constant state of crisis. What seems to be an oxymoron at first sight, as a crisis cannot be constant in its nature, becomes clear looking at the last 15 years of European Union history. Starting with the referendum on a European Constitution in 2004 that failed in France and the Netherlands, continuing with the banking and sovereign debt crisis from 2008 onwards, heading into the so-called 'refugee crisis' that started in 2015, showed that the EU lacks calmness to talk about its aim or 'finalité'. Today's generation only knows a European Union that is contested, as the time of the 'permissive consensus' was before the time of their births. The question of where Europe is heading is currently again an unwavering one for political scientists and citizens. With the election of the French president Emmanuel Macron hope appeared for an impetus for European integration. With the Sorbonne proposals new integration steps should have been achieved. Germany's lack of answers seems to limit Europe again. Meanwhile, the United Kingdom will (probably) leave the European Union.[1]

For a long time, in the realm of EU-Studies, the opposite of integration was stagnation instead of disintegration (see Börzel 2018, p. 475). With a Brexit in sight and states like Poland and Hungary contesting the liberal consensus in the European Union, scholars have to think about a different kind of Union. Disintegration is a real and existing danger. Therefore, a new approach to the future of integration is needed. What has been one of the prospects to head into the future, is the possibility of a *Differentiated Europe (DI)*. In the White Paper on the Future of the European Union, Commission president Juncker proposed one prospective reality offering different obligations and rights for member states (MS) (see Commission White Paper 2017). However, this suggestion is not a brand-new phenomenon as the process of widening and deepening didn't always occur as a uniform process (see Majone 2009, p. 221). In the beginning of the European Communities in the 1950s the principle of integration was that of

[1] As this introduction is written, one cannot predict how Brexit will end.

the same rights and obligation for every member state. Based on that approach a system of freeriding, this is to say benefits without obligation, could be avoided. Nonetheless, the principle was not always favourable for the EU's evolvement. It forced the member states to find the lowest common denominator with a high risk of integrational stagnation. This was especially a problem during the *Eurosclerosis* in the 1970s, where deepening came to a stop. To overcome such blockades differentiated solutions where found, so that some states chose to opt-out of whole policy fields or derived legislation. This phenomenon and strand of research is called *Differentiated Integration* (DI). The most prominent case under the umbrella of DI is the example of the opt-out undertaken by the United Kingdom from the European Monetary Union (EMU) and Schengen. Even more, over the years, the European Union created a system that differs according to policy fields, participating countries and time periods. Regarding the current state, Schimmelfennig argues that "the EU has developed into a system of differentiated integration" (Schimmelfennig et al. 2015a, p. 770) and calls it "an essential and, most likely, enduring characteristic of the EU" (Ibid.). Following Bellamy and Kröger, this paper considers "DI as EU member states having different rights and obligations in regard to specific EU policies." (Bellamy and Kröger 2017, p. 626) Some member states choose to cooperate on a specific policy field, whilst others take an opt-out option (see Schimmelfennig 2016, p. 789). In the end, today's system is already a highly fragmented one, that has its roots as deep as the Schengen agreement from 1985.[2]

From the start, DI was seen as a remedy for the management of diverse interests and capacities among EU member states. In a situation of deadlock, DI enables some member states to pursue further integration, while others apply different standards and rules. This flexibility, as Kölliker showed, is the European Union's key mechanism for overcoming deadlock since the 1980s (see Kölliker 2006). Already in 1994, scholars talked about the mastery of the heterogeneity via 'variable geometry' (see Maillet 1994, pp. 11–17).

But in the current situation one certainly must ask again which effect DI has on the future of the European Union? While it is possible to argue that opt-outs trigger a domino effect that endangers the European project as a whole (see Slapin and Jensen 2015, p. 70), most researchers focus on the ensured heterogeneity by leaving the question of a *finalité* of the European project aside (see Dyson and Sepos 2010; Jensen and Slapin 2012; Kölliker 2001; Leuffen et al. 2013; Majone 2009).

[2] UK, Denmark and Greece rejected the idea of letting go of their external border control and Italy, due to lacking border control capability, couldn't join in the first place

Scholars normally agree on associating two functions with Differentiated Integration – the resolving of blockades in the short run and to ensure a uniform European Integration process in the long run (see Ondarza 2012, p. 12; Kölliker 2006).

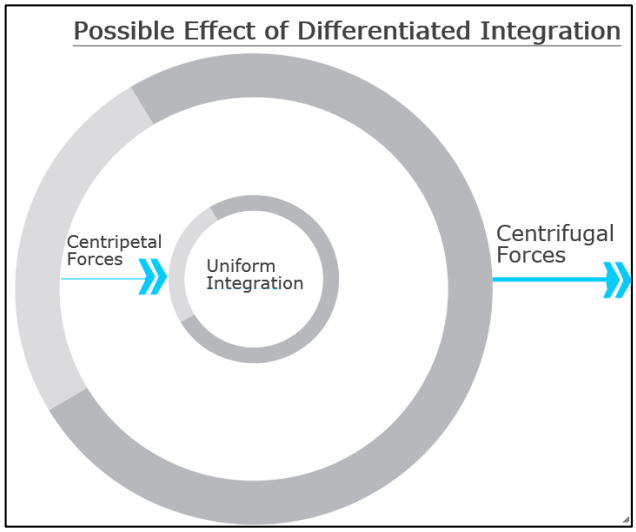

Figure 1 – custom graphic

Even though the literature emphasises the ensured uniformity in the long run, this second function, is empirically highly questionable. It is therefore possible to speak of centrifugal and centripetal forces accompanying DI (see Figure1).

In this master thesis, uniform integration is defined as an outcome that shows the same behaviours towards rights and obligations of every member state in the European Union and is therefore also a question of compliance with EU rules. Uniform integration is consequently not only a question of the bargaining process and the signing of a treaty or to accept a legislation, it is additionally the transposition into national law and its application.

This paper questions the second function of DI, looking at the outcomes produced by differentiated solutions. If DI leads to uniform integration in the long run, it should also influence the compliance behavior of states. As compliance studies are still of importance, as the current Juncker Commission called it a high priority[3], this study will combine DI with a study on non-compliance. Even though scholars have stated that there are less and less problems with non-compliance, following the data from the commission, one should recognize that in some cases member states still fail to deliver on agreed legislation. One of the last examples is the right to fair and efficient asylum procedures – an entitlement that is firmly enshrined in the *aquis communautaire* of the European Union as well as in international law. In fact, it is primarily the member state's responsibility to secure the correct implementation of these EU policies (see Schmälter 2018, p. 1331 f.) and according to Article 258 TFEU it is the European Commission as the 'guardian of the treaties' that should enforce those laws.

This paper combines two schools of research tackling the question of how a differentiated Europe and non-compliance performance are intertwined. Unlike Versluis' paper from 2007

[3] See citation at the beginning

where she states that the EU has "even rules [and] uneven practices" (Versluis 2007, p. 50), this paper's title refers to uneven rules (DI) and the possible result of even practices (Compliance). Putting forward the research question, if the level of Differentiated Integration influences the degree of non-compliance, the paper tries to investigate if DI can help assuring the uniform application of EU-law. Is Differentiated Integration a remedy for non-compliance? To put it on a more abstract level, this paper asks if agents comply better or worse with the norms embedded in regimes and international institutions, if they use the possibility to pick and choose policy they like and dislike?

This introduction will continue with the relevance of this study. In a second chapter this master thesis will advance with the aquis académique to get an overview on what has been written on both topics and which literature has already combined both fields. The biggest debates such as the conceptualisation of non-compliance will be touched upon in this part. In a third chapter this work will continue, presenting the theoretical framework and approaches on which the empirical part will be based. Following a simplified model of decision-making this study focuses on two different logics of compliance: a rational choice and a socialisation one. Based on these insights two hypotheses will be constructed: The first one will consider an overall country-level comparison, the second one will involve a specific policy-field comparison of states. In the fourth chapter the case selection and construction of cohorts will be clustered. Furthermore, this section will serve to implement a solid operationalisation of the two hypotheses. Chapter V will test the derived hypotheses with data from the European Commission on the compliance behaviour of states. In the last chapter the insights from the empirical part and their consequences for European Integration will be discussed. Lastly, this Master thesis will end with a critical assessment and possible further paths to study the relationship between Differentiated Integration and non-compliance.

2. Relevance

In this part, the paper will explore why a study on the relationship between non-compliance performance and Differentiated Integration outcome even matters. First, it is necessary to have a look at non-compliance studies and their relevance for the European Integration process. Second, the importance of studies on Differentiated Integration will be presented. Lastly, our approach to combine both fields of research will be defended.

2.1.The importance of studies on compliance

Walter Hallstein, the first president of the Commission of the European Economic Community (EEC), once stated that the EEC is a "Community of law"[4](Hallstein 1969, p. 33). Since its beginning, compliance is an essential part of EU's functioning and non-respect could endanger the process of European Integration as a whole. Even if *the Delor's myth* (that 80% of legislation will originate from the European Community) is still far from reality (see Brouard et al. 2012), complying with EU-law is highly important. The relevance of the study of non-compliance will be underpinned by a legal, an economic and a political argument.

First, implementation studies concerning the EU are of highest importance, as 'integration through law' is still the process of how the Union is advancing. European Commission (EC), council together with the Parliament legislate, whereas the member states have to implement and applicate the law. Secondly, it is the EC's and the European Court of Justice's (ECJ) matter to check upon its rightful implementation. If this process becomes kind of a dead letter, the rule of law as the cornerstone of European democracy becomes obsolete. If the *aquis communautaire*, referring to the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law, loses its trustworthiness, the EU loses its basic characteristic. Even more in comparison to a nation-state, it has to be argued that the disrespect of rules has severe consequences for the state of the Union (see Falkner 2013b, p. 13).

Having an economic perspective of the phenomena, it becomes clear that the EU is founded on the principle of same rights and obligations for everyone. In a common internal market, where tariffs and barriers are forbidden, goods can circulate freely between member states. Nonetheless, there is still competition between regulated actors across the market striving for a bigger market share. In a competitive situation, "uneven implementation of [...] rules could

[4] in German a "Rechtsgemeinschaft"

distort competition across the market" and could create "[un]equal competitive positions for all regulated actors" (Versluis 2007, p. 50). It is not surprising that most complaints to the European Commission come from businesses all over Europe. In consequence, non-compliance undermines the 'economic integration' in the European Union and the functioning of the internal market.

Finally, Europe seems to be in a fragile state at the minute. Uneven compliant behavior also endangers the political components of integration. If one member state does not apply the law as it should, another one could blame her for freeriding, which will result in tensions. As seen during the Euro crisis, with the non-respect of the Maastricht criteria by a lot of member states, non-respect of the rules can create a system of public blaming and shaming. The same accounts for the migration crisis causing distrust in between the states. Especially in a situation like that, it is important to enforce the 'rule of law' in the European community. This becomes even more significant when Poland and Hungary try to undermine the rule of law in their respective countries with "The Politics of Fear" (Wodak 2015). According to Börzel, non-compliance fuels national populism even more as the EU fails to achieve common solutions creating a 'cycle of authoritarism' (see Börzel 2018, p. 480). Consequently, even more scholars should focus on the good application of law, as it ensures the long-lasting existence of the EU.

2.2. The importance of studies on Differentiated Integration

As shown in the introduction, DI is an important and enduring characteristic of the EU.

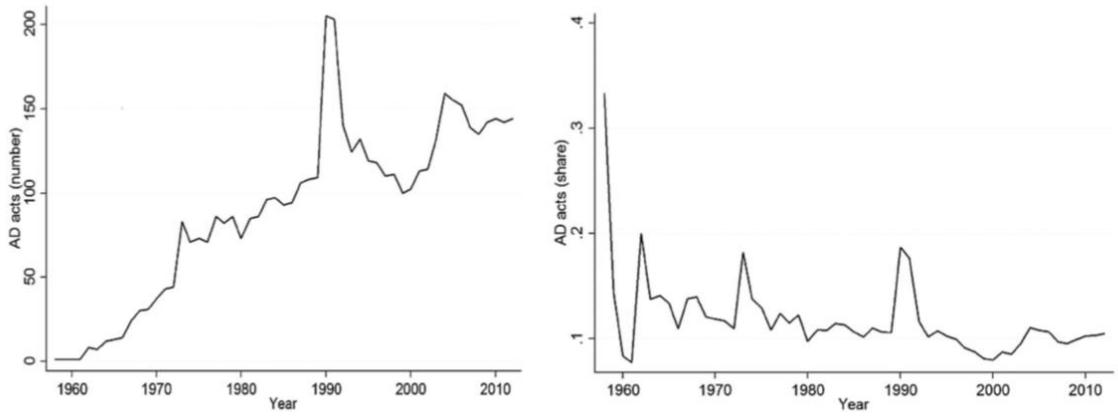

Figure 2: Duttle et al. Differentiation number increasing.PNG (Duttle et al. 2016, p. 413)

Duttle et al. showed in 2016 that the total number of actual differentiations in force (including primary and secondary law) is constantly growing since the 1960s (see Figure 2). This could be partly explained by a growing *aquis communautaire*. However, a look at the relatively stable

share of actual differentiations in force shows that DI remains an enduring phenomenon in Europe. As already mentioned, for the European Commission it was one of the scenarios in the White Paper on the future of Europe (see European Commission 2017, p. 20). As a consequence, European studies as a field of research should revolve around questions surrounding opt-outs and opt-ins. Especially the question where DI leads to is of highest importance for the future of the European Union. Will there be a dissolvement of the Union, which could be argued after (a possible) Brexit, or will the centripetal forces be stronger and unite Europe in the long run? This study wants to take part in the advancement of the field, looking at outcomes that are created by DI.

2.3. Relevance to combine both fields

> "While we have an extensive and rich data set on compliance as a dependent variable, it is far from obvious how we can find and compile data on interesting independent variables that can be matched and merged with our data. Depending on the focus of the research, a wide range of country-, rule- and policy sector-specific hypotheses are conceivable." (Börzel and Knoll 2012, p. 21)

First, as Börzel and Knoll called for further research on compliance as a dependent variable, this paper aims to develop such a study, combining it with an independent variable of DI.

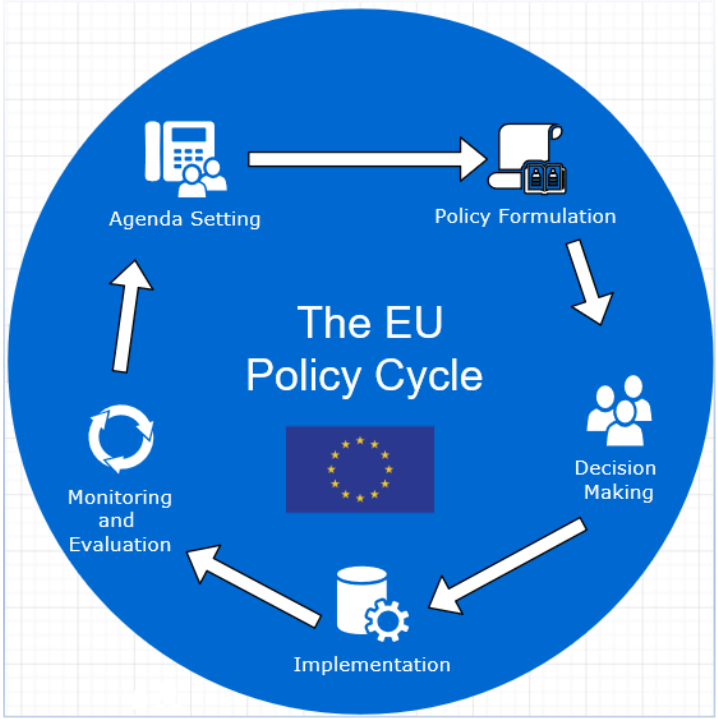

Figure 3: Custom Design

Second, looking at the policy cycle of the EU, two stages of the development seem to be highly relevant for the research question: First the decision-making and second the policy implementation process (see Figure 3). As to the author's knowledge, almost no study combines both fields in the way this study is doing. It is further argued that non-compliance is not only a problem of the policy implementation of the European Union but also a possible extra alternative action during bargaining processes. This paper argues that both need to be thought together as they influence each other. In the two-level game of European Integration (see Putnam 1988), almost no

research studied the relationship between both fields, which could give new insides on how decisions in the EU are made. There is a lacuna of research this paper tries to fill.

Lastly, this work can contribute to a broader question, if states should gain more freedom in international organizations to opt-out from the acquis as they might better implement the remaining law. This research tries to help international organizations to find an equilibrium between overregulation, resulting in possible non-compliant behavior from nation-states, or underregulation, not having any effect on nation states at all.

II. Aquis Académique

In order to tackle the question how DI and non-compliance are intertwined, it is of importance to present what has been written on how both fields influence each other. This will be undertaken, first for the field of non-compliance to further it with a part on DI. This thesis tries to cover the most important pieces written on both topics but cannot claim for exhaustiveness.

1. The Study of non-compliance

What makes the securitisation of good application of law so difficult stems from the EU's *sui generis* character. The latter refers to the fact that the EU is neither an International Organisation, nor a kind of state and cannot be subsumed under traditional comparative governmental theory categorisations. The constitutional court of Germany called it once a 'Staatenverbund – an association of states' (BVerfG 2009), which displays how the EU is in between two poles, having direct effect (see Van Gend en Loos 1964) but no 'Kompetenz-Kompetenz' (see Benz 2004, p. 79). In contrast to a (unitary) state, decision-making is not centralised (see Schimmelfennig et al. 2015, p.8). It is still the member states who are responsible to transpose European legislation into national law, being especially the case for directives.[5]

The non-respect of EU law is certainly not a new phenomenon and various research has been written to get a grasp of it. Ellen Mastenbroek once structured the field into three different waves all having different foci (see Mastenbroek 2005). All started off with a study by Krislov et al. from 1986 that first pointed to the growing problem of non-compliance in the EU (see Krislov et al. 1986: cited in Mastenbroek 2005, p.1004) This so-called first wave was influenced

[5] For Literature on nation-state and memberstateness conflict see Bickerton et al. 2015, p. 705; Bulmer and Lequesne 2013.

by a lot of different disciplinary backgrounds, focusing on legal variables (quality of European legislation), administrative explanations (national legal culture) and political causes from the national and supranational level. As there was a lack of theoretical approaches, researchers combined International Relations (IR) theory insights from earlier implementation research and legal studies, so that compliance was understood as a rather a-political process (see Ibid. p.1004). Inversely, the second wave, starting during the 1990s, put forward the Europeanisation and the Goodness-of-fit approach looking at the discrepancy between national and supranational regulation (see Börzel 2003). Goodness-of-fit looks at the cost of adaption for MS in a rational way and stresses the normative aspects of adaption. Non-compliance studies became more and more theoretical. Nonetheless, one must certainly bring the wave's assumption into question, as Treib did in 2003, that MS are always willing to maintain the status quo. Quite often MS strive for policy change in their favour, especially through European channels (see Treib 2003).

As the misfit approach produced different empirical findings, a third wave of research occurred focusing on the country and sectoral level of non-compliance. In 2005 Mastenbroek called to take back political explanations into non-compliance research. This paper completes 'Mastenbroek's three' by a fourth wave from Treib focusing for the first time on the European Court of Justice Rulings, whereas quantitative studies still focused on the timely transposition of directives (see Treib 2014, p. 13).

For the sake of this study one could argue that all these studies almost exclusively focused on the transposition of legislation or the implementation process. Misfit and Goodness-of-fit never included a possibility to opt-out from certain legislations. This study will include the negotiation process of a legislation as it might have an influence on the outcome, the transposition.

1.1. What is non-compliance and how to make it measurable

The field of non-compliance was always marked by a vivid discussion on which data to use as a proxy for non-compliance. First, this paper presents a definition for non-compliance. Secondly, a proxy for non-compliance will be constructed. Whereas various authors criticised the flawed data availability, a lot has been discussed on conclusions based on studies using them (see Börzel 2012; 2012a; Treib 2014, p. 17; Toshkov 2010a, p. 12; Hartlapp and Falkner 2009, p. 283). This master thesis will take part in that discussion.

Starting off with a more generalist definition, stemming from economic research one could agree that "compliance refers to a target acting in accordance with an influence attempt from the source" (Payan and McFarland 2005, p. 72). Looking at the EU the definition helps to distinguish between *target* as the member state and the *influence attempt* referring to the supranational legislation and the *source* being the European legislator (see Table 1).

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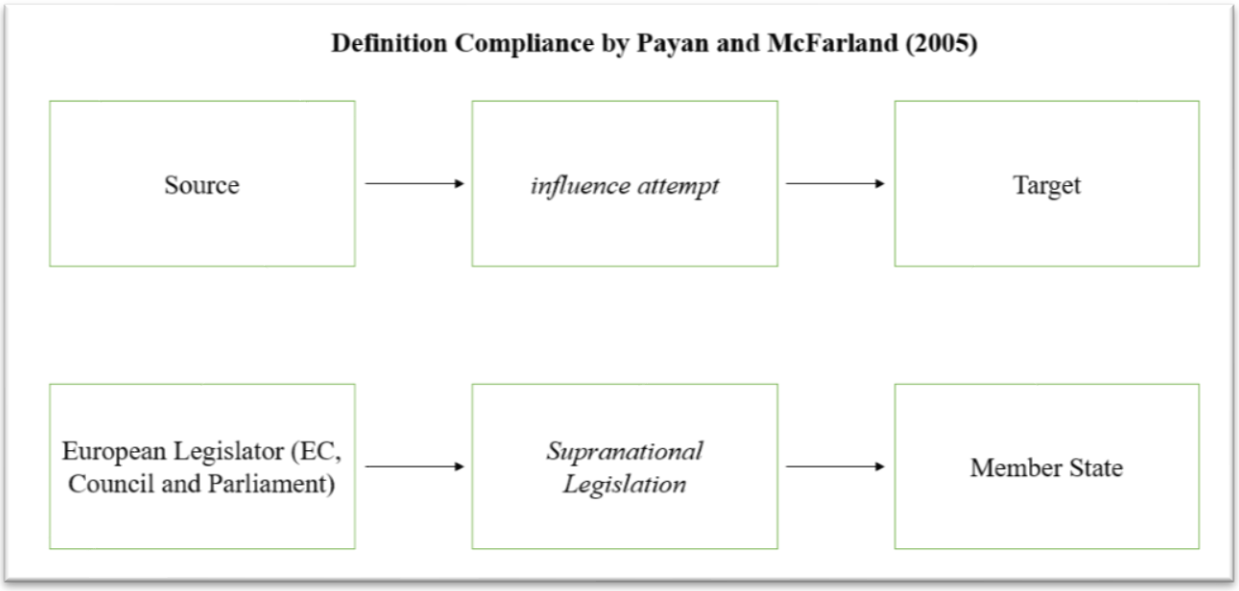

Following a more legal reading of compliance, it refers to obeying to a law, rule or a norm (see Gelderman et al. 2006, p.5). The definition that is most often used in the EU non-compliance literature is Checkel's definition from 1999 which states that compliance is "the extent to which agents act in accordance with and fulfilment of the prescriptions contained in […] rules and norms" (Checkel 1999, p.3). Turned around this definition leads to a quite wide but for the sake of this paper suitable definition:

Non-compliance refers to the fact that a member state's transposition, application or enforcement is not in line with the requirements of EU rules and norms.

Europeanisation as a process of European Integration may explain but also includes compliance with European legislation (see Börzel; Risse, 2000, p. 4; Bauer et al. 2007, p. 406).

1.2. Source, Aspects and Domains

Non-compliance can be applied to primary law such as the treaties of the EU, secondary law, like regulations, directives, and decisions, and judgements by the Court of Justice. Most authors

include the summit decisions taken by the head of states and the agreed economic and monetary union rules. Nonetheless, especially in the early 2000s the focus of studying non-compliance lied on the transposition of EU-directives. This stems from its basic legal characteristic for member states having the obligation to transpose and still being free to choose an instrument to implement and reach the objective of the directive (see Angelova et al. 2012). Implementation remains therefore often a black box as most member states have different legal traditions on how to transpose directives. Some are centralised around the prime minister or president of the respective state, others circle around the foreign ministry and others have a decentralized implementation process (see Szukala 2012, 203 ff.). It differs from country to country and in between different matters of the directives: Some have a high participation of their legislative, whereas in other states transposition is solely an administrative process. To measure and to check on the compliance performance of a state is therefore a highly complex task. For this paper's sake, as Knoll did in 2016, this study focuses on the implementation of directives (see Knoll 2016).

Figure 3a – Custom Design

Furthermore, derived from the definition one can state three aspects of non-compliance: First, the non-transposition refers to the incorporation of the policy provisions of EU directives into domestic law and can be either delayed or incorrect. Second, the non-application refers to the situation that the law is in the books, but not applied. It is a hard task to find out if there is a discrepancy between the law in the book and its actual application, as feedback and evaluation demand a lot of resources. Third, the non-enforcement of EU-law, refers to not detecting or not forcing change either by regional or national authorities (see Toshkov 2016, p. 4).

In the study of non-compliance one can further differentiate between time, sector and country being called the *domains of non-compliance*. For example some studies just focus on one specific region (see Jano 2016), or just one time frame (see Hille and Knill 2006) which makes it more and more difficult to find broad generalizations in the field that hold for all domains of non-compliance (see Toshkov 2010, p. 20).

1.3. How to measure non-compliance

It is the conceptualisation of non-compliance that poses the biggest problem. This Master thesis will present different ways to make compliance measurable. Traditionally EU-compliance studies can be separated into two camps, one focusing on the *timely transposition of EU directives* in the MS, the other studying the *infringement proceedings* that the EC launches against member states for the violation of EU law. As Toshkov, Börzel and others show, both proxies try to "generate results of higher generalizability and external validity [but] they have their own shortcomings and methodological obstacles" (Toshkov et al. 2010).

For the *timely transposition*, it is the MS that try to sugarcoat and over-exaggerate their effort to comply with the aim to avoid a 'so-called' infringement procedure (IP) against the respective country (see Börzel and Knoll 2012). As IPs are a part of a mechanism that can have a lump sum or a penalty as a result, MS will try to avoid an official and judicial stage of the IP.[6] Furthermore, timely transposition does not contain any information about the content and the completeness of the transposition measure. It is therefore possible to conclude that the timely transposition just focuses on one *aspect of compliance* (see Hartlapp and Falkner 2009). An important part of the phenomenon is therefore not measured and gets lost (see Siegel 2011). Looking at the timely transposition of EU-directives leaves out two important aspects of non-compliance – the application and enforcement. Incorrect and missing practical applications are not included. Hartlapp gives a devastating judgement calling notification data a "superficial measure" (Hartlapp, 2009, p. 298).

[6] For an overview of the different stages of an IP see: https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

On the other side, *Infringement procedures* as a measurement for non-compliance are part of the 'remedies for non-compliance', which are put in place for the monitoring process. It is just the Commission as 'the agent of trust' who can launch such an IP as stated in the article 258 of the TFEU. Nevertheless, as it is visible in figure 4 taken from Börzel and Knoll, most of the IPs have their origins with complaints from outside the EU-Institutions, which shows a lack of persecution from the Commission. This can be explained by a lack of staff. If one MS does not comply after a set time-limit by the Commission, the EC will send a so-called Reasoned Opinion (RO) and the Court of Justice becomes the main actor and may in the end of the process impose final sanctions or a lump sum on the member state. Nonetheless, these penalisations are highly rare and "the Commission regards second proceedings and penalization as an exceptional means to demonstrate power in selected cases, and not as the standard means to be applied whenever member states do not comply with ECJ judgments" (Falkner, 2013b, p. 23).

Figure 1: Origins of infringement proceedings 1995-2009

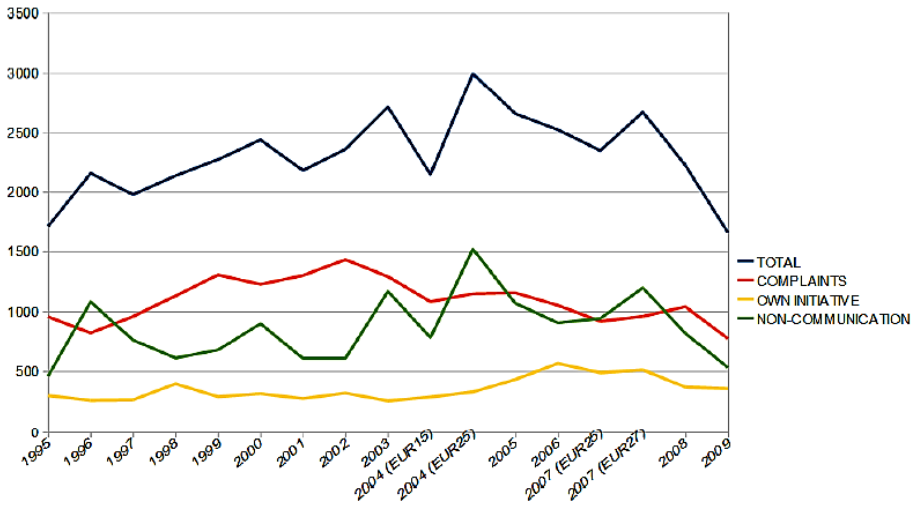

Figure 4: Börzel and Knoll (2012): p.10

The only use of IP to measure non-compliance amounts to research the top of an iceberg to find out something about its wholeness (see Falkner 2005). As there is a non-formal stage before an IP, called 'EU pilot', where a lot of cases already get settled and the fact that non-application is often not discovered, these analyses just draw partial conclusions. Findings about the explanations of variation in compliance might be just a segment of the whole picture. Since the database comes from the Commission's infringement data set, we cannot be sure "whether they constitute a representative sample of all the cases of non-compliances that occur" (Börzel et al., 2012a, p. 456). In some cases, the data might not be complete or biased due to political reasons. After all, Hartlapp states that "much of the scholarly research on compliance with EU law is in fact research on the reaction to non-compliance on the part of the European Commission" (Hartlapp et al., 2009, p. 293).

Whereas both only measure a partiality of non-compliance, they serve as an indicator for the whole non-compliance complex. All the data is collected under the same circumstances and therefore allows a comparability of the results for states and policy fields. For the purpose of this Master thesis, data on the *transposition deficit* and the *Infringement proceedings* will therefore be considered.

2. The study of DI

After establishing a definition and discussing the data availability of non-compliance, it is necessary to take a look at the development of the field of DI in European Studies.

The field started off, when the traditional theories of European Integration failed to explain the evolvement of the EU with different rights and obligations of member states. The separation of MS into "laggards and integrationists" (see Slapin and Jensen, 2015, p. 64 f.) could not really be explained by traditional approaches to European integration. Supranationalism, institutionalism and intergovernmentalism did not consider 'a graded membership' for the European Union. Even with the occurrence from the 1980s onwards, these theories stuck to its assumption of uniform integration.

As a reaction a group of researchers first tried to categorise the phenomena of DI. The founding study of the DI field is from Alexander Stubb (see Stubb, 1996), establishing different *kinds of DI*. Based on these insights, Bellamy and Kröger, newly established a conceptualisation in 2017 (see Bellamy and Kröger, 2017, p. 628). They distinguish between three categories – time, space and policy. Putting the focus on time, leads to a '*multi-speed-Europe'*, where some MS advance in the hope that others will follow later. Space differentiation is linked to '*variable geometry'*, meaning that some territories of the EU permanently advance, whereas others lag behind. Differentiation on policy is associated with '*Europe à la carte'* where MS can pick and choose the policies they like to participate on. All in all, there are various different studies surrounding the question of conceptualising DI, being the reason why Holzinger and Schimmelfennig lamented that the field is "overconceptualized and undertheorized" (Holzinger and Schimmelfennig 2012, p. 302). For the sake of this paper the most important conceptualisations were presented. [7]

[7] Most specific overview of the conceptualisation with 6 dimensions is given by Katharina Holzinger and Frank Schimmelfennig, 2012, p. 302

Based on Schimmelfennig et al., one can also distinguish between *different kinds of DI* (see Figure 4). Firstly, they separate horizontally, referring to the territorial differentiation, from vertical differentiation, representing different speeds and levels of centralisation (see Schimmelfennig, Leuffen and Rittberger, 2015: 765). Secondly, horizontal DI is split up in internal horizontal differentiation, which is the case, if at least one MS does not participate in integration, and external horizontal differentiation, where non-MS opt-in on integration steps (see Ibid. 767). As this paper deals with member state's non-participation in certain policy fields and certain legislation, the research is limited to internal horizontal integration.

It is furthermore possible to differentiate DI concerning the source it is based on. It is traditionally differentiated between primary law, this is to say the treaties since Rome and the European Charta of Human Rights, and secondary law, derived from the treaty basis, such as

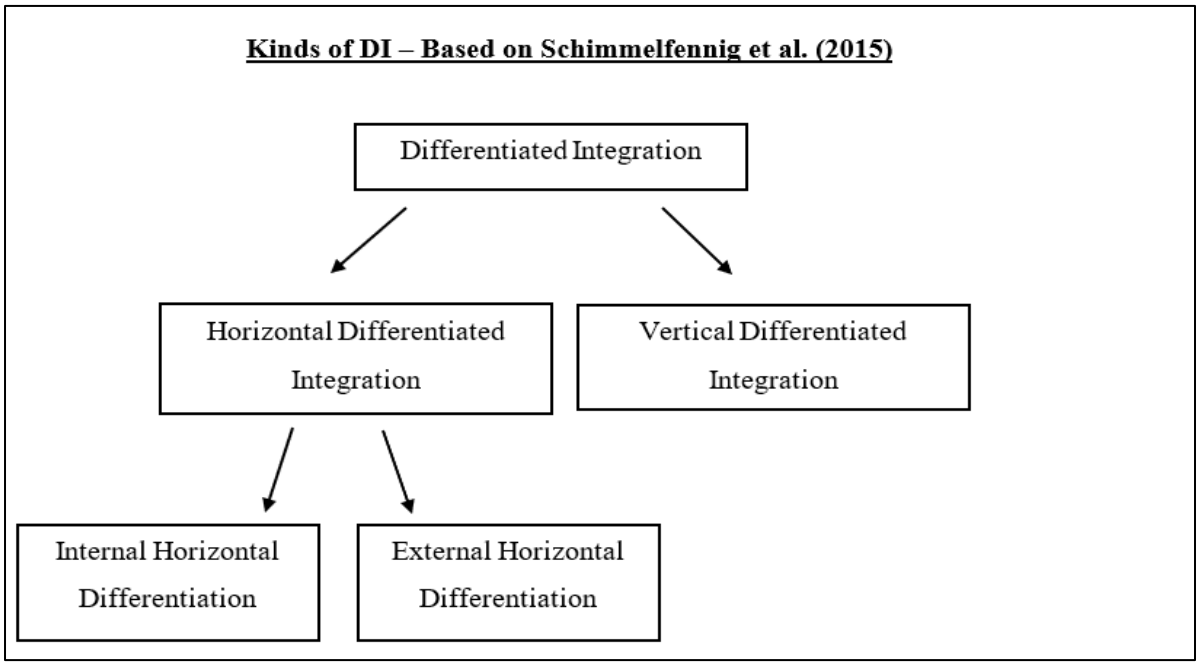

Figure 4 – custom graphic

regulations, directives and decisions. Most research focuses on primary law, whereas secondary law has been highly neglected (see Duttle et al. 2016, p. 416).This study will try to include the two sources of DI, primary and secondary law as a basis to construct an independent variable (see part IV).

III. Theoretical approaches

The following part aims to establish a theoretical framework as a solid basis for the empirical research done in part V. First, it will be identified why traditional EI theory cannot explain how DI and non-compliance are intertwined. Having produced a lot of theory to explain member state's compliance record, the most important compliance theories will be presented as some insights into DI theorization. It will be possible to divide both fields in rational choice explanations and constructivist approaches. Lastly, this paper's hypotheses will be derived from a theoretical approach based on former research.

1. Basic theories

Classical Theories of European Integration such as Hoffmann's *Intergovernmentalism* (see Hoffmann 1966) or Haas *Neofunctionalism* (see Haas 1958) aimed at explaining the deepening of the European communities. Whereas the first sees integration as a product of bargaining between member states, the latter explains integration as a supranational cooperation and self-enforcing process via 'spill-overs' (see Saurugger 2010, p. 67 ff.). Both have without doubt made big contributions to the field of European Integration, nonetheless their theorization and the theorization of their successors (see Moravcsik 1993) are based on the assumption that integration always occurs following a uniform character. Looking at the reality and the highly complex differentiated EU system, the traditional theories do not help tackling our research question. As traditional theories have assumptions that do not cover this paper's fields of study, they do not serve our purpose.

1.1. Why do member states comply?

Whereas traditional theories don't serve this paper's purpose, non-compliance theory established a lot of different approaches to explain why some member states comply better than others. Coming from International Relations theory, the field emerged from the late 1980s (see Haas 2011). It aimed at answering the question of what drives compliant behaviour. Following the basic literature, this paper presents three different approaches to explain the European "non-compliance community" (Falkner 2013a, p. 5).

First, an explanation of NC is the *enforcement approach* as first theorized by Downs et al. (see Downs et al. 1996, p. 385), based on a coercive stance and character. The main argument is that states only comply when the loss of being detected is higher than the perceived gains of complying with EU legislation (see Schmälter 2018, p. 1334). States weigh the cost and benefit

of compliance. Downs therefore follows an ontology where states have a stable and unchangeable interest. Being rooted in a rationalist thought (see Keohane 1984), this school of thought assumes that states are closed entities with a unitary interest. As the enforcement approach sees non-compliance as a voluntary phenomenon, only sanction and monitoring as a remedy can dissolve the problem.

Whereas enforcement scholars assume that states willingly violate international law, the *managerial* theorists argue that non-compliance is more a consequence of capacity limitations. Hille and Knill mention the "bureaucratic strength and effectiveness of a country" (Hille and Knill 2006, p. 531) as an explanation for non-compliance. Börzel sees three differences sub-explanations of the phenomenon mentioning the lack of time for transposition, a wrong understanding of the legislation or insufficient capacities (see Börzel et al. 2012, p. 459). Remedies for non-compliance should therefore provide financial means and help interpreting the legislation as they are counter measurements against "financial, administrative or technical shortcomings" (Hartlapp 2007, p. 655). To sum it up, the managerial theorists explain non-compliance not via intentional non-transposition, but due to failing administration or a lack of understanding, which is an unintentional cause.

The enforcement and the managerial approach were the traditional two ways of studying non-compliance. Whereas the first assumes a stable state interest with a sort of black box, the latter tries to open the black box and look at a state's capacity.

Lastly, this paper also includes a third approach called *persuasion*. Based on the reasoning of normative obligation, states respect and implement a rule when they perceive it as legitimate. It is again Hartlapp who follows the identity turn in the 2000s arguing that norms and values drive MS behaviour (see Hartlapp 2007, p. 656). Coming from the IR theory of social constructivism[8] compliance is therefore not a utilitarian calculus of interest, but interest is constructed in a process of mutuality. Therefore, non-compliance can also be a question of legitimacy and perceived justice and fairness. Following an ontology of social constructivism, highlighting the importance of values, the persuasion approach values a different logic of action. Therefore, the compliance outcome is not always a result of being in line with the rationally calculated interest of the state. State's interest is also marked by the common interest of the community (see Börzel and Risse 2000, p. 8). Consequently, norms are constitutive for

[8] One can argue, as Risse pointed out that social constructivism is not a theory itself, but can incorporate reasoning from different theories just as neofunctionalism or supranationalism (see Risse, Thomas 2019).

actor's identities and their behaviour. What scholars call the *socialization effect* shows that actors have a higher motivation to follow rules if they are part of a community and their behaviour is socially acceptable. Therefore, it is not about the maximising of his or her self-interest but rather about the interactions between different actors (see Börzel et al. 2012). The longer and the deeper they are integrated in the society the better the rules are respected. A remedy for non-compliance could therefore be to socialise states that are not that well integrated in the European Union. Sanctions and obligations would only harm the purpose of compliance.

Abstraction of NC-Theory

What can be derived from theory of non-compliance for this paper's purpose? First, it is possible that states act and comply for two different reasons. Following two different ontologies and behavioural logics/perspectives, states can either follow their unitary, self-centred and rational interest, based on a utilitarian calculus, which is called the "individualist ontology" (Checkel 2001, p. 556) *or* follow the interest from sociological institutionalism, where socially acceptable behaviour and a sense of intersubjectivity in the group is a dominant factor – what Checkel calls the "ontology of mutual constitution" (ibid., p. 559). It is therefore possible to differentiate between logics or motives of compliance. States conform to the rules because it lies in their interest (rational choice) or that their willingness to comply is based on a "sense of appropriateness" (March and Olsen 1989; Hartlapp 2007).

Table 2: Theoretical Approaches – Custom Design

	Rational-Choice	**Sociological Institutionalism**
Ontology	Individualist	Mutual constitution
Behavioural logic	Self-Interest and rational calculus	Sense of appropriateness

1.2.Why is there a differentiated Europe?

The same logical conclusion is also drawn in the field of research on DI. Before looking deeper into that dualism, a short introduction to DI theory is needed. The aim of the school was and is mostly to explain why DI is an increasing phenomenon since the Maastricht treaty (see Schimmelfennig and Winzen 2014). The theorization of DI was a long-neglected field and treated as the stepchild of traditional EI theories as concentration laid on the formal transfer of competences from the national to the European level (see Holzinger, Schimmelfennig 2012, p. 297). Even when DI was already a reality, liberal intergovernmentalism and supranationalism ignored the fact that the assumption of uniform integration was false.

Nonetheless, taking orientation from the former ontological divide, this paper separates the late emerged field into two schools. As in non-compliance theory, it is necessary to start off with a rational choice argument. States have either a stable unitary interest to pursue integration or not to pursue integration. If integration lies in the margin of self-centred interest, they will pursue uniform integration, if not, they will try to opt out from legislation. The school's foci therefore lie on distribution preferences, bargaining power and the institutional setting. One of the major scholars is Kölliker who based his theory on the assumption, that actors behave in a rational way with the aim to maximise utility. For him, states have a unitary and stable interest they pursue during supranational bargaining processes (see Kölliker 2001, p. 133 f.). As in the realist school of International Relations states are a 'black box' where the interest formation is a given. As in table 2, the ontology of the rational-choice theory is individual and follows a logic of self-interest and a relies on a cost-benefit calculus.

Opposing again another possible explanation will shed light on the DI literature. For example, Adler-Nissen argues that identity and values are important factors creating and shaping DI. In her opinion one cannot think DI without considering socialisation effects and legitimacy constraints (see Adler-Nissen 2009, p. 63 f.). The main argument here is that states, even though it is not in their primary (utilitarian) interest, pursue integration due to socialisation effects as explained in the non-compliance part. Community values and whether a rule is formally acceptable are more important than the cost that integration brings to the country. Comparable to Schimmelfennig's Eastern Enlargement argument with the "Logic of Rhetoric" (Schimmelfennig 2001), the character of intersubjectivity comes into play. A "sense of appropriateness" is what drives integration.

1.3. Limits of the Theories

Up to this point it was possible to establish an overview of the traditional theories used to explain integration in the EU, the emergence of non-compliance with its three approaches and lastly theorisation surrounding the field of DI. Furthermore, it was possible to find a dualism of reasoning in both fields. Hence, all these approaches have their own shortcomings concerning this paper's research question, as will be shown in this part.

Both presented approaches fail to explain how the two variables are intertwined. Looking for reasons why member states do not comply with EU-legislation will be important for this paper's theoretical approach but fails to include the possibility of a differentiated solution during the

bargaining process. Looking again at the policy cycle it focuses solely on the implementation part, ignoring the decision-making part. Vice versa, theories of DI fail to include that during the bargaining process states have the possibility to agree to the legislation but just not to implement it on national level. Therefore, two theoretical approaches will be constructed. The first, deriving from a rational-choice logic, the second based on a logic of socialisation.

2. Own theoretical approach

The author of this paper decided to establish a hybrid out of non-compliance theory and DI theory. Combining both theoretical backgrounds comes with certain difficulties as at least an ontological unity between both approaches needs to be established. First, one rational choice approach will be established. Secondly, constructivist approaches from both fields are combined. Both approaches serve as a source to derive opposing hypotheses.

2.1. Rational-choice logic

In order to base a firm theoretical framework for the analysis in part V, it is necessary to lay the assumptions for this part's research.

First, it is assumed that member states have a unitary interest that was formed on national level, that they rationally pursue on supranational level. If a proposed legislation is in their interest, they will pursue uniform integration. On the contrary, if the MS is not in favour of the legislation, it will try to either veto the legislation or to opt-out of the legislation. In such a situation, following Hirschmann from 1970, a state has the possibility to either *exit*, meaning the withdrawal from legislation or to *voice*, to complain about and veto the proposed legislation (see Hirschman 1970). This paper's approach furthers that notion based on Jensen and Slapin, as states rationally calculate if it is more suitable to stay part of the decision-making process or to opt-out. At the heart of their approach lies the differentiation between laggards and integrationists. Both have to "weigh the costs and benefits of deeper integration against the costs and benefits of pursuing integration in smaller groups" (Jensen and Slapin 2012, p. 67) As in Jensen's and Slapin's approach, this paper presents a simplified model of decision-making in the European Union. It is therefore possible to find a starting point with a supranational initiative stemming from the Commission. In this model the European Parliament is excluded. This is justified first by the fact, that the EP is not always involved in decision-making on supranational level and secondly, that the EP is known for a mostly pro-integrationist stance

and can therefore be subsumed under the integrationist position in bargaining. Lastly, the EP is only an actor during the bargaining process but not during the implementation of a legislation. MS represent the main actors in the model. Whereas the Commission desires the most integration in all policy areas, the MS can be differentiated in laggards, preferring little or no cooperation and integrationists, desiring high cooperation in the policy field.

As states calculate rationally, what consequence it would have staying part of the decision-making process or leaving it, a third option appears to be an important factor throughout the decision-making process. Following the rational-choice approach it is possible to add a 'non-compliance option' during the bargaining process. As states have an interest to stay part of the decision-making process, still having the possibility to *voice* future legislation, they could just decide not to implement the EU-legislation in question, risking a lump sum imposed by the ECJ. Based on the enforcement approach, states violate international law willingly if the costs of compliance exceed its benefits. Therefore, in some cases it can be in the interest of the state, not to find an opt-out option and to confirm the legislation on supranational level but not to implement it on national level, risking to be detected.

First, looking at this rational choice logic, a simple but valid argument comes into mind. The less a state has the burden of European law, the better it can applicate the rest of the law as there is lower costs of complying. Vice versa, the more states pursue uniform integration, the more burden of compliance they need to carry. This very simple thought comes from a time-frame perspective. States that already opted out during the bargaining process will have less problems with compliance as there is less burden of European law on their shoulders.

Secondly, another reasoning of the rational choice logic comes into mind. States that epitomise European Integration as they were part of the EU from the beginning on, will have problems to *exit* the decision-making process. It is for example just not possible for France or Germany to opt-out from an entire policy field. Even if it is not in their immediate interest to agree to the proposal, they will agree to their long-term interest of holding the European Union together. Germany and France follow a logic, according to which there cannot be a European proposal for which they are not involved. This paper therefore predicts that states like Germany and France with a low level of differentiation cannot *exit* legislation. This missing *exit option* during bargaining processes leads to a bigger problem with compliance. As the transposition and implementation of a directive happens on national level, uniform integration states will have big problems transposing, implementing or enforcing the legislation on national level.

Based on these two theoretical logics, a first hypothesis is constructed:

Hypothesis Ia:

States that always pursue uniform integration have a bigger problem with non-compliance than countries that chose opt-out solutions.

States like Germany and France have a high interest to portray themselves as being pro-integrationists even though it might be contrary to their policy interest. The long-lasting advantages of uniform European Integration is in their perception higher, than the short-term loss of staying part of the decision-making process. During the bargaining process they are in favour of more integration and will not veto the legislation. This can also be the case if they are not in favour of the legislation. For them a flawed download of the legislation is a kind of remedy. Based on a rational-choice reasoning this paper expects that their non-compliance share will be higher as the veto solution cannot be used.
Vice versa, for states like the UK or Denmark a lower level of non-compliance is expected as the veto and opt-out solution is used quite frequently. As they don't always pursue the overarching aim of uniform integration, it is easier to opt-out instead of not implementing. Therefore, a lower non-compliance record is expected.

Lastly, if Hypothesis Ia holds, it is also expected to see this effect inside policy fields. If DI has a real impact on the non-compliance behaviour of a state, this should be observable in all different policy fields of the European Union. Looking at different policy-fields would allow to confirm the general tendency observed while verifying HI. Therefore, a second hypothesis is constructed regarding the difference between countries in different policy fields:

Hypothesis IIa:

If a country always pursues uniform integration, their non-compliance record is higher not only in general but also in specific policy fields.

2.2. Socialisation logic

As shown before, there are various explanations for non-compliant behaviour of member states. In this case it is important to oppose a probable explanation to the rational choice hypotheses. The socialisation effect based on scholars like Adler-Nissen argue that the more a country is entangled and integrated, the more it is socialised in the European Union and the less problems

they have with non-compliance. Furthermore, the more European norms, ideas and policies are already part of the state's aquis, the more likely it is, that states have less problems with non-compliance (see Olsen 1996, p. 272). This would in fact mean the total opposite of the rational choice argument. Countries with uniform integration would therefore have a low non-compliance record as they are way more entangled and follow the logic of appropriateness, whereas states like the UK and Denmark that are less integrated would have a higher non-compliance record.

States like Germany and France that have been in the European Communities from the treaty of Rome onwards are way more socialised than the UK and Denmark. Not only the time variable but also the scope of European legislation on the nations is very different. Especially the UK with its Eurosceptical approach, ranging from 'We want our money back' to the NHS-bus during the Brexit campaign shows that the separation between 'us – the Brits' and 'the continental Europe' still exists. On the contrary, it was the basic peace between Germany and France after World War II that made the development of such a Union possible in the first place and is seen as the motor of integration.

Therefore, in a logic of socialisation an opposed hypothesis can be constructed:

Hypothesis Ib:

States that chose opt-out solutions have a bigger problem with non-compliance than countries that always pursue uniform integration.

Lastly, a second hypothesis can be generated, building up on Hypothesis I:

Hypothesis IIb:

If a country always pursues uniform integration their compliance record is lower not only in general but also in specific policy fields.

IV. Methodological Approach, Conceptualisation and Variables

1. Selection of Cases and Countries

As this is a first step to look at the relationship between Differentiated Integration and non-compliance this paper will use descriptive statistics as its method. The interstate comparison will be conducted with key statistical figures. As part III showed, this paper uses a deductive hypothesis-generating and hypothesis-validation approach. To disprove or approve hypothesis an empirical section will be presented in part V. It will compare the specific countries over time and in different policy fields. In order to do so, a categorization and classification of countries is primarily necessary. The independent variable of this research is *the degree of Differentiated Integration*, which is taken from the level of primary law DI and secondary law DI.

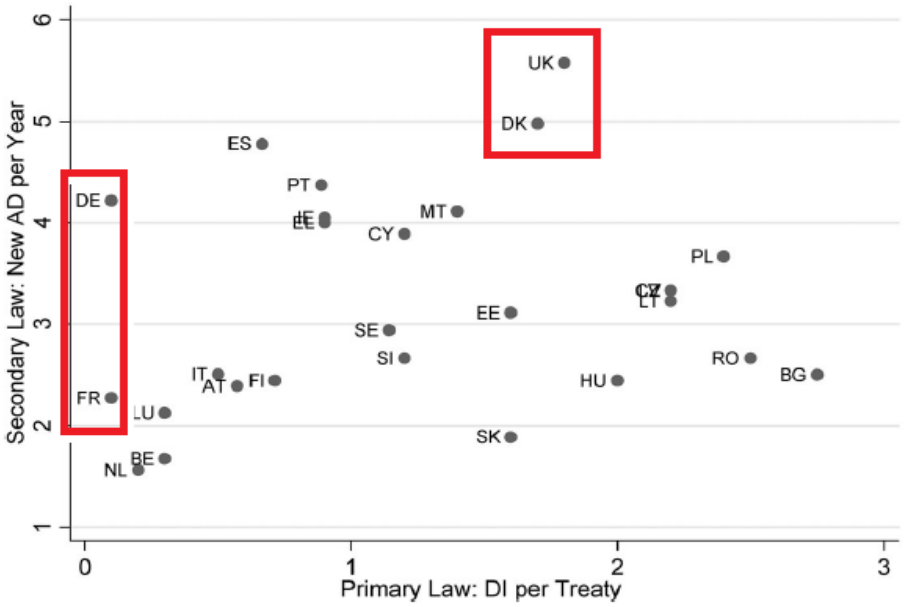

Figure 5: Different levels of DI (Duttle et al. 2016, p. 427)- Relationship primary-secondary law differentiation by country, new AD per year/treaty

To build the degree of DI, countries will be pooled via their opt-out behaviour, derived from the study by Duttle et al. from 2016 (see Figure 5). In their study they present a data set of DI in the EU, accounting data for the differentiation across time, member states and policies. As little research has been done to get a grasp of secondary law DI, it is necessary to consider especially this research. A table of the degree of DI can therefore be constructed that is oriented on their study. What the researchers from Konstanz could show is that most DI on secondary law stems from the opt-outs undertaken on primary law.

Table 3: Independent Variable: Degree of DI per MS and Cohort – Information from (Duttle et al. 2016, p. 427)

	Primary law: DI per treaty	Secondary law (New Actual Differentiations per year)
United Kingdom	1,8	5,8
Denmark	1,7	5
Germany	0	4,2
France	0	2,2
Northern Cohort	1,75	5,4
Founding Cohort	0	3,2

This paper will use a most-different case selection as it expects the most diverging and most clear effect of DI on non-compliance. If there exists at least a correlation between our dependent and independent variable, it should be the most visible using a most-different case model. The paper compares the entities of states, all of them being part of the European Union. France, Germany and the UK are the biggest economies of the European Union – all countries in the sample are industrialised nations. The level of democratisation is the same, all being full democracies. Therefore, we also exclude possible 'capacity explanations' as independent variables. The author of this paper therefore argues that the sample represents nations that are similar enough for a comparison, but diverge the most on our independent variable, the level of DI. One could argue that the sample should include Bulgaria, Romania and Poland as they opted-out from more legislation (see Figure 5). However, these states did not deliberatively choose to opt-out but were not able to opt-in on certain policy field such as the monetary union, which is a big difference. Looking at internal horizontal differentiation, this paper limits itself to voluntary opt-outs (see categorisation in part II. 2)

First, a cohort consisting of the UK and Denmark as the 'opt-out champions' was created, having a high level of primary and secondary law DI. Policy areas affected are the economic monetary union (EMU) and civil matters where the UK has an opt-in arrangement while Denmark has a full opt-out. Concerning Schengen the UK has a full opt-out, whereas Denmark participates on an intergovernmental level (see Adler-Nissen 2009, p. 63 f.). As it is possible to see, Denmark and the UK are considered the laggards of integration, representing what will be called "the northern cohort" (Duttle et al. 2016, p. 420). With more than 5 Actual Differentiations per year and up to two DI per treaty, Denmark and the UK are surely the laggards of integration (see Table 3). Furthermore, both countries joined the EU with the first wave of enlargement in 1973. Especially the UK always had an ambivalent relationship towards the EU. For both logics, the socialization and the rational choice, this group represents the laggards of integration. Both, Denmark and the UK, are without doubt less socialised into the EU than the next cohort.

Creating a real opposition, 'the founding cohort' will consist of the integrationist countries represented by France and Germany. As the Franco-German couple pursues and directs EI in many cases, they will be pooled together. Their level of DI per treaty (primary law) is zero, as they never opted out from a complete policy field. The founding member cohort strives for uniform integration. Concerning secondary law Germany has a higher rate than France but anyhow lower than from the 'northern cohort' (see Table 3). Being members from the beginning, both are very much socialised into the European Union. Next to a cohort comparison, this paper will nevertheless always control for a country comparison as well.

2. Operationalisation Hypothesis I: Countries

To operationalise Hypothesis I, the non-compliance performance of the opt-out champions 'the northern cohort' and the 'founding cohort' will be compared. If the integrationist cohort has a higher level of non-compliance, the logic of rational-choice and cost-benefit prevails (Ia). The other way around, the socialisation effect prevails (Ib).

The dependent variable, the 'non-compliance performance', will be taken from the ESA Scoreboard,[9] for each member state. First, this paper will regard the transposition deficit and secondly, the infringement data of each country in comparison to the EU.

The transposition deficit indicates how many directives and regulations the member states have failed to communicate as transposed on time as an indicator of the willingness to comply with EU law. They are alone no good and valid measurements for a non-compliance operationalisation. However, their insights serve as a first indicator. In a second step the infringement data that records actual cases of non-compliance will be compared. For a discussion of the data see part II. To sum it up, this paper will focus on the infringement data but will include transposition data as well to construct a 'dependent variable'.

[9] http://ec.europa.eu/internal_market/scoreboard/performance_by_member_state/denmark/
http://ec.europa.eu/internal_market/scoreboard/performance_by_member_state/index_en.htm

3. Operationalisation Hypothesis II: Policy Fields

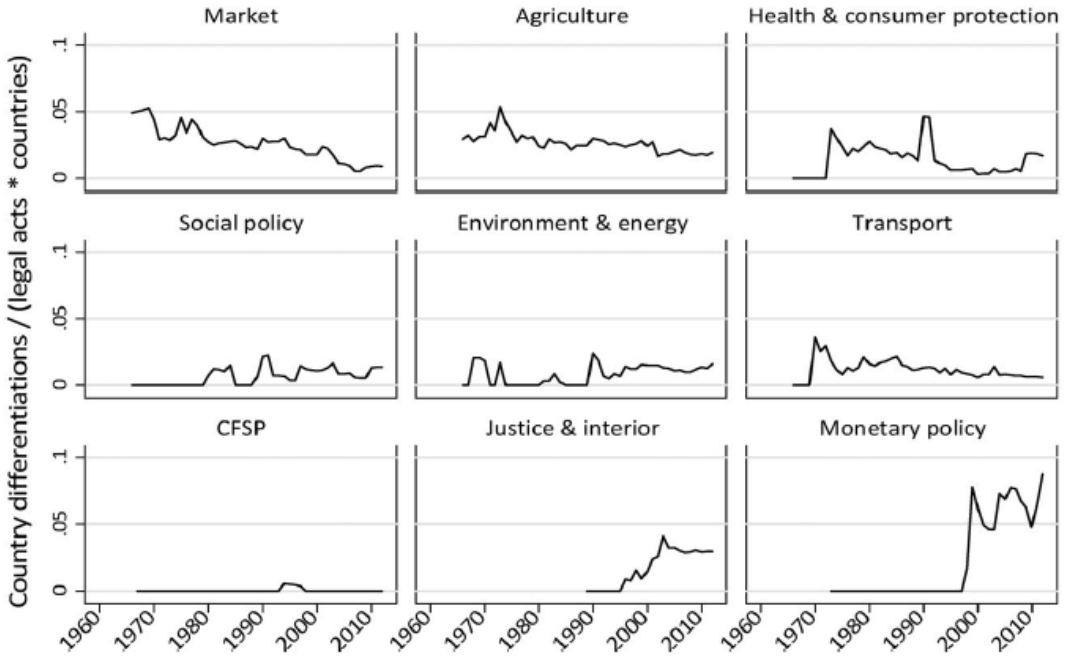

Figure 6: Policy areas (Duttle et al. 2016, p.417 The development of actual differentiations across policy areas, in acts 1960-2012

In order to tackle the second hypothesis, it is necessary to have a look at the policy fields marked by DI. A comparison of the infringement data per country from the Commission will help to give insights on non-compliance behaviour of states. To construct a dependent variable for the policy field comparison, an orientation from Knoll's 'sector specific research' in his doctoral thesis is taken (see Knoll 2016, p.17). There he uses the number of reasoned opinions (RO) per year send to member states. First, a look at all relevant policy fields in comparison is taken, to regard the policy field of the environment, internal market and mobility and transport in a second step. The conceptualisation of Hypothesis II will look at the RO sent to MS per year. If the founding cohort outperforms the northern cohort in a policy field the socialisation hypothesis prevails (IIb). The other way around, the rational-choice logic prevails (IIa).

V. Empirical Hypothesis testing

1. Overall country performance Hypothesis I

In this first part of the empirical analysis, the focus lies on the overall country performance concerning their non-compliance behaviour. Hypothesis Ia holds if the UK and Denmark perform better than France and Germany on both measures, the transposition deficit and the infringement procedures opened against that state.

1.1.Transposition Deficit

In order to tackle this paper's research question and to validate the first derived hypotheses, this part starts off looking at the transposition deficit in the European Union. First, it is necessary to create a histogram of the transposition deficit of the EU average. Secondly, a country comparison will be conducted.

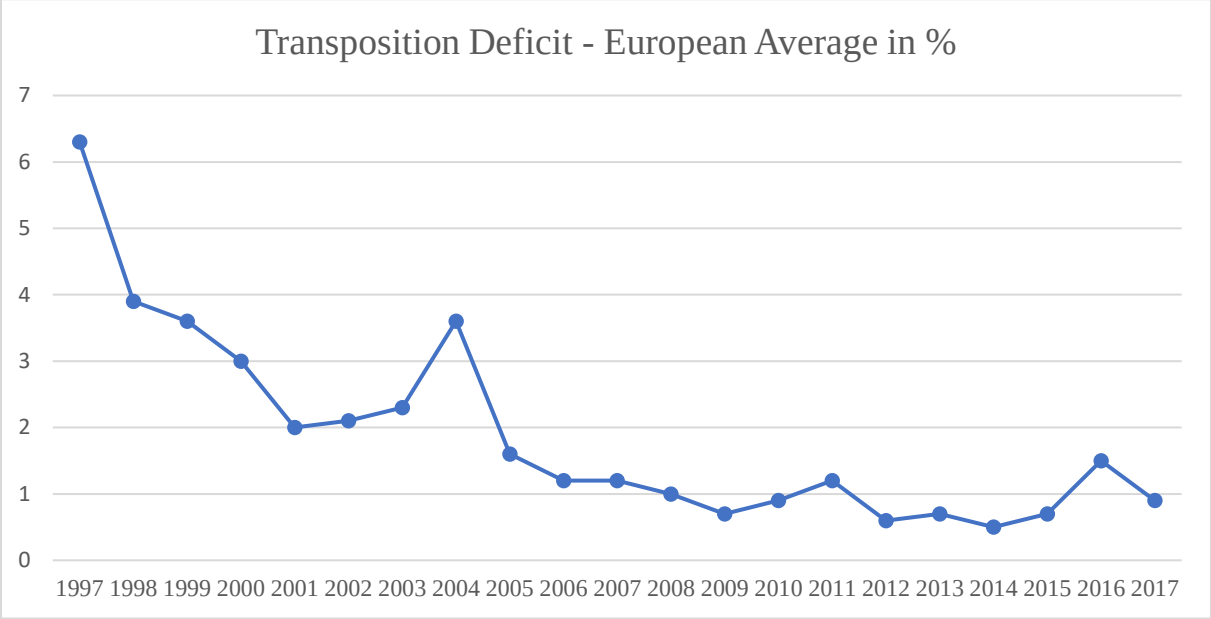

Figure 7: EU Average Transposition Deficit (Data from Single Market Scoreboard 01.03.19)

The EU average transposition deficit, referring to the gap between the number of Single Market directives adopted by the EU and those transposed in member states, shrank over the last couple of years, meaning that the member states of the EU had less problems with reporting timely or correctly transposing directives in time. Until 2005 the transposition deficit was constantly over 2 percent. After 2005 the EU average transposition deficit is pending around the one percent

threshold (see Figure 7). This gives an orientation and overall trend for the following inter-country comparison.

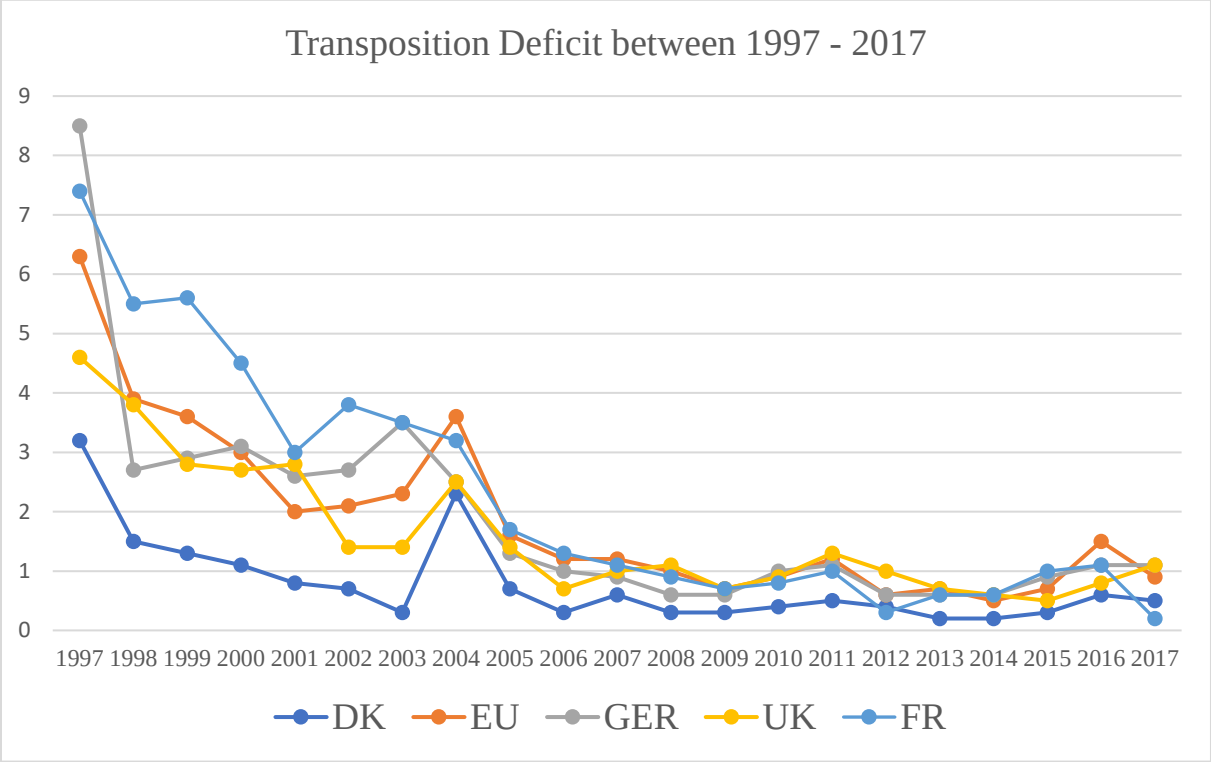

Figure 8: Evolution of Transposition Deficit Overall (Data from Single Market Scoreboard 01.03.19)

The declining trend also accounts for every single country in this sample. Figure 8 shows the evolution of the transposition deficit for each MS. It is possible to divide the data in between a pre-2005 era where especially France and Germany (8 to 3 percent) but also the UK (4 to 2 percent) had problems to transpose directives into national law. It is Denmark that was already before 2005 the leader in timely transposition. Denmark's leadership position continues and even increases post-2005, ranging in between 0,8 and 0,2 percent transposition deficit. Regardless the other countries of this sample converge to the European average of around 1 percent.

Looking at the arithmetic mean of the transposition deficit (Figure 9), it becomes clear that France and Germany transpose in average worse than the UK and Denmark. In comparison to the European average, France performs worse and Germany on European average with 1,8%. The better performance by the UK and Denmark becomes even clearer, combining the two countries to the northern cohort and comparing it with the founding cohort. With a difference of 0,89 percent points the northern cohort outperforms the founding cohort significantly.

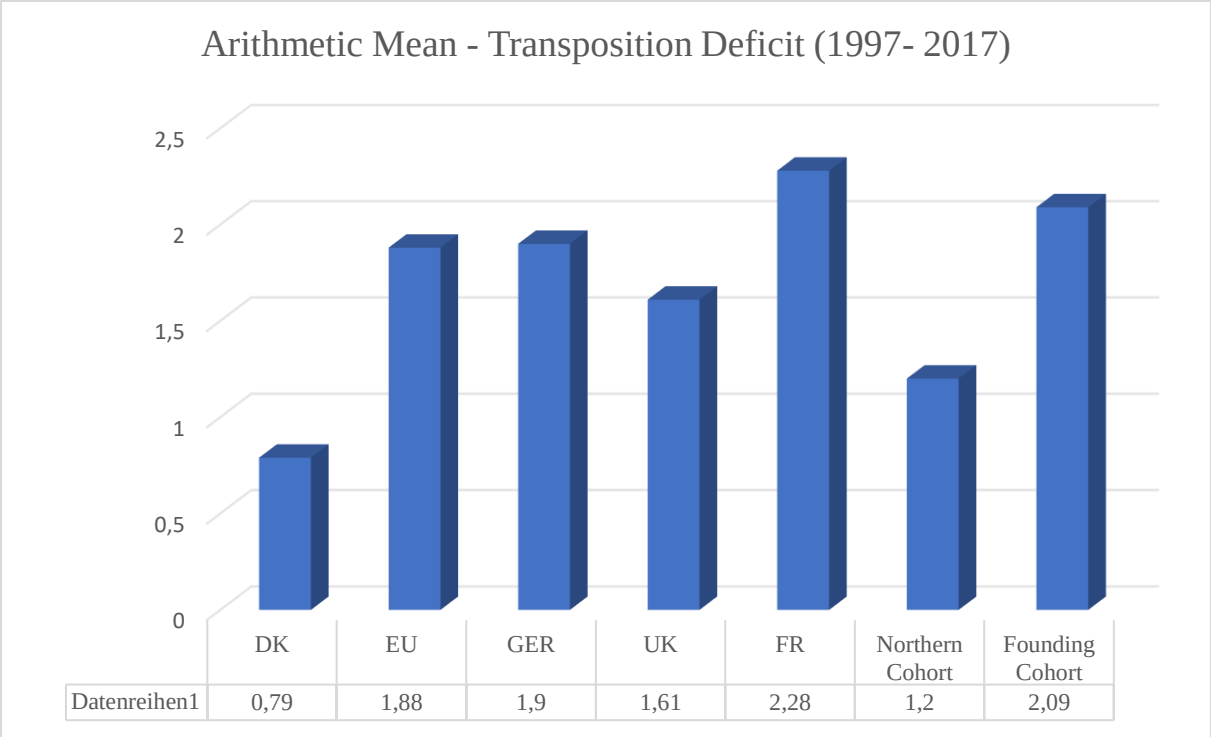

Figure 9: Arithmetic Mean _Deficit (Data from Single Market Scoreboard 01.03.19)

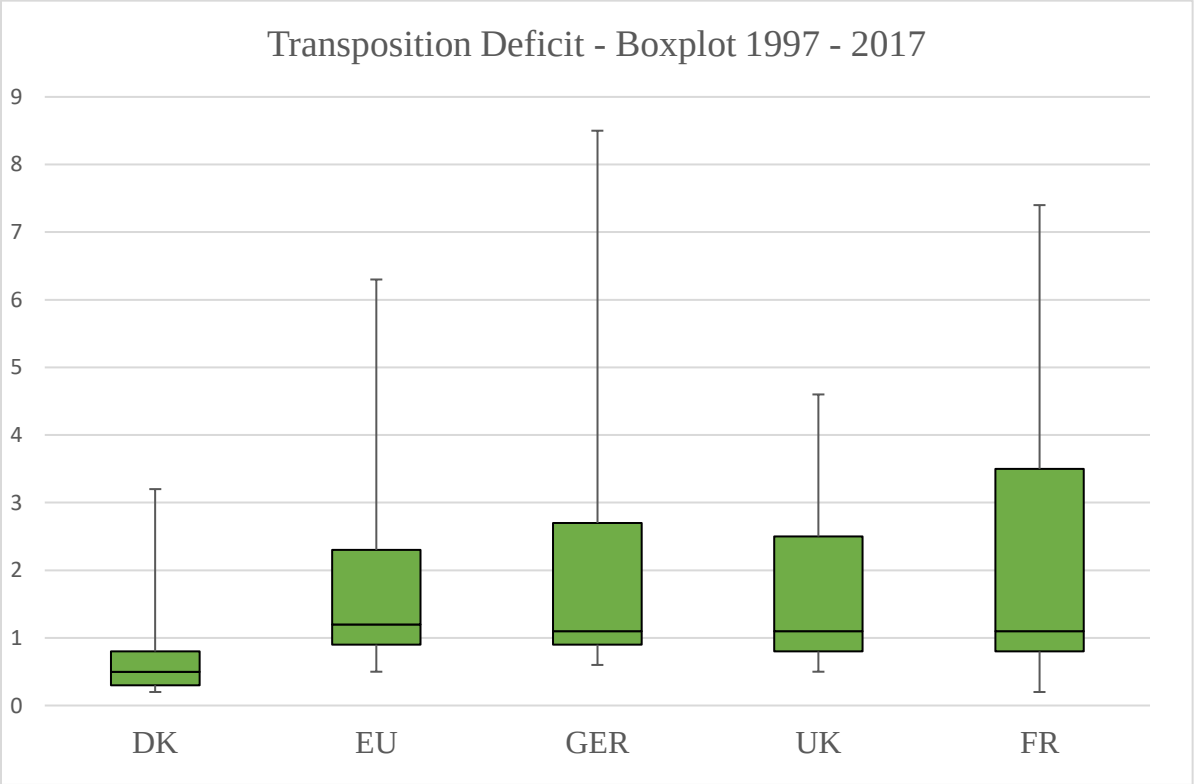

Figure 10: Boxplot Transposition Deficit (Data from Single Market Scoreboard 01.03.19)

As the arithmetic mean is very sensitive to the extremes, it is necessary to secure the results with the median and the variance of the data. Therefore, a boxplot (see Figure 10) is presented, where it is possible to see that only the Danish median is negatively deviant from the others. However, Germany and France have very high maximum extremes around 8 and 7 percent and the biggest third quartile. In every possible statistical key figure (minimum, median, mean and maximum) the northern cohort countries outperform the founding cohort.

After checking upon all the different data concerning the transposition deficit, it is therefore possible to conclude that especially Denmark outperforms the other states. On top of that, also the UK transposes faster and more efficiently than Germany and France. All countries follow the European trend that that implementation and transposition is faster and more efficient than in the 1990s and beginning of the 2000s.

As the transposition deficit only partly measures non-compliance, these insights are solely first hints. Countries marked by a high level of DI, having less regulatory burden, have less problems with non-compliance. To really check upon hypothesis I, it is nonetheless necessary to look at the Infringement proceedings also offered by the Single Market Scoreboard.

1.2.Infringement Proceedings

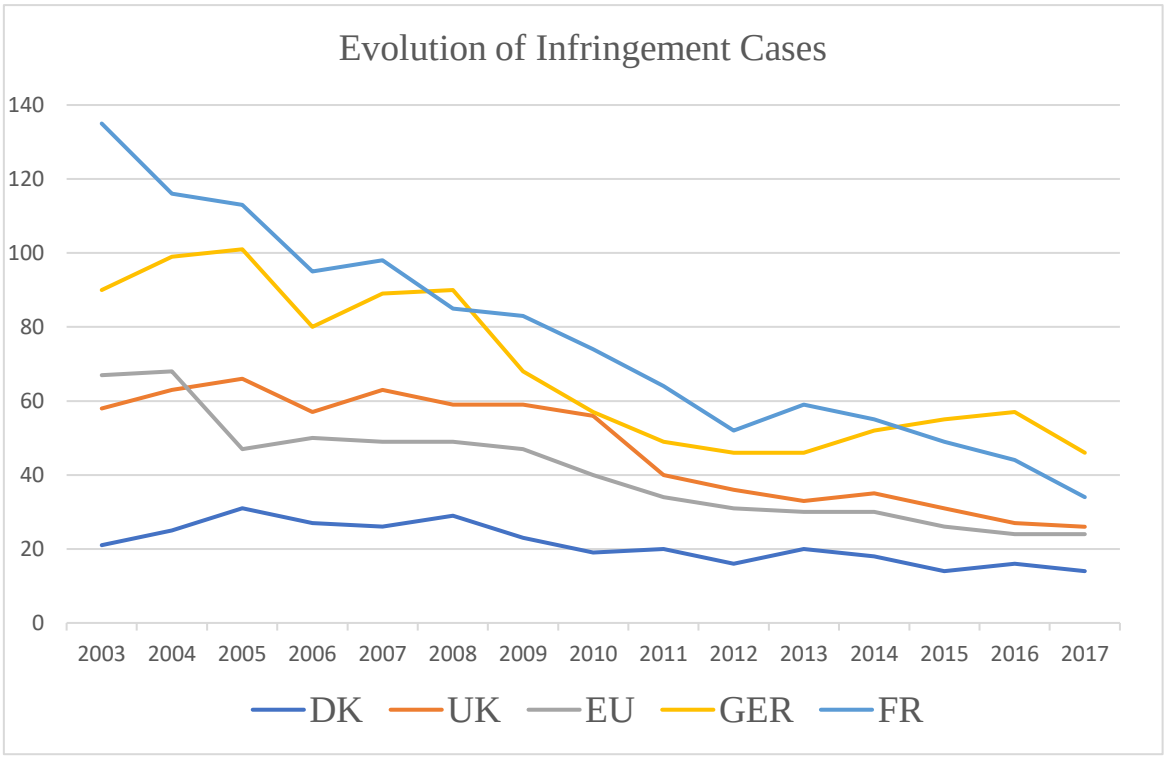

Figure 11: Evolution of Infringement Cases per Country (Data from Single Market Scoreboard 01.03.19)

As the transposition deficit is just one of many possible indicators for non-compliance, this study will complete the intercountry comparison with data on the evolution of Infringement

Cases. Like the transposition deficit, the IPs opened by the European Commission diminished over the last 15 years (see Figure 11). The European average shrank more than 50 percent, from

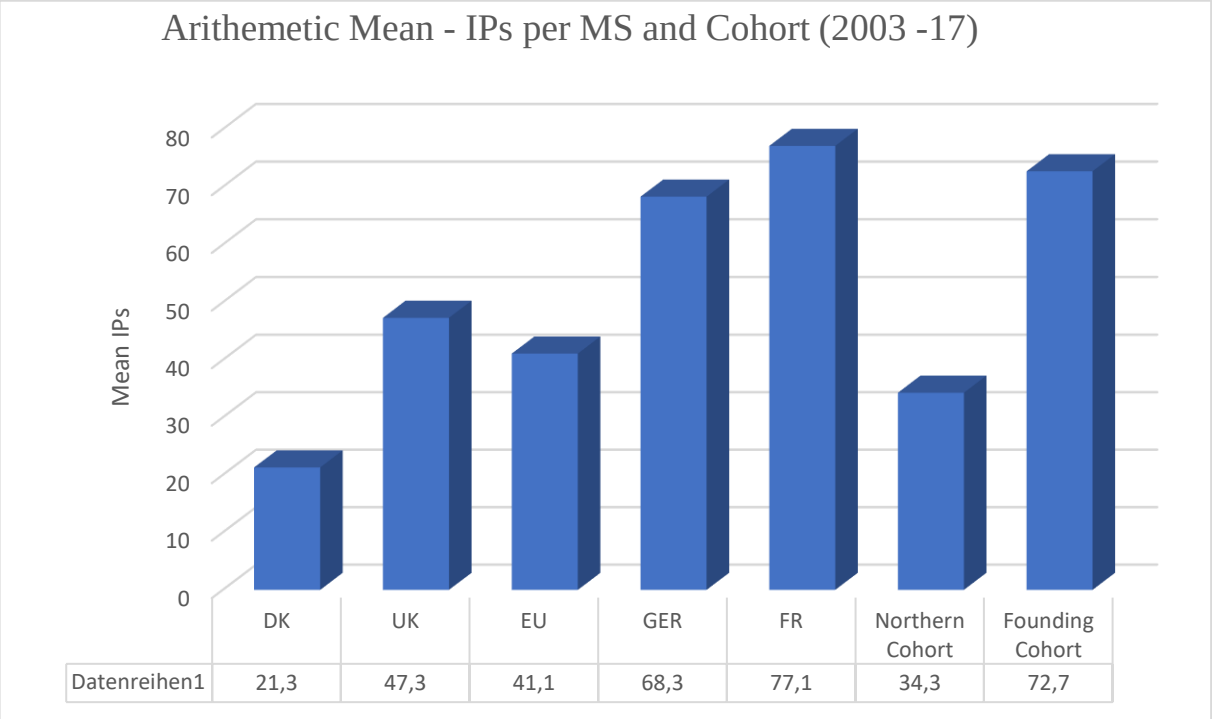

Figure 12: Mean IPs per country and cohort (Data from Single Market Scoreboard 01.03.19)

67 (2003) to 24 (2017). This is an indicator that the 'non-compliance problem' might be less virulent than in the 1990s and the 2000s. Whereas Germany and France started off with a very high number of IPs opened against them (in France 135 in 2003, in Germany 101 in 2005), Denmark is again the 'good pupil' of compliance, with a slightly diminishing rate pending around 20 IPs per year. The same accounts for the UK, who could diminish its IPs from around 60 (2003-05) to 28 (2017). Nonetheless, one must argue that the UK lies since 2005 constantly above European average. It is just in comparison with the founding cohort, that the UK performs well.

Looking again at the arithmetic mean of IPs sent to countries per year (Figure 12), this initial impression is confirmed. Whereas Denmark has the lowest mean with 21 IPs in average, France leads the group with an average of 77 IPs per year. The UK is sharply above European average, but still with a difference of 27 IPs to Germany. This difference shows that the UK performs significantly better than Germany or France. Comparing the results, using the categorization in cohorts, this insight becomes even clearer. Whereas the northern cohort has an average of 34

IPs per year, the founding one performs significantly worse with an average of 73 IPs per year. That means that the founding cohort had more than double the number of IPs.

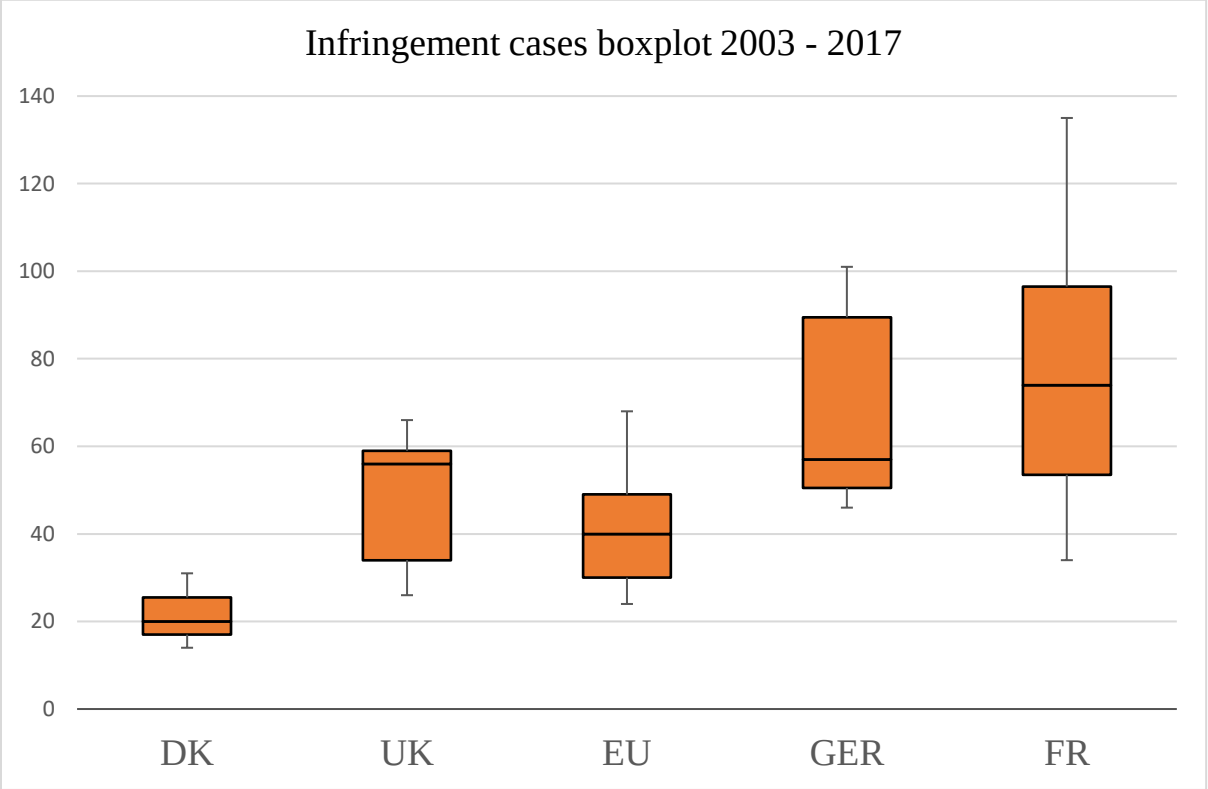

Figure 13: Boxplot Infringement Cases (Data from Single Market Scoreboard 01.03.19)

The boxplot in Figure 13 shows the separation of the data per country between 2003 and 2017. It is visible to the naked eye that the northern cohort with Denmark and the UK outperforms the founding cohort with Germany and France. France's maximum is 4 times higher than Denmark's. Again, every possible key statistical figure (minimum, median and maximum) indicates a better performance by the northern cohort. Therefore, it is possible to conclude that the second operationalisation of non-compliance, the IPs per country, also indicate that the northern cohort, with a high level of DI, performs better than countries like France and Germany, with a very low level of DI.

In conclusion, both measurements, the transposition deficit and the IPs sent to member states indicate that the northern cohort outperforms the founding cohort. Therefore, it is possible to conclude that Hypothesis Ia, following a rational choice logic, prevails. States that always pursue uniform integration are more likely to have a problem with non-compliance and vice-versa, states that choose opt-out solutions are more likely to have a lower non-compliance record. Hypothesis Ib following a logic of appropriateness fails as countries that should have been better socialised perform worse than countries that are less entangled in the European system.

2. Hypothesis II Policy Field

Having found out, that the northern cohort outperforms the founding cohort in the general measurements of *Transposition Deficit* and *Infringement Procedures*, this paper will continue looking at the question whether these insights also hold for different policy fields in comparison. In a first part a closer look at the Reasoned Opinions sent by the Commission to each member states per policy field will be realised, in order to thereafter compare the most deviant ones.

2.1. Denmark

As Denmark was the best compliant state in the former part, this section starts off looking at the sum of Reasoned Opinions (RO) sent to the state who joined the EU in 1973 (see Figure 14). With

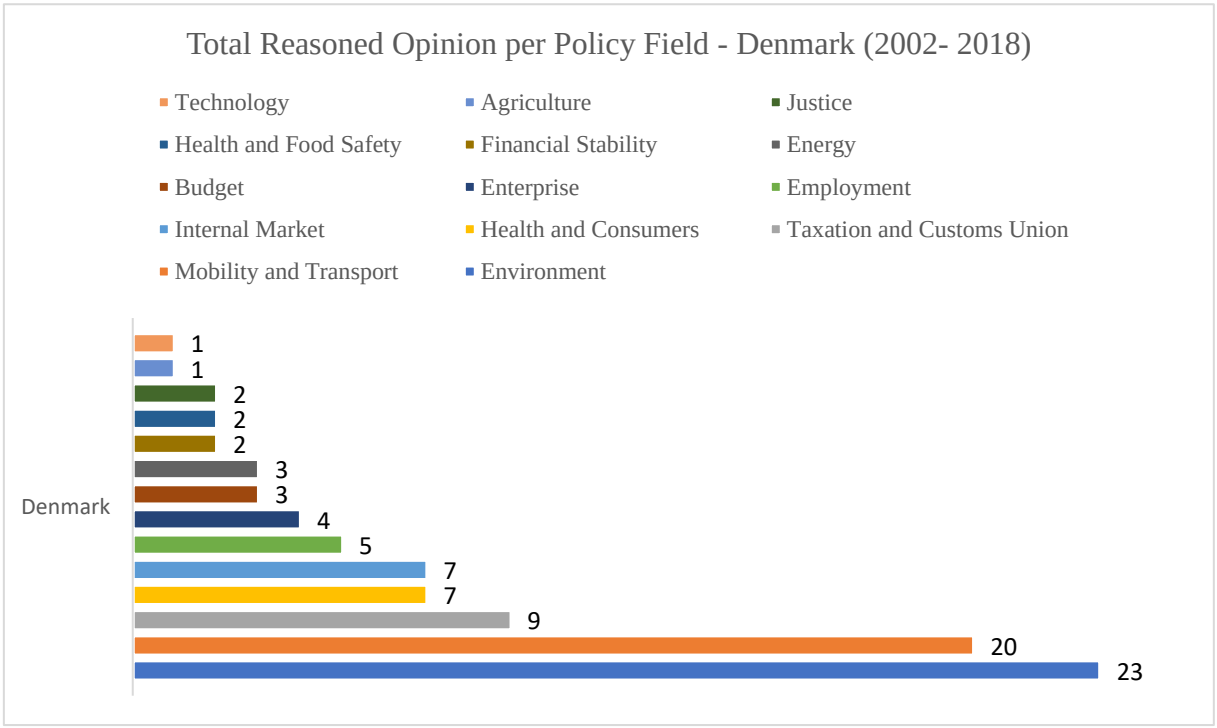

Figure 14: Reasoned Opinion Denmark Policy Field (Data from the Infringement Database European Commission)

a total of 93 RO sent to Denmark, they still perform quite well. However, the most deviant policy fields are Environment with 23 RO since 2002 closely followed by Mobility and Transport with 20 RO on second place. On third place, there is Taxation and Customs Union with 9 ROs. Lastly, there are Health and Consumer and the Internal Market with 7 Reasoned Opinions since 2002. All the other policy fields with a score below 5 seem to be less interesting for this research's purpose.

2.2.The United Kingdom

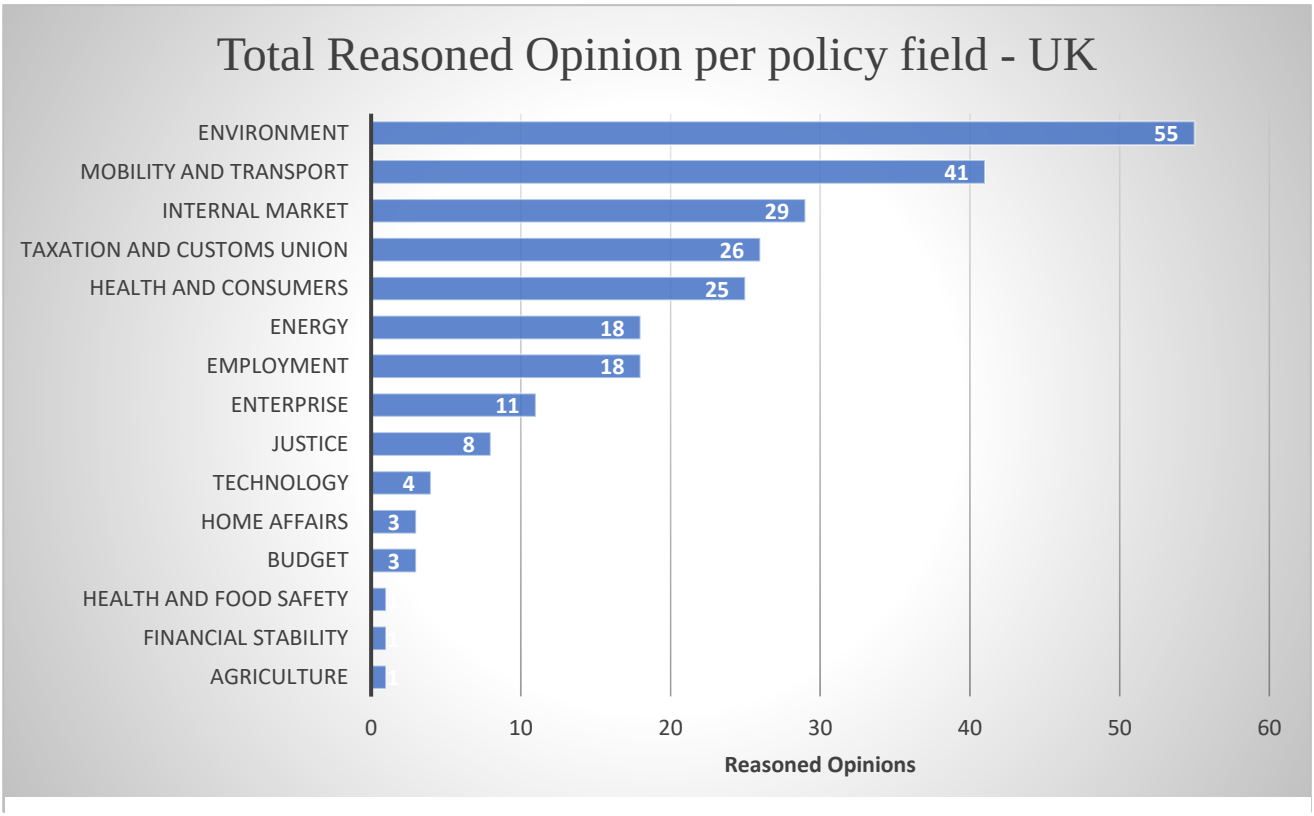

Figure 15: Reasoned Opinion Denmark Policy Field (Data from the Infringement Database European Commission)

With a total of 258 Reasoned Opinions sent to the UK, the Brits more than double the amount sent to Denmark. With a big difference to all other policy fields, it is again Environment that causes the biggest problems of compliance. A total of 55 Reasoned Opinions have been sent to the UK in between 2002 and 2018, followed again by Mobility and Transport with 41 Reasoned Opinions. Between 25 and 29 Reasoned Opinions have been sent to due to breaches in the policy fields of Internal Market, Taxation and Customs Union and Health and Consumers (see Figure 15).

To sum it up, the northern cohort performs overall well looking at the sum of RO since 2002. Although they especially struggle to transpose directives in the field of Environment, Mobility and Transport and the Internal Market. In a next step the founding cohort and the policy fields that cause the most breaches will be investigated.

2.3.Germany

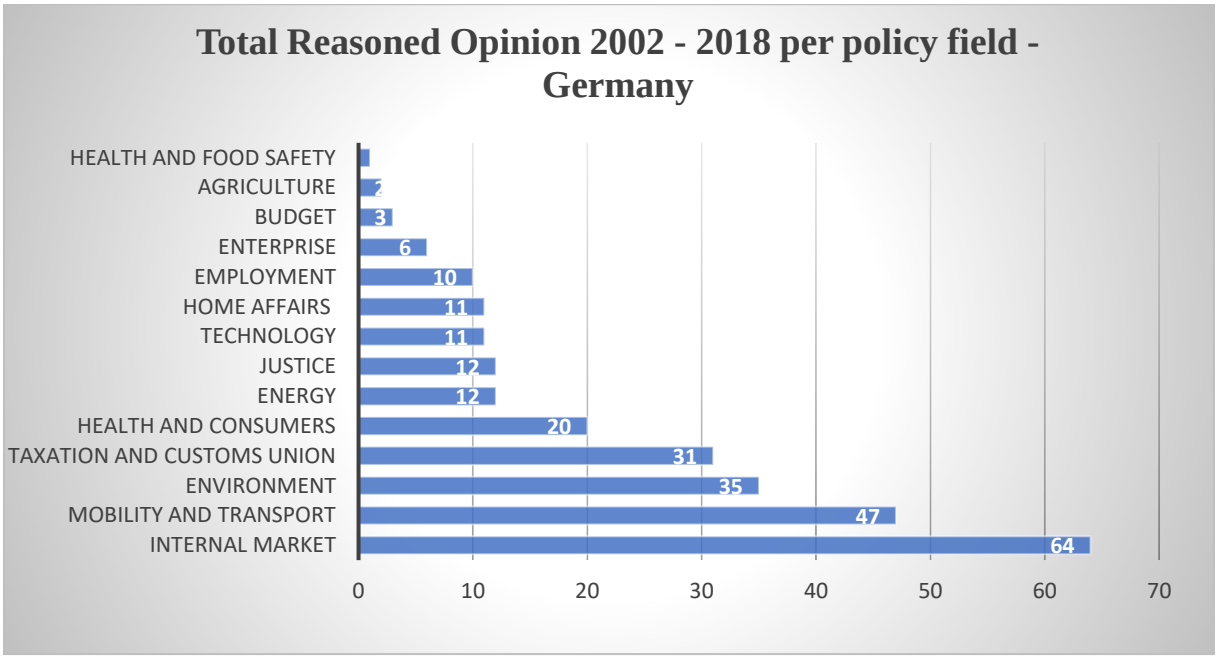

Figure 16: Reasoned Opinion Germany Policy Field (European Commission)

Looking at the German data, Figure 16 visualises a first variation. Out of the total 294 Reasoned Opinions, it is not the field of Environment that attracts the most non-compliant behaviour but the field of the Internal Market. Germany has big problems to comply with the internal market rules, as it is visible with 64 Reasoned Opinions since 2002. It is again the field of Mobility and Transport that ranks second with a total number of 47, followed by Environment with only 35 Reasoned Opinions. Health (20) and Taxation (31) still have a total number above 20 Reasoned Opinions.

2.4. France

France's compliance performance is the worst out of our four countries, with a total of 347 Reasoned Opinions since 2002. It is again the Internal Market, like in the German case, that leads with a total of 61, but shortly followed by the Environment field. Mobility, Health and Consumers and Taxation and Customs Union follow shortly afterwards (see Figure 17).

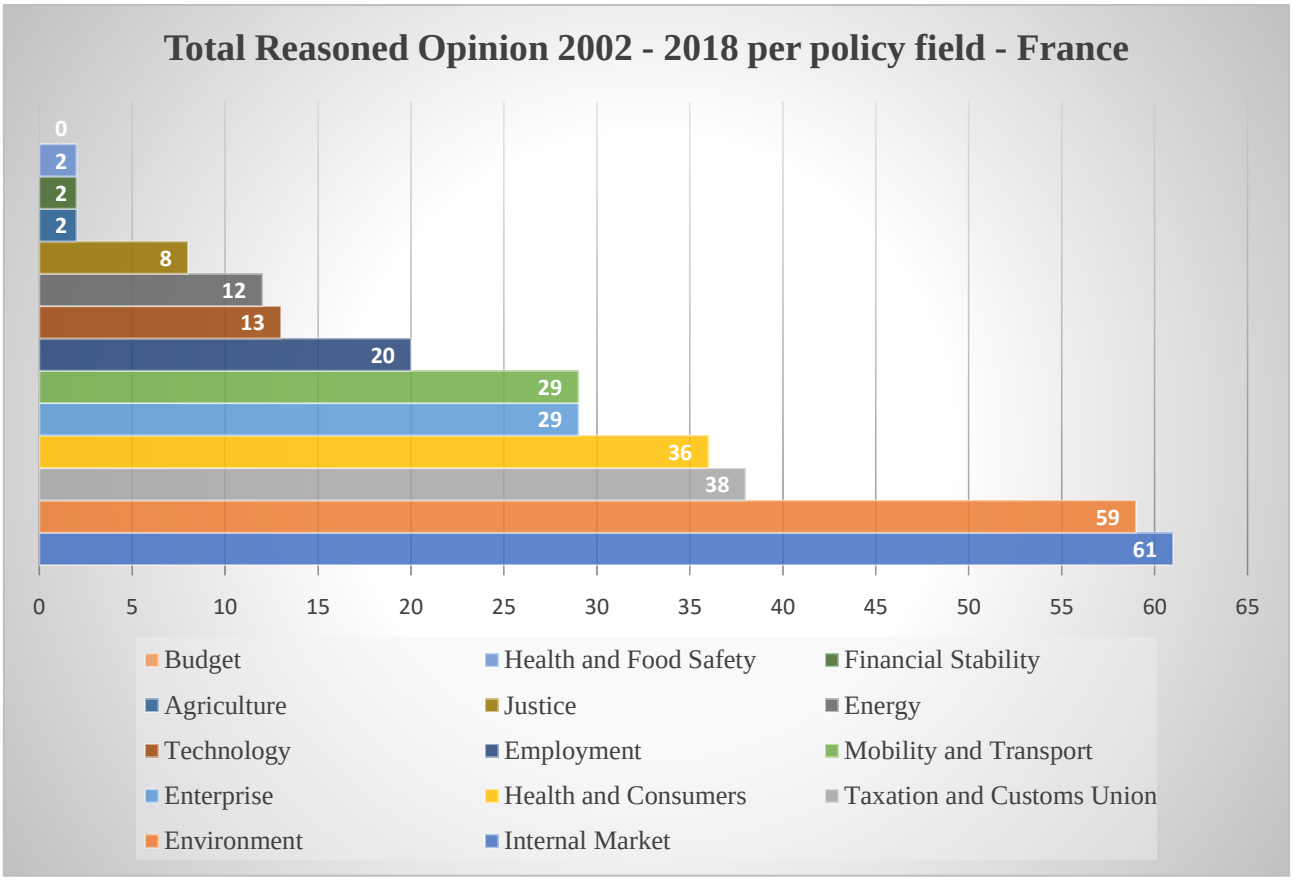

Figure 17: Reasoned Opinion France Policy Field (Data from the European Commission Infringement Data Base)

To sum it up, the founding cohort, has a high number of RO against them. Congruent to the country-comparison, one phenomenon can be drawn from this part – the northern cohort outperforms the founding cohort. Surprisingly, it is in the field of the Environment that the UK and Denmark struggle the most, whereas the founding cohort has the most RO opened against them in the field of Internal Market.

2.5. Interstate Comparison per policy field

To compare the states and cohorts inside the policy fields, it is necessary to aggregate the data. In order to do so, the total Reasoned Opinions per cohort between 2002 and 2018 will first be compared and presented for each policy field individually. In a second step, it is necessary to also compare the share of those Reasoned Opinions in a specific policy field in perspective of the total reasoned opinions opened against a state.

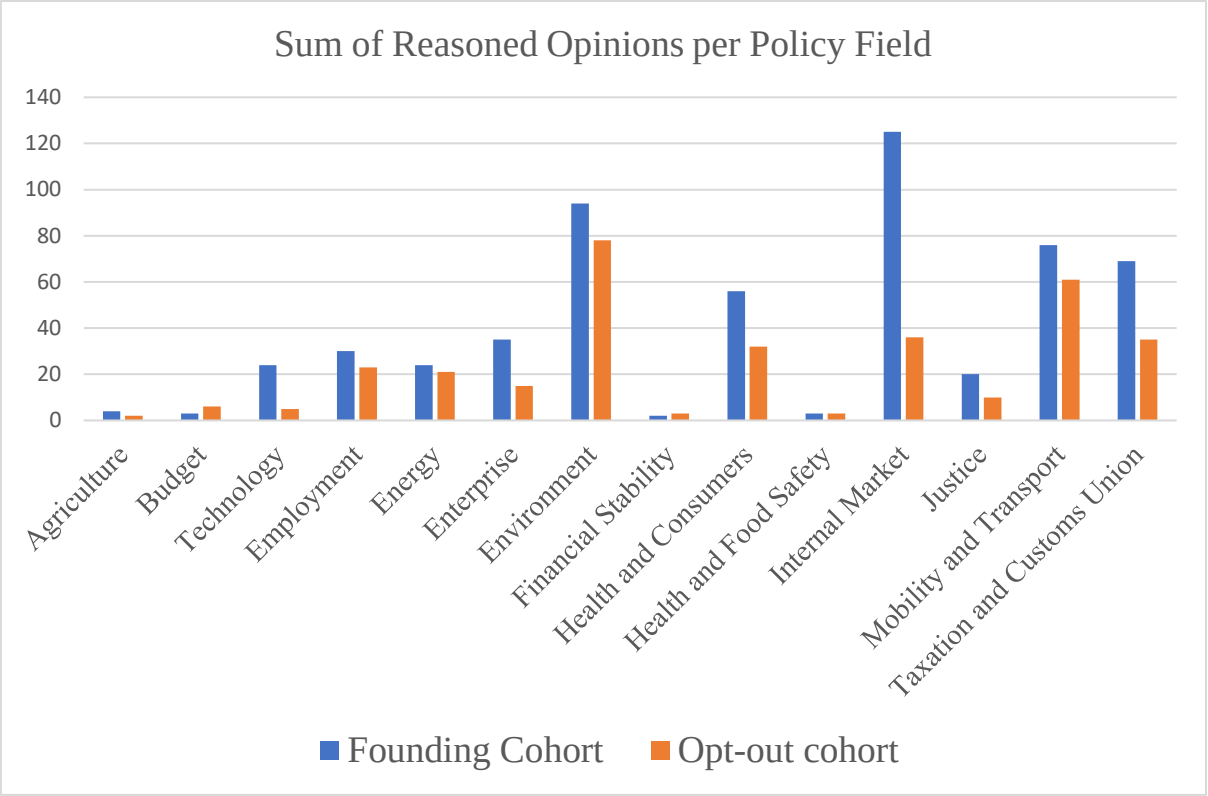

Figure 18: Reasoned Opinions per Policy Field – Cohort Comparison (Data from the European Commission Infringement Data Base)

First, it is necessary to look at the sum of Reasoned Opinions per policy field, aggregated for each cohort. Even in cohorts, it becomes clear that the founding cohort has more Reasoned Opinions against them. It is especially the case in the field of the Internal Market, Environment, Mobility and Transport, Taxation and Custom Union and Health and Consumers that draws big numbers of breaches. The biggest difference accounts for the policy field of the Internal Market, where the founding cohort triples the score of the northern cohort. Policy fields where the northern cohort almost levels the breaches of the founding cohorts are the Environment, and Mobility and Transport.

Looking at Figure 18 and the sum of RO opened against each cohort per policy field, it seems that the rational choice logic prevails, as in each policy field (Budget and Financial Stability being the exception), the founding cohort, having followed uniform integration, breaches law more often than the northern cohort that allowed itself to opt-out more frequently.

After the overview, a regard of the specific policy fields will be shown in a next part. Built on Figure 18, it will be of great interest to have a closer look into the fields of the Environment, the Internal Market and Mobility and Transport.

2.5.1. Environment

First, the data of the Environment sector will be reviewed. Following the insights from Knoll 2016, the environmental policy field combines a low policy output but a high non-compliance rate (see Knoll 2016). Until 1986, the harmonisation of environmental standards existed to tear down barriers for the establishment of the internal market. Afterwards, with the Single European Act, the environmental policy was pooled on European level. Most regulation comes with directives, setting aims and obliging MS to choose their instrument to reach them.

Comparing our sample countries, it becomes obvious that France is the worst complier with directives in the field of environment. However, the greater surprise is that the UK follows directly afterwards with the amount of 55 Reasoned Opinions since 2002. Germany has 20 Reasoned Opinions and therefore significantly less than the UK. In this specific case Germany complies better than the UK. Lastly, Denmark stays the best complier also in the field of Environment (see row 1 – Figure 19). In a second step it is necessary to regard these insights, however, in comparison to the number of total Reasoned Opinions to finish the interstate comparison.

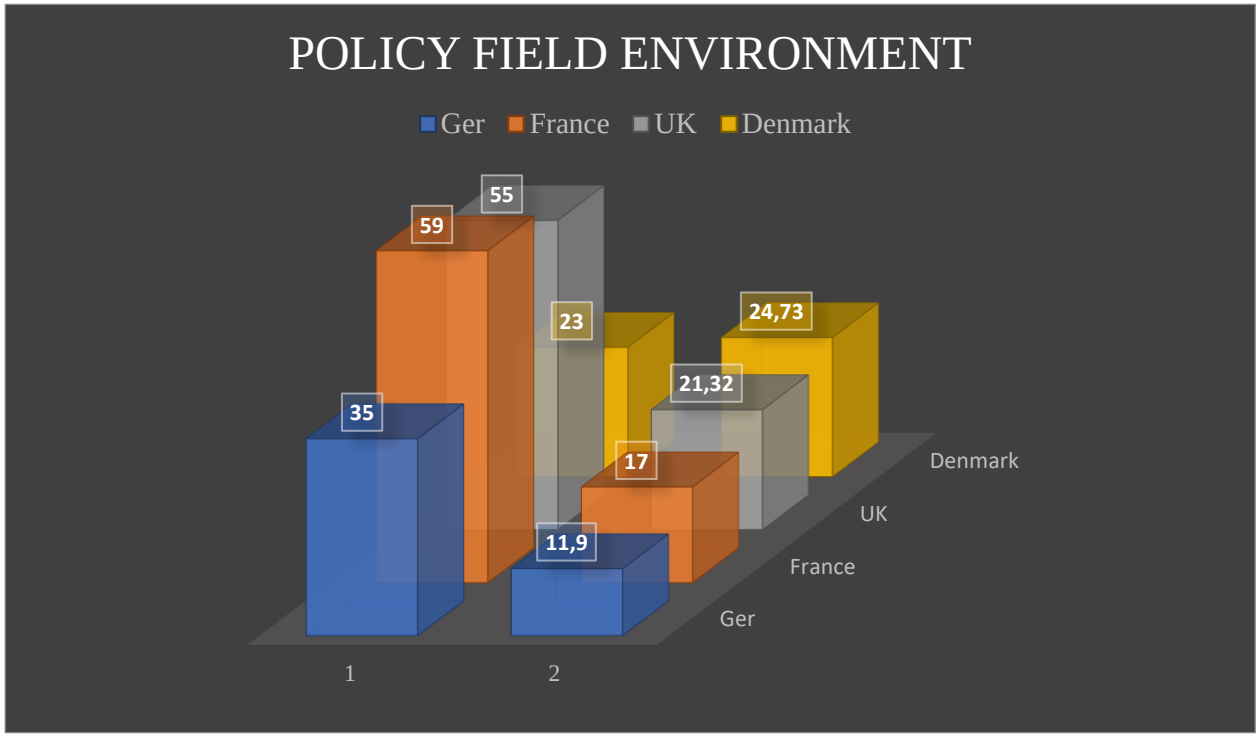

Figure 19: 1= Sum Reasoned Opinions per Year 2 = Share of Reasoned Opinions Stemming from the policy field of Environment in percent (Data from the European Commission Infringement Data Base)

The share of Reasoned Opinions stemming from the sector of environment, calculated in relation to the sum of RO per MS, will be a measure to compare the non-compliance problems

of the states in a specific field. The measure is calculated via a simple 'rule of three', calculating the environmental share of the total numbers of Reasoned Opinion. Whereas Denmark has a large share of almost 25 percent of Reasoned Opinions stemming from the field of Environment, for Germany the field only accounts for almost 12 percent of their total Reasoned Opinions (see row 2, Figure 19). As this measure does not really serve a comparison, it is just an indicator, where countries have the biggest problems to comply. It is for the first time that it is possible to say that Denmark has a non-compliance problem that just accounts for one field of European Integration – stemming from the environmental field. The same accounts for the UK. Looking at the absolute numbers, it is possible to see that the UK outperforms the founding cohort. Looking at the specific policy field of the environment, the UK has a higher share stemming from this field than from any other field. To sum it up, the northern cohort has more problems implementing and transposing environmental directives into national law. For the first time it seems that a socialisation logic prevails concerning the field of the environment. However, as France is still leading the group with 58 RO opened against them, one must argue, that a clear effect in the field of the environment cannot be seen. The field of environment therefore only offers inconclusive results.

2.5.2. Internal Market

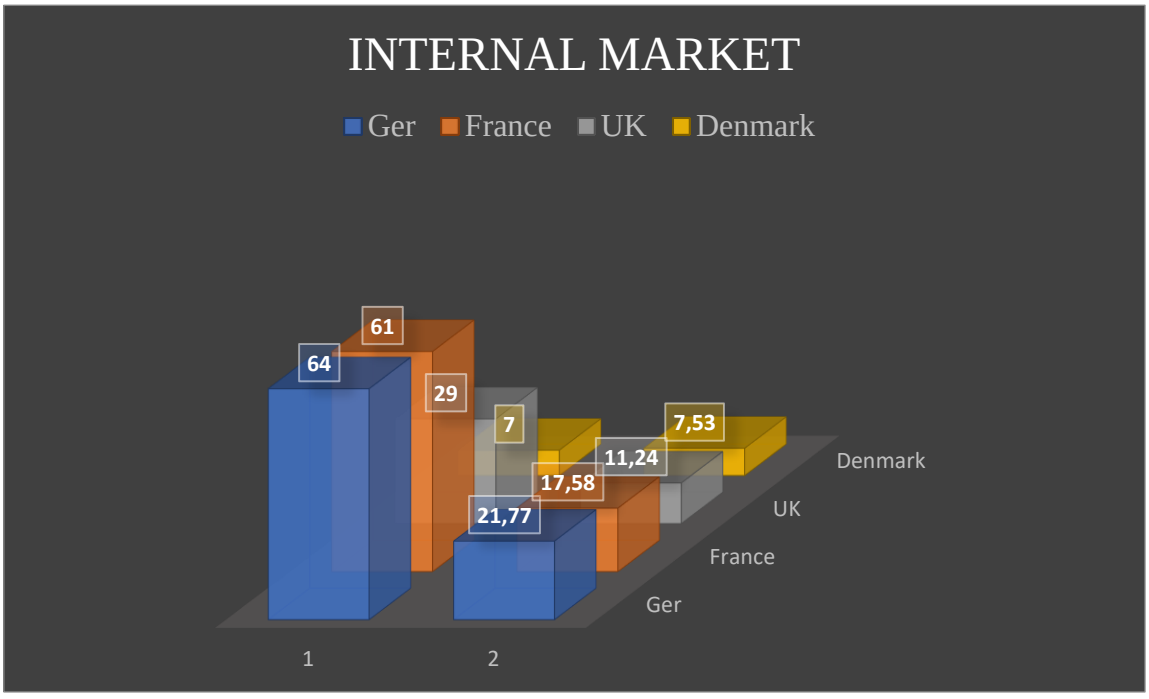

Figure 20: 1= Sum of RO per country in the field of Internal Market 2= Share of Reasoned Opinions Stemming from the policy field of Internal Market in percent (Data from the European Commission Infringement Data Base)

Whereas the policy field of Environment offered inconclusive results, the field of the Internal Market seems to offer clear insights. Whereas France and Germany each had over 60 RO opened against them and their share of RO stems to around 20 percent from the Internal Market field, it becomes clear that the northern cohort outperforms the founding cohort in this field. Denmark just has 7 RO since 2002. The share of Internal Market reasoned opinions of total reasoned opinions against Germany is almost 22 percent (biggest share from a policy field). In Denmark the Internal Market directives only accounts for 7,5 percent of all Reasoned Opinions. As France and Germany are itself big member states, with big companies, they have a higher interest to defend them from competitors. For Denmark in comparison, compliance with internal market directives are relatively unproblematic as their industry and firms are not that big and they benefit from an open market without tariffs. In this case DI could play a decisive role, as Germany and France cannot opt-out, because they do not have the *exit option*. The non-compliance possibility seems to be their remedy. The same accounts for the other argument of rational-choice. As UK and Denmark do not participate on all legislation, they have a lower burden of legislation and therefore comply better than the founding cohort.

In the policy field the logic of the rational-choice argument prevails, as the northern cohort outperforms the founding cohort.

2.5.3. Mobility and Transport

Lastly, the Mobility and Transport is the third biggest deviant policy field. Therefore, it is necessary to regard the total of RO and its share stemming from that policy field. As the sum of reasoned opinions in comparison of the cohorts was very close, a look at the country level

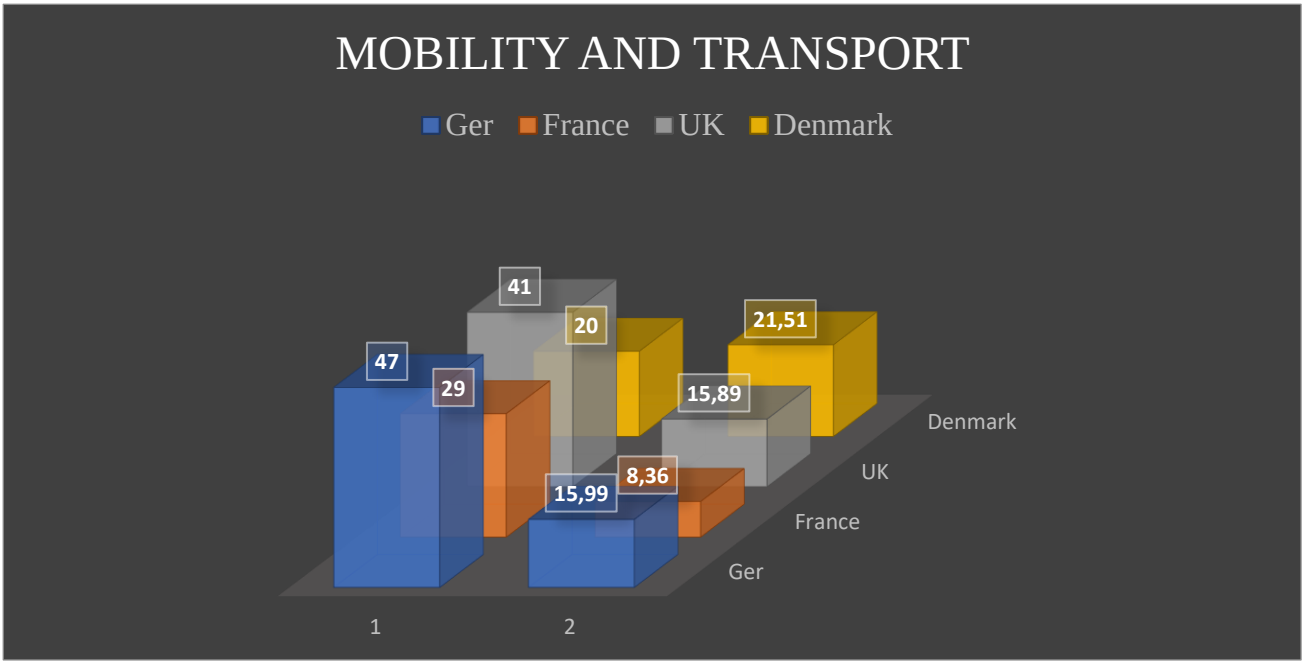

Figure 21: 1= Sum of RO per country in the field of Mobility and Transport 2= Share of Reasoned Opinions Stemming from the policy field of Mobility and Transport in percent (Data from the European Commission Infringement Data Base)

might be of interest (see Figure 18). Comparing the sum of RO in that policy field (row 1; Figure 21) reveals that Germany has the most RO opened against itself (47). However, the UK follows with the sum of 41 RO shortly afterwards. With a difference of 12 RO, France noticeably outperforms the UK. Again, Denmark is the good pupil of compliance – also in the field of Mobility and Transport, they outperform every other country with 20 RO. Looking at the share of RO stemming from the policy field of Mobility and Transport (row 2), it becomes clear that even though Denmark has a low RO sum in total, almost one fourth of their RO stems from the field of Mobility and Transport. After the field of the Environment this is the highest share for Denmark. Germany and the UK have a share of almost 16 percent, whereas France only has about 8 percent of their RO stemming from the field of Mobility and Transport. One can conclude that especially for Denmark the share is quite high.

In the policy field of Mobility and Transport, a rational choice logic seems to prevail, supporting Hypothesis IIa. The founding cohort has a higher number of RO against them than the northern cohort. However, having a look at the country level, France outperforms the UK offering

inconclusive results. Finally, it is possible to argue that neither a rational-choice logic, nor a socialisation logic prevails in the field of Mobility and Transport.

3. Summary of the Results

In this empirical part, this Master thesis first looked at the overall country comparison over time concerning their non-compliance performance. Both conceptualisations of non-compliance, the transposition deficit and the infringement procedures, indicate that the behavioural rational-choice logic predominates. So that Hypothesis Ia, according to which countries with uniform integration comply worse than countries that chose opt-outs prevails. Hypothesis Ib, according to which socialisation means that states with uniform integration outperform countries marked by differentiated integration, fails as both conceptualisations indicate the opposite.

Secondly, this study checked for a country comparison inside different policy fields. After a small cohort-specific regard, where this study could show that especially Environment, Internal Market and the field of Mobility and Transport are marked by non-compliance, a policy field related research was presented. After the overview of the sum of RO separated by cohort, a rational-choice logic was assumed. Inside the policy field of Environment, no clear logic of action could be found, even though there were indices that a socialisation logic prevails. However, these insides remain vague and are therefore inconsistent. For the field of the internal market, it was clear that a rational-choice logic prevails. The northern cohort clearly outperforms the founding cohort. Lastly, the results for the field of mobility and transport were equally inconclusive.

In conclusion this empirical part could validate Hypothesis Ia, according to which states that always pursue uniform integration have a bigger problem with non-compliance than countries that chose opt-out solutions. A rational-choice logic prevailed, so that Hypothesis Ib failed. Howbeit, looking at Hypothesis IIa, if a country always pursues uniform integration their non-compliance record is higher – not only in general but also in specific policy fields, failed due to inconclusive results in the fields of the Environment and Mobility and Transport. One could neither demonstrate a rational-choice logic nor a socialisation logic, which means that Hypothesis IIb failed in the same way.

VI. Discussion and implications

1. Critical Assessment

This paper certainly shows important and new insights how DI influences the compliance behaviour of a state. Notwithstanding, it has some shortcomings, which will be discussed in this part.

In the empirical part - Hypothesis Ia got validated with the help of the EC dataset. States that always pursue uniform integration have a bigger problem with non-compliance than countries that chose opt-out solutions. This insight remains valid looking at the outcomes delivered by the case-study forming cohorts of the northern states and the founding states. Nonetheless, one has to argue that these insights remain valid *only* for these countries, during the chosen time frame and in the European Union. Why a generalisation of these results remains difficult, will be discussed in this part.

First, the method of descriptive statistics has to be a starting point for a research on the relationship between DI and non-compliance. In a next step one should look at a possible correlation between the evolvement of the degree of DI and the evolvement of non-compliance. Lastly one could look at a possible inference between the two variables. As there might be a lot of interfering independent variables that influence the outcome of non-compliance, it will be difficult to control for every possible independent variable. This paper, with its most-different case design, has to be seen as a first step. However, for future research a proper regression analysis, controlling for other variables could be helpful. Due to the limited scale and resources of this Master thesis, the method of descriptive statistics should yet be sufficient for this paper's purpose.

Second, the case selection, classifying the countries into cohorts can be questioned due to a simplification of characteristics. To assume that France and Germany can be subsumed together into one cohort could be problematic, as a lot of Franco-German Scholars would criticise that those two countries are itself the ones with the most diverging interest in European Integration.

The narrative is that when Germany and France find a compromise it includes all different interests in the Union and all member states can agree.

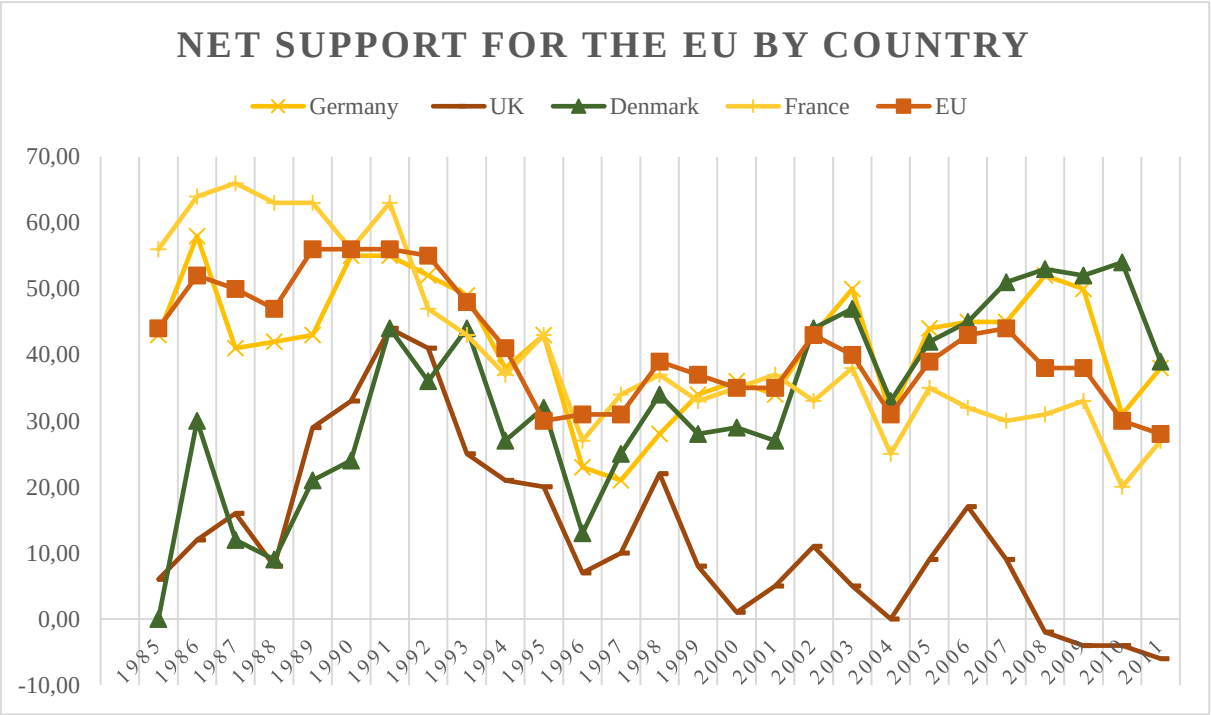

Figure 22: Net Support for the EU by country; Data source EB from 1985 to 2011 – at least one per year (custom graphic)

On top of that looking at the net support for the EU by country taken from the Eurobarometer, the classification of the UK and Denmark as the northern cohort could be criticised. The countries are in its nature and its relationship to the EU fundamentally different. Whereas the UK is and always remained critical towards the European Union due to legacy reasons, Denmark was in the beginning critical but developed into a strong supporter being the leader in the net support for the EU in this group of countries (see Figure 22).[10] For Denmark it was more legitimation and democratic restrains that were important opting out from policy fields. However, these two countries were clustered together as they are the "opt-out champions". Getting orientation from Duttle et al. allowed this paper to separate the camps in a northern and founding cohort. On top of that this classification can also be defended as this paper always controlled for the country level to secure its insights. Future research could also control for bureaucratic explanations or capacity issues.

Lastly, data from the Commission can be criticised as e.g. the categorisation of policy fields is not unitary over the years and poses problems to compare it over time. As discussed above,

[10] Unfortunately, more recent data is not available for support for the EU

Scoreboard data (Transposition Deficit, IPs and ROs) only indicates the extent of compliance known to the EC and not the actual problem of non-compliance.

2. (Political) Implications for the European Union

For the field of non-compliance in the EU, this paper illustrated how IPs and transposition deficits show a very positive trend since 2005. Especially the founding cohort complies way better in comparison to the 1990s. This trend could be itself an indication for a socialisation logic in non-compliance studies and a future road for research. However, the fields of Environment, Internal Market and Mobility and Transport provoke the most ROs. The northern countries have the biggest problems in the field of Environment, whereas the founding cohort has the biggest problems in the field of Internal Market.

What this paper could show for the field of Differentiated Integration is that the instrument to organise different interests in the EU does not automatically lead to uniform integration in the long run. Neither does it lead to a dissolvement of the European Union. Coming from Hypothesis I it can be an extra possibility for countries during a bargaining process. In a rational choice logic, it can protect from too much unwanted European law burden and therefore still helps in a situation of deadlock.

On top of that, this paper started off discussing the Future of the European Union. Consequently, what are this paper's implications? It would be quite farfetched to argue based on Hypothesis Ia that the European Union should allow for more Differentiated Integration in order to secure the good application of its law. Furthermore, this paper does not go as far as to say that Differentiated Integration is a remedy for non-compliance. As this paper did not show an inference such a statement is not possible. Nevertheless, it could show that in the mentioned cases the opt-out countries performed overall better than the uniform integration countries concerning our two indicators transposition deficit and IPs. One can therefore conclude that DI is not necessarily a remedy for non-compliance but that it does not provoke non-compliant behaviour neither. For the future use of DI, this paper cannot give any clear recommendations. Especially the inconsistent results surrounding Hypothesis II show that no clear effect of DI could be shown, which forbids broad generalisation of these results. These results are already

quite interesting for the future of Europe and the management of diverse interests in international organisations.

VII. Conclusions

This Master thesis combined two schools of research, tackling the question of how a differentiated Europe and non-compliance performance are intertwined. After a short introduction this paper continued with the relevance of this study. It could be shown that non-compliance matters due to economic, legal and political reasons, whereas DI as the organisation of diverse interests is a question of the future of the European Union. Lastly, little research had been presented on how the two phenomena are intertwined. A lacuna of research had to be filled. This Master thesis continued, summoning upon the aquis académique to get an overview on what has been written on both topics and what literature has already combined both fields. The biggest debates such as the conceptualisation of non-compliance were touched upon. The use of the variables such as the transposition deficit, Infringement Procedures and Reasoned Opinions as an indicator for non-compliance was defended and the different forms of Differentiated Integration that built the independent variable were presented. In a third chapter this work continued, presenting the theoretical framework and approaches on which our empirical part was based. Summoning upon literature from non-compliance, it was possible to divide approaches into sociological institutionalism and rational-choice theory. Different logics of compliance could be established. The same accounted for the literature of Differentiated Integration, where the same dualism was found. Based on a simplified model of decision-making this study focused on two different logics of actions: a rational choice and a socialisation one.

Two hypotheses were derived from the theory and their respective logics. The first one looked at the overall inter-country comparison of the non-compliance performance. In its rational choice configuration, it was expected that countries who pursue uniform integration are less compliant than countries using opt-outs. Taken into consideration that states like Germany and France are too important for the European project and cannot just opt out of whole policy fields – therefore a possibility to just not transpose or apply European law serves as a kind of remedy. Furthermore, European law is and will always remain costly for the member states. Having a bigger ‘burden’ of legislation therefore automatically leads to a higher non-compliance performance. In its socialisation configuration, the opposite was expected: Countries that chose opt-outs are less compliant than countries pursuing uniform integration. The reasoning here relies on socialisation effects. The more a country is entangled and integrated, the more it is socialised into the European Union and the less problems it has with non-compliance.

Furthermore, the more European norms, ideas and policies are already part of the state's aquis, the more probable it is that states have less problems with non-compliance. The second Hypothesis stated in both logics that if there is a trend for one of the logics this should also account for non-compliance in all the other policy fields of the European Union.

In a fourth chapter, this Master thesis continued with the construction of the cohorts using a most-different case design and presented the method of descriptive statistics. Furthermore, in this chapter a solid operationalisation of our two hypotheses was presented. In the fifth chapter the derived hypotheses were tested with data from the European Commission on the non-compliance behaviour of states. It could be shown that Hypothesis I with the logic of rational choice prevailed for the variables of the transposition deficit and Infringement procedures. Hypothesis I, according to which "States that always pursue uniform integration have a bigger problem with non-compliance than countries that chose opt-out solutions," could be validated. Germany and France showed in all key statistical figures a higher non-compliance rate than Denmark and the UK. However, concerning Hypothesis II, this trend could not be confirmed. After a cohort comparison, the look inside the policy fields were inconclusive as the field of the Environment showed partly that a socialisation logic prevailed, whereas the field of the Internal Market brought forth a rational-choice logic. For the field of the Mobility and Transport, the data showed completely inconclusive results. In a sixth chapter the insights from the empirical part and their consequences for European Integration were discussed.

As the title of this Master thesis 'uneven rules, even practices' refers to the fact that opt-out countries in general comply better with Union law than uniform integration country, one can point to this study for proof. However, as shown above, this is just partly correct as the thesis fails when looking at detailed policy fields. Future studies could focus on these policy fields. Combining the level of DI with other possible explanations will be of great importance for the field as well. As a final remark studies should also be undertaken on how the use of Differentiated Integration influenced the exit from the European Union by the UK.

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Data Resources

Scoreboard Data

Overall

http://ec.europa.eu/internal_market/scoreboard/performance_by_member_state/index_en.htm

Country Specific

http://ec.europa.eu/internal_market/scoreboard/performance_by_member_state/denmark/
http://ec.europa.eu/internal_market/scoreboard/performance_by_member_state/germany/index_en.htm

http://ec.europa.eu/internal_market/scoreboard/performance_by_member_state/united_kingdom/index_en.htm

http://ec.europa.eu/internal_market/scoreboard/performance_by_member_state/france/index_en.htm

Explanation of the Infringement Procedures

https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

Reasoned Opinions

European Commission: Infringement Data base. Reasoned Opinion (Art. 248). European Commission. Available online at http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/

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Hiermit versichere ich, dass ich die Masterarbeit selbständig und lediglich unter Benutzung der angegebenen Quellen und Hilfsmittel verfasst habe.
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Berlin, den 15.04.2019

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Raffael Ruppert